ARTICLE

SOME TENANTS HAVE TAILS: WHEN HOUSING PROVIDERS MUST PERMIT ANIMALS TO RESIDE IN "NO-PET" PROPERTIES

By
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Living with a disability can make finding a home a difficult task. Discrimination against the use of a service or assistive animal in lease agreements is a hurdle to finding a home for persons with disabilities. This discrimination is particularly pronounced when the individual suffers from a mental or emotional disability, because these disabilities are "invisible." Because these disabilities are invisible, landlords are often reluctant to make reasonable accommodations in lease agreements to further the use of service and assistive animals in the treatment of mental illnesses or other disabilities, as required by the Fair Housing Act. This Article considers the requirements the Fair Housing Act imposes on landlords to make reasonable accommodations to their no-pets policies in order to facilitate the use of service and assistive animals. This Article begins with a look at the history of the Fair Housing Act and then analyzes different courts' approaches to interpreting the Fair Housing Act in relation to maintaining a service or assistive animal. This Article concludes with suggested model legislation that would further the policy considerations behind the Fair Housing Act and make finding a home easier for people with disabilities.

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I. INTRODUCTION

Alex Roberts is a full-time graduate student in a competitive masters program, where she is in the top 10% of her class and is active in the school's scholastic journal, externship program, and recreational sports teams.[1] Despite her academic success, Alex suffers from depression, which prevents her from concentrating on school, as well as working, eating, and sleeping regularly. Alex started seeing a psychiatrist and tried several different prescription medications, but nothing alleviated her symptoms. She felt more depressed and unable to get out of bed most mornings.

Then, Alex's psychiatrist, Dr. Chen, recommended a different method of treatment. He prescribed an emotional support animal for Alex. Dr. Chen had read numerous medical studies, all of which concluded that emotional support animals are an extremely effective form of treatment for an array of disabilities, including depression.[2] Dr.

[1] The author created this fictional story using facts from various emotional support animal cases, service animal cases, and consent decree orders.

[2] *See* Lucy Atkins, *Pets Are Better Than Prozac*, The Telegraph (July 25, 2006) (available at http://www.telegraph.co.uk/health/alternativemedicine/3342048/Pets-are-better-than-Prozac.html (accessed Apr. 8, 2012)) (noting that increasing amounts of sci-

Chen believed that Alex would benefit from an emotional support animal and proposed this treatment option to her. Alex agreed to include an emotional support animal as part of her treatment for depression. Although Alex lives at Westville Pointe, a private apartment complex with a no-pets policy, she believed that her landlord would allow the emotional support animal because her doctor had prescribed it as a form of treatment for her depression. Without seeking prior permission from her landlord, Alex went to the local animal shelter and adopted a dog, named Baxter. Several days after adopting Baxter, Alex reported to Dr. Chen that she felt a substantial improvement in her mood and was able to get out of bed every day to walk Baxter and attend morning classes. Dr. Chen was glad the emotional support animal was effectively treating some of Alex's depression symptoms.

However, Alex's landlord, Don, was angered to learn that Alex was housing a dog in violation of her lease. Don sent Alex a notice of lease violation and ordered Alex to either "remove the dog or face eviction."[3] Alex went to Don's office upon receiving the notice of lease violation and explained that her dog is not a pet, but rather was a prescribed form of treatment for her mental illness. Don had never heard of a dog being prescribed as a form of treatment before and de-

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entific evidence demonstrate that animals have significant therapeutic potential); 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, 21 (2006) (noting that emotional support animals are beneficial for persons with mental impairments like depression); Christopher C. Ligatti, *No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act*, 35 Thurgood Marshall L. Rev. 139, 141–42 (2010) (discussing how the United States Department of Defense physicians have relied on emotional support animals and animal-assisted therapy since 2005 as a way to help soldiers with post-traumatic stress disorders); Sunny Lyn Nagengast et al., *The Effects of the Presence of a Companion Animal on Physiological Arousal and Behavioral Distress in Children during a Physical Examination*, 12 J. Pediatric Nursing 323, 323 (1997) (describing companion animals' positive effects on children's physiological and behavioral health).

[3] *See e.g. U.S. Dept. of Hous. & Urb. Dev. v. Bayberry Condo. Assn.*, No. 02-00-0504-8, 2002 WL 475240 at *1 (H.U.D. A.L.J Mar. 21, 2002) (stating that based on the Department of Housing and Urban Development's (HUD) investigation, the tenant was a person with a disability who sought to maintain an emotional support animal in private no-pet housing, and that the tenant was therefore entitled to a waiver of the no-pet policy as a reasonable accommodation for her disability); Stephen Hudak, *Dog Prescribed by Doctor May Get Couple Evicted from Mobile Home*, Orlando Sentinel (Feb. 18, 2010) (available at http://articles.orlandosentinel.com/2010-02-18/news/os-dog-violation-eviction-mobile-home-20100218_1_mobile-home-mobile-home-dog (accessed Apr. 8, 2012)) (providing a real-world example where a housing provider ordered a seventy-eight-year-old woman with multiple disabilities who sought to maintain an emotional support animal to either "[r]emove the dog or face eviction"); *see generally* Holly E. Hazard & Gus Thornton, *Introduction*, in *Best Friends for Life: Humane Housing for Animals and People* (Lisa Gallo et al. eds., 2001) (available at http://www.ddal.org/pdf/bffl.pdf (accessed Apr. 8, 2012)) (noting that housing providers' refusal to allow pets is one of the most frequent reasons that people surrender animals to shelters, and stating that it is rare for a humane society not to receive at least one phone call a week from "an individual desperately seeking rental housing that allows pets").

manded that Alex provide him with some proof of her medical condition and need for the dog.[4] Alex agreed to provide the documentation and subsequently provided Don with two documents: (1) a prescription for her emotional support animal; and (2) a letter from her psychiatrist explaining how the emotional support dog is part of Alex's treatment. Even after Alex provided Don with these documents, Don continued to believe that Alex was faking her mental illness as a way to avoid complying with Westville Pointe's no-pets policy. Yet Don was unsure whether he could evict Alex for maintaining a dog in violation of Westville Pointe's no-pets policy when a doctor had prescribed the dog for the purpose of treating her alleged mental illness. Don decided the only fair solution would be for Alex to either voluntarily give up her dog or move out of Westville Pointe Apartments.[5] Don explained his proposed solution, stating that because Westville Pointe had always strictly enforced its no-pets policy it would be unfair to make an exception for Alex's dog, because an exception would confuse other tenants.[6] Don also explained that it would be unfair to allow a dog in the no-pets complex because some residents have allergies to animals, some are afraid of dogs, and others would simply be annoyed by a dog's presence. Alex felt it was equally unfair to be asked to vacate her apartment simply because she had a medical need for an emotional support animal; therefore, she rejected Don's proposal. When Alex refused to surrender her emotional support dog and failed to move out of Westville Pointe, Don issued an eviction letter. The eviction letter cited the reasons for the eviction as a disturbance to other residents, specifically stating that the dog barked at all hours and was a health and safety risk to other tenants.

Alex's fictional story illustrates a prevalent problem in both public and private housing: disability discrimination.[7] Section 804(f)(3)(B) of

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[4] *See* Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone*?, 8 J.L. & Health 15, 26 (1993–1994) (noting that surveys show "mental disabilities are the most negatively perceived of all disabilities"); *see also infra* pt. II(C)(2) (explaining the FHA's reasonable accommodation provision and the obligations it imposes on landlords).

[5] *See e.g*. Hudak, *supra* n. 3, at ¶ 10 (reporting that a Florida mobile home park sought to evict a seventy-eight-year-old resident with disabilities over her use of an emotional support animal in violation of its "no-dogs" policy and justified its firm stance because the mobile home park feared that "other residents who want the companionship of a dog, cat or other prohibited pet will press their doctors for similar notes").

[6] *See id.* at ¶ 4 (noting that the mobile-home park insisted that the tenant either "remove the dog or face eviction," because the mobile home park has a strict "no-dogs" policy).

[7] *See* 42 U.S.C. § 3604(f)(3)(B) (2008) (defining unlawful discrimination in housing to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford . . . [persons with disabilities with an] equal opportunity to use and enjoy a dwelling"); *see also* Kellyann Everly, *A Reasonable Burden: The Need for a Uniform Burden of Proof Scheme in Reasonable Accommodation Claims*, 29 U. Dayton L. Rev. 37, 37 (2003) (noting that entities and individuals continue to discriminate against persons with disabilities); Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37

Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988 (FHA), prohibits both public and private housing providers from discriminating against persons with disabilities.[8] As part of that prohibition, the FHA obligates virtually all housing providers "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a person with a disability an] equal opportunity to use and enjoy a dwelling."[9] In some circumstances, a tenant like Alex may be able to maintain an animal in an otherwise no-pet property as a reasonable accommodation.[10] However, not all housing providers are familiar with the FHA and the rights and obligations it mandates.[11] This Article provides the history behind the enactment of the FHA, sets forth the reasonable accommodation factors, discusses applicable case law, and analyzes whether the reasonable accommodation process sufficiently protects the rights of persons with disabilities in housing.

Part II reviews the history of housing discrimination, particularly against persons with disabilities, and the laws that prohibit such discrimination, including the FHA. Part III analyzes how both federal regulatory bodies and selected courts interpret the FHA's reasonable accommodation requirement when a person with a disability seeks to maintain an assistive animal. Part III also emphasizes why the FHA has not achieved its goal of reducing disability discrimination. Part IV proposes model federal legislation that would further the goals of the FHA by reducing disability discrimination through a mandatory education program, which all housing providers within the purview of the Act would be required to complete.

II. BACKGROUND

Persons with disabilities have been and continue to be severely limited in their choice of housing due to societal prejudices and fears.[12]

Pepp. L. Rev. 1163, 1164, 1189 (2010) (noting that over 20 million families in the U.S. include at least one person with a disability, but that persons with disabilities continue to face discrimination when accompanied by an animal) [hereinafter Huss, *Why Context Matters*].

[8] 42 U.S.C. § 3604(f)(1) (2000) (stating that "it shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . .").

[9] *Id*. at § 3604(f)(3)(A)–(B).

[10] *See infra* pt. III(D) (describing varying case decisions on the FHA and reasonable accommodation requirements).

[11] *See* Susan B. Eisner, *There's No Place Like Home: Housing Discrimination against Disabled Persons and the Concept of Reasonable Accommodations Under the Fair Housing Amendments Act of 1988*, 14 N.Y. L. Sch. J. Hum. Rights 435, 440 (1998) (stating that the reasonable accommodation requirement is misunderstood due to its "chameleon-like" character); *see also infra* pt. III(D) (describing varying case decisions on the FHA and the confusion they cause to for landlords and other groups).

[12] *See* Everly, *supra* n. 7, at 37–38 (explaining that housing discrimination against persons with disabilities persists due to "a lack of understanding of the needs" of persons with disabilities and a "fear or discomfort" that persons without disabilities feel in

Although Congress has committed itself to eliminating discrimination against persons with disabilities through its enactment of various statutes beginning in the 1960s, disability discrimination in housing continues to be a problem throughout the U.S.[13] Part II of this Article provides background on housing discrimination, particularly against persons with disabilities, and the laws that were enacted to prohibit such discrimination. First, Part II(A) reviews the history of housing discrimination in the U.S., particularly against persons with disabilities. Second, Part II(B) examines the early laws that prohibited some forms of housing discrimination. Third, Part II(C) examines the Fair Housing Act of 1988 (FHA), which amended Title VIII of the Civil Rights Act of 1968 by extending protections to persons with disabilities in both public and private housing. Finally, Part II(D) considers whether and under what circumstances a housing provider has an obligation to waive its no-pet policy to allow an individual with a disability to maintain a service or assistive animal as a reasonable accommodation under the FHA.

A. History of Housing Discrimination

In the U.S., persons with disabilities have historically been denied the "basic right" to choose where and how to live, regardless of their financial resources.[14] Before the 1960s, societal prejudices, fears, and stigmas regarding persons with disabilities prompted states to confine most persons with disabilities to large, state-sponsored institutions.[15] In 1961, the Joint Commission on Mental Illness and Health recommended improving the conditions of state hospitals and developing community alternatives to institutions to treat persons with disabilities.[16] Subsequently, Congress, courts, and states also called for deinstitutionalization,[17] which gradually decreased the number of disabled persons confined to living in state institutions.[18] Despite the national policy of deinstitutionalization, persons with disabilities continue to be

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the company of persons with disabilities); 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, 928–33 (1994) (discussing our nation's history of housing discrimination against persons with disabilities); Laurie C. Malkin, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 U. Pa. L. Rev. 757, 774–76 (1995) (noting that Congress enacted the FHA in order to "eradicate the manifestation of such stereotyping and bias" against persons with disabilities who had traditionally been excluded from mainstream society).

13 Everly, *supra* n. 7, at 37, 40.

14 Kanter, *supra* n. 12, at 928, 933.

15 *Id*. at 929–30; *see* Malkin, *supra* n. 12, at 774 (acknowledging the prejudice and bias against persons with disabilities and noting that such prejudices and stereotyping excluded persons with disabilities from mainstream society).

16 Kanter, *supra* n. 12, at 929.

17 *Id.*

18 *Id*.

segregated, stigmatized, and discriminated against in housing.[19] As one scholar notes, "'[l]aws 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.'"[20] Next, Part II(B) discusses some of these early laws and their effects.

B. Early Laws Prohibiting Housing Discrimination

Prior to the passage of the FHA, as amended in 1988, various laws were enacted to prohibit certain persons from engaging in housing discrimination. Although these early laws were not as comprehensive as the FHA of 1988, each played an important role in leading to its enactment and will be reviewed herein. First, Part II(B)(1) considers the 1962 executive order, which was the first major federal initiative to prohibit housing discrimination. Then, Part II(B)(2) discusses Title VII of the Civil Rights Act of 1968, which expanded the scope of the 1962 executive order to prohibit housing discrimination by private and public housing providers against persons on the basis of their race, color, religion, or national origin. Finally, Part II(B)(3) reviews the Rehabilitation Act of 1973, which was the first legislation to prohibit public housing providers from discriminating against persons on the basis of disability.

1. Executive Order 11,063

In 1962, President Kennedy signed Executive Order 11,063, which was the first major federal initiative to prohibit housing discrimination.[21] Executive Order 11,063 prohibited federally operated or assisted housing providers from discriminating "in the sale, leas[e], rental, or other disposition of residential property" on the basis of race.[22] Despite the enactment of Executive Order 11,063, discriminatory housing practices continued unabated because of its limited scope.[23] Specifically, Executive Order 11,063 covered only federally operated or assisted housing—less than 1% of the market in the U.S.[24] Six years later, Congress broadened the scope of Executive Order 11,063 by enacting Title VIII of the Civil Rights Act of 1968.[25]

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[19] *Id*. at 929–30.

[20] Ligatti, *supra* n. 2., at 139 (omission in original) (quoting Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* xv (Am. Psychol. Assn. 2001)).

[21] Exec. Or. 11063, 3 C.F.R. 261 (Supp. 1962) (reprinted as amended in 42 U.S.C. § 1982 (1994)); Kanter, *supra* n. 12, at 934–35.

[22] Exec. Or. 11063, 3 C.F.R. at 261.

[23] Kanter, *supra* n. 12, at 934 (criticizing Executive Order 11,063 because of its narrow scope).

[24] *Id.*

[25] *Id.* at 935.

2. Title VIII of the Civil Rights Act of 1968

Congress expanded the scope of President Kennedy's 1962 Executive Order by passing Title VIII of the Civil Rights Act of 1968, which prohibited both public and private housing providers from engaging in housing discrimination on the basis of an individual's race, color, religion, or national origin.[26] Thus, the Civil Rights Act of 1968 covered more housing providers than Executive Order 11,063 and prohibited housing providers from discriminating against persons on the basis of color, religion, and national origin, as well as race.[27] In 1974, Congress amended the Civil Rights Act of 1968 to prohibit housing discrimination on the basis of one's sex.[28]

Although the Civil Rights Act of 1968 prohibited both public and private housing providers from engaging in discrimination against persons on the basis of race, color, religion, national origin, and sex, the primary problem was that the Act had limited enforcement mechanisms.[29] The Civil Rights Act of 1968 provided that the Department of Housing and Urban Development (HUD) was responsible for investigating and deciding whether to mediate alleged incidents of housing discrimination; however, the Act further provided that only an "aggrieved" person could file a complaint with HUD.[30] Although HUD had authority to pass cases to the Department of Justice (DOJ) for enforcement, the DOJ had limited powers under the Civil Rights Act: it could bring suit only against a landowner and only if there was an established "pattern or practice" of discrimination.[31] Further, the Civil Rights Act of 1968 did not include protection for persons with disabilities.[32] It was not until 1973 that Congress first enacted a federal statute that prohibited housing providers from engaging in disability discrimination.[33]

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[26] Pub. L. No. 90-284, § 245, 82 Stat. 73, 73–74 (1968) (codified as amended in scattered sections of 18, 25, and 42 U.S.C.); *see* Malkin, *supra* n. 12, at 775 (reiterating that the Civil Rights Act of 1968 prohibited housing discrimination on the basis of color, race, religion, or national origin, and that later amendments included sex).

[27] Pub. L. No. 90-284 (1968) (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

[28] *Id.*; Kanter, *supra* n. 12, at 935 (noting that in 1974 Congress amended the Civil Rights Act of 1968 to include sex).

[29] *See* Kanter, *supra* n. 12, at 937 (noting that a criticism of the Civil Rights Act of 1968 was the Act's lack of enforcement powers, in particular the FHA's $1,000 cap on punitive damages); James A. Kushner, *The Role of the Federal Government*, in *The Fair Housing Act After Twenty Years: A Conference at Yale Law School* 48 (Robert G. Schwemm ed., Yale L. Sch. 1989) (characterizing the "federal fair housing enforcement effort" as an "oxymoron").

[30] Pub. L. No. 90-284 at § 810(a).

[31] *Id*. at § 813(a).

[32] *See* Kanter, *supra* n. 12, at 935 (stating that the FHA of 1968 prohibited discrimination based on race, color, religion, national origin, and gender, but not disability).

[33] The Rehabilitation Act, 29 U.S.C. § 794 (1973); *see* Everly, *supra* n. 7, at 37 (stating that "Congress committed itself to the elimination of discrimination against disabled individuals when it enacted the Rehabilitation Act in 1973").

3. The Rehabilitation Act of 1973

In 1973, Congress enacted the Rehabilitation Act,[34] which for the first time prohibited public housing providers from discriminating against persons with disabilities.[35] Section 504 of the Rehabilitation Act prohibits, among other things, discrimination against persons with disabilities by any person or entity that receives federal funds, in any amount or in any form.[36] In order to prevail on a claim brought under Section 504 of the Rehabilitation Act, a plaintiff must establish four elements: (1) the program or activity being challenged must be in receipt of federal financial assistance; (2) the plaintiff must be a qualified individual with a disability; (3) the plaintiff must be "otherwise qualified" for the challenged program or activity; and (4) the plaintiff's exclusion from the program must be based solely on his or her disability.[37] Although the Rehabilitation Act was once thought to be "a 'necessary step toward universal equal rights,'" like both Executive Order 11,063 and the Civil Rights Act of 1968, the Rehabilitation Act was eventually criticized for its failure to adequately define the central concept of what constitute discrimination against persons with disabilities.[38] Accordingly, prior to 1988, discrimination against persons with disabilities in state-supported housing was legal and common.[39] Although the Civil Rights Act of 1968 prohibited public and private housing providers from discriminating against persons on the basis of race, color, religion, national origin, or sex, it did not extend protection to persons with disabilities.[40] Moreover, despite the passage of section

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[34] 29 U.S.C. § 794.

[35] *Id.*; *see* Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development, 24 C.F.R. § 8.3 (2011) (prohibiting discrimination on the basis of disability and requiring recipients of federal financial assistance to provide reasonable accommodations to applicants and residents with disabilities).

[36] 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."); *see also* Kanter, *supra* n. 12, at 939–42 (discussing section 504 of the Rehabilitation Act).

[37] 29 U.S.C. § 794(a); Kanter, *supra* n. 12, at 940.

[38] Kanter, *supra* n. 12, at 939 (quoting 124 Cong. Rec. 38,552 (1978) (statement of Sen. Cranston)); *see* Everly, *supra* n. 7, at 41 (explaining that the Rehabilitation Act did not address what actions would constitute disability discrimination in violation of the Act, but did define a disability as: "(A) a physical or mental impairment which substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" (quoting 42 U.S.C. § 12102(2) (2003))).

[39] Kenneth M. Walden, Testimony for the United Nations Human Rights Council, United Nations Compliance Program: Discrimination Against Persons with Disabilities in Public and Subsidized Housing 1, http://www.jmls.edu/fairhousingcenter/Access%20Living.pdf (Apr. 13, 2010) (accessed Apr. 8, 2012).

[40] *See* Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 Animal L. 69, 73 (2005) (discussing the history of the FHA and explaining that the original statute was passed in 1968 as part of the Civil Rights Act but did not extend

504 of the Rehabilitation Act in 1973, which prohibited any person or entity receiving any federal money from engaging in disability discrimination, the Rehabilitation Act did not govern private housing providers who did not receive federal money.[41] In fact, there was no federal law to prohibit a private housing provider from discriminating against a person on the basis of a disability, supported by nothing more than prejudice, stereotypes, or unfounded fears.[42] With this legislative gap in mind, Congress amended Title VIII of the Civil Rights Act of 1968 to include protection against discrimination on the basis of disability and familial status.[43] Specifically, the FHA House Report states that the purpose of the FHA is:

> a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. [The FHA] repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculation about threats to safety are specifically rejected as grounds to justify exclusion.[44]

Thus, the federal FHA, as amended in 1988, extends protection to both families and persons with disabilities and prohibits both public and private housing providers from engaging in discrimination on the basis of either status.

C. The Fair Housing Act

The FHA amended Title VIII of the Civil Rights Act of 1968 to prohibit both public and private housing providers from discriminating against individuals on the basis of a disability or familial status.[45] This Part examines the FHA's prohibition of housing discrimination on the basis of disability. First, Part II(C)(1) discusses the key provisions of Title VIII of the FHA, including: the FHA's definition of a disability;

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protections to persons with disabilities until the FHA was amended in 1988) [hereinafter Huss, *No Pets Allowed*].

41 29 U.S.C. § 794(a).

42 *See* Walden, *supra* n. 39, at ¶ 4 (stating that "housing providers, with impunity, could slam the door on prospective residents with disabilities").

43 Pub. L. No. 100-430, § 6(b)(1), 102 Stat. 1619, 1620 (1988) (codified as amended at 42 U.S.C. § 3604 (1988)); *see* Eisner, *supra* n. 11, at 436 (noting that the Civil Rights Act of 1968 prohibited housing discrimination on the basis of national origin, religion, race, or color, but not disability). Congress amended the Civil Rights Act in 1988, with the passage of the Fair Housing Act, for the purpose of expanding protections to persons with disabilities. *See* Everly, *supra* n. 7, at 37 (stating that Congress committed itself to eliminating discrimination against persons with disabilities when it enacted legislation such as the FHA).

44 H.R. Rpt. 100-711 at 2179 (Aug. 8, 1988) (reprinted in 1988 U.S.C.C.A.N. 2173, 2179); *see* Malkin, *supra* n. 12, at 776 (quoting Senator Alan Cranston as stating that "[t]he right to vote, to work, and to travel freely are all important aspects for an individual's life, but none is more elementary than having the freedom to choose where and how one lives"). Congress considered the FHA to be a policy of the "highest priority." Malkin, *supra* n. 12, at 818.

45 42 U.S.C. §§ 3601–3619 (1989).

the persons and entities that must comply with the FHA; and the conduct the Act prohibits. Second, Part II(C)(2) examines the FHA's reasonable accommodations provision and reviews the factors courts and agencies use to decide whether a housing provider violated the FHA. Third, Part II(C)(3) considers whether, and under what circumstances, a housing provider must waive a no-pet policy as a reasonable accommodation for a person with a disability.

1. Key Provisions

This subsection provides an overview of several key statutory provisions of the FHA. Specifically, Part II(C)(1)(a) reviews how the FHA defines a person with a disability, while Part II(C)(1)(b) identifies what persons and entities must comply with the requirements of the Act. Then, Part II(C)(1)(c) examines the type of conduct that is prohibited under the FHA. Last, Part II(C)(1)(d) sets forth the enforcement options and remedies available under the Act.

a. Section 3602(h)—Defining a Disability

The FHA prohibits public and private housing providers from engaging in disability discrimination.[46] In order to qualify for protection from disability discrimination under the FHA, an individual must be able to show that he or she has a disability within the meaning of the Act. A disability is defined in Section 3602(h)(1)–(3) of the Act as "a physical or mental impairment" that "substantially limits one or more of [a] person's major life activities," "a record of having such an impairment," or "being regarded as having such an impairment."[47] There are many conditions, diseases, and afflictions that constitute a "physical or mental impairment," including "orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism."[48] Moreover, the term "major life

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[46] *See generally id.* at § 3604(f) (prohibiting discrimination involved in a sale or rental of housing against any buyer or renter, or person residing or associated with the buyer or renter, on the basis of a disability).

[47] *Id.* at § 3602(h)(1)–(3); *see* Jt. Statement, Dept. of Hous. & Urb. Dev. & Dept. of J., *Reasonable Accommodations Under the Fair Housing Act* 3, http://www.justice.gov/crt/about/hce/joint_statement_ra.pdf (May 17, 2004) (accessed Apr. 8, 2012) (reiterating the FHA's definition of a disability and providing examples of various conditions and diseases which constitute a disability within the meaning of the Act) [hereinafter Joint Statement]. It is irrelevant that the FHA uses the term "handicap" instead of "disability," as they have the "same legal meaning." Joint Statement, *supra* n. 47, at 1 n. 2; *see also* H.R. Rpt. 101–485 pt. 3, at 26 (May 15, 1990) (noting the Committee's use of the term disability instead of handicap, as used in previous laws such as FHA, "does not intend to change the substantive definition of handicap").

[48] Joint Statement, *supra* n. 47, at 3 (identifying a non-exhaustive list of conditions, ailments, diseases, and afflictions which constitute "physical or mental impairments" within the meaning of section 3602(h)).

activities" as used in the FHA[49] has been interpreted broadly to include those "activities that are of central importance to daily life."[50] Some examples of "major life activities" include "seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking."[51] Reproduction is also a major life activity.[52]

b. Persons and Entities Who Must Comply

Given the limited scope of some of the early laws prohibiting housing discrimination,[53] Congress enacted the FHA with the intent to cover "virtually all housing" providers and to eradicate discrimination throughout the U.S.[54] Thus, the FHA governs almost all housing providers, irrespective of whether they receive federal financial assistance.[55] Unless a housing provider falls within one of the narrow exceptions to the FHA, the housing provider must adhere to the Act.[56] Courts have held that many persons and entities can be liable for engaging in disability discrimination in violation of the FHA including: "individuals, corporations, associations and others involved in the provision of housing and residential lending, including property owners, housing managers, homeowners and condominium associations, lenders, real estate agents, and brokerage services."[57]

c. Prohibited Conduct

The FHA prohibits almost every housing provider, whether public or private, from discriminating against any applicant, tenant, or person associated with an applicant or tenant who has or is perceived to

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49 42 U.S.C. § 3602(h)(1).

50 Joint Statement, *supra* n. 47, at 4.

51 *Id*.

52 *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (concluding that reproduction is central to the life process itself). *Bragdon* involved a claim for disability discrimination under the Americans with Disabilities Act (ADA); however, both the FHA and the ADA use the same definition of a disability because Congress intended the definitions to receive identical judicial construction. *Id.* at 646.

53 *Supra* pt. II(B).

54 Ligatti, *supra* n. 2, at 145; *see supra* pt. II(B) (discussing early laws that prohibited various forms of housing discrimination and the problems with their limited scope and enforcement mechanisms).

55 *See* 42 U.S.C. § 3604(f)(7)(A)–(B) (defining "covered multifamily dwellings" solely by number of units and presence of elevators); *see also* 42 U.S.C. § 3603(1)(A)–(D) (specifically including those dwellings receiving aid, loans, or assistance).

56 *See* 42 U.S.C. §§ 3603(b)(1)–(2) (exempting from the FHA, for example, certain private owners who own fewer than four houses and who do not use a broker or advertise), 3607 (identifying further exemptions from the FHA for religious organizations and private clubs); Malkin, *supra* n. 12, at 789 (noting that there "are only a few exceptions to the broad protection" of FHA and that Congress intended for these exceptions to be construed narrowly).

57 *See* Joint Statement, *supra* n. 47, at 3 (Courts have also found that the FHA applies to state and local governments "in the context of exclusionary zoning or other land-use decisions.").

have a disability.[58] Specifically, the FHA prohibits housing providers from "discriminat[ing] in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter" because of a disability of that buyer, renter, or person residing or intending to reside in the dwelling, or any person associated with the buyer or renter.[59] Further, the FHA prohibits housing providers from discriminating against any person "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities" of a dwelling.[60] The FHA defines discrimination to include "a refusal to make a reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[61]

d. Enforcement Mechanisms and Remedies

Unlike some of the early laws prohibiting housing discrimination, the FHA has stronger and more accessible enforcement mechanisms and statutory remedies, which are available when a housing provider engages in discrimination in violation of the FHA.[62] First, an aggrieved person may file as a private person in either federal or state court within two years of the alleged discriminatory conduct.[63] Second, aggrieved persons may file an administrative complaint with HUD or the DOJ—the regulatory bodies charged with enforcement of the Act—within one year of the alleged discriminatory conduct.[64] HUD has stat-

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58 42 U.S.C. §§ 3602(f), 3604(f)(1)–(2); *see* H.R. Rpt. 100-711 at 24 (Aug. 8, 1988) (reprinted in 1988 U.S.C.A.N.N. 2173, 2185) (stating that the House Committee intended for the provisions of the FHA to prohibit discrimination against the primary buyer or renter, as well as to prohibit discrimination against applicants. Further, the House Committee intended to prohibit instances of discrimination against an individual simply because he or she is associated with a person who has a disability.); *see also* Joint Statement, *supra* n. 47, at 2 ("The Act prohibits housing providers from discriminating against applicants or residents because of their disability or the disability of anyone associated with them and from treating persons with disabilities less favorably than others because of their disability."); Kanter, *supra* n. 12, at 944 (citing HUD's final FHA regulations, published on January 23, 1989, which reiterated the purpose of the Act as prohibiting discrimination in housing against persons on the basis of "race, color, religion, sex, handicap, familial status, or national origin").

59 42 U.S.C. § 3604(f)(1)(A)–(C).

60 *Id.* at § 3604(f)(2).

61 *Id.* at § 3604(f)(3)(B); *see* Joint Statement, *supra* n. 47, at 2 n.4 (noting that housing providers who receive federal financial assistance are also required to make reasonable accommodations for its applicants and residents with disabilities under Section 504 of the Rehabilitation Act, which imposes greater financial obligations than the FHA does).

62 *See* Ligatti, *supra* n. 2, at 146–47 (noting that the FHA was enacted to increase the enforcement options "available to victims of housing discrimination"); *see also* Kanter, *supra* n. 12, at 943, 982 (noting that the FHA strengthened the Civil Rights Act enforcement mechanisms by granting more powers to HUD).

63 42 U.S.C. § 3613(a)(1)(A).

64 *Id.* at §§ 3610(a)(1)(A)(i), 3612(b)–(f); *see id.* at §§ 3610(a)(1)(B)(iv) (providing that the Secretary of HUD must investigate the complaint within 100 days of the filing date and file a final investigative report), 3610(g)(1)–(2) (providing that if no agreement can

utory "authority to investigate and bring lawsuits when mediation efforts fail" and can establish "an administrative enforcement mechanism for cases where discriminatory housing practices cannot be resolved informally."[65] Furthermore, the Attorney General has enforcement powers under the FHA, which include the power to "file suit on behalf of the United States where there is a pattern or practice of discrimination or acts of discrimination against a group," and to enforce the FHA "against state and local governments whose" laws violate the federal statute.[66]

2. Section 3604(f)(3)(B)—Reasonable Accommodation

The FHA prohibits disability discrimination in housing, which it defines to include, among other things, a housing provider's "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a person with a disability with an] equal opportunity to use and enjoy a dwelling."[67] A "reasonable accommodation" is defined as "a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling."[68] "Rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons"; therefore, it is essential for housing providers to grant all reasonable requests for an accommodation.[69] A request for an accommodation is reasonable when it does not impose an "undue financial and administrative burden" on the housing provider[70] and does not

be reached, the HUD Secretary must decide whether there is "reasonable cause" to believe a violation of the FHA exists or is about to occur, and that if such a finding is made, the Secretary of HUD must issue a charge which requires the aggrieved party to authorize the Attorney General to bring a civil action in federal court or proceed to a hearing before an law judge).

65 Kanter, *supra* n. 12, at 982.

66 42 U.S.C. § 3614(a); Kanter, *supra* n. 12, at 983.

67 42 U.S.C. § 3604(f)(3)(B); *see* Joint Statement, *supra* n. 47, at 9 (noting that a housing provider's failure to reach an agreement over a requested accommodation during the interactive process receives the same treatment as a provider's refusal to grant the requested accommodation). In addition, if a housing provider has unduly delayed responding to a requested accommodation, a court may find such delay to constitute a denial and refusal to make reasonable accommodations in violation of the FHA. Joint Statement, *supra* n. 47, at 11; *see also* Malkin, *supra* n. 12, at 816 (explaining that the FHA's reasonable accommodation provision extends the Act "beyond traditional notions of equal opportunity" by requiring housing providers to take positive steps in order to meet the needs of persons with disabilities).

68 Joint Statement, *supra* n. 47, at 6 (also noting that reasonable accommodations can extend beyond a person's dwelling to include public and common use spaces); *see* Malkin, *supra* n. 12, at 816 (describing the FHA's reasonable accommodation provision as imposing an affirmative obligation on housing providers).

69 Joint Statement, *supra* n. 47, at 6.

70 *Id.* at 8 (explaining that a requested accommodation involving some cost is not necessarily an undue financial burden). Furthermore, courts have held that housing providers may be required to grant requested accommodations if the costs do not impose undue financial or administrative burdens or cause fundamental alterations. *Id.* at 9.

constitute a "fundamental alteration" of the housing program.[71] Further, the request is necessary when there is "an identifiable relationship, or nexus, between the requested accommodation and the individual's disability."[72] The FHA's reasonable accommodation analysis is a "highly fact-specific [inquiry], requiring case-by-case determination[s]," because the FHA does not allow for "exclusion of [persons with disabilities] based upon fear, speculation, or stereotype about a particular disability or persons with disabilities in general."[73]

In order for a plaintiff to prevail on a claim alleging that a housing provider refused to make a reasonable accommodation, the plaintiff must establish that: (1) the plaintiff has a disability within the meaning of the Act; (2) the plaintiff requested that the housing provider make a reasonable accommodation in a rule, policy, or practice which was necessary to afford the plaintiff an equal opportunity to use and enjoy the premises; (3) the housing provider knew or reasonably should have known that the plaintiff is a person with a disability; and

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Many courts will apply a cost-benefit analysis to determine whether a requested accommodation would constitute an undue financial burden on the housing provider. *Id.* at 8–9; *see Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334–35 (2d Cir. 1995) (noting that a reasonable accommodation under either section 504 of the Rehabilitation Act or under section 3604 of the FHA can and often will involve some costs, and that a housing provider can be required to incur reasonable costs necessary to accommodate a persons disability—so long as the "accommodations do not impose an undue hardship or substantial burden").

71 *See Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1157 (9th Cir. 2003) (quoting *S.E. Community College v. Davis*, 442 U.S. 397, 410, 412 (1979)); *U.S. v. Cal. Mobile Home Park Mgmt. Co*. (*Cal. Mobile Home II*), 107 F.3d 1374, 1381 (9th Cir. 1997) (noting that before a court will consider the "reasonableness" element of an FHA claim, the "plaintiff must first show that the defendant's policy caused an interference with her use and enjoyment" of the unit); Joint Statement, *supra* n. 47, at 8 (describing a fundamental alteration as a "modification that alters the essential nature of a housing provider's operations"). Housing providers may not charge persons with disabilities "extra fees or deposits as a condition of receiving requested reasonable accommodation." Joint Statement, *supra* n. 47, at 9.

72 Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834, 63834–35 (Oct. 27, 2008); *see Cal. Mobile Home II*, 107 F.3d at 1381 (explaining that before a court will consider whether a requested accommodation is reasonable, the plaintiff must first show that the defendant's policy caused an interference with her use and enjoyment of the dwelling).

73 *U.S. v. Cal. Mobile Home Park Mgmt. Co*., 29 F.3d 1413, 1418 (9th Cir. 1994); *see also* Joint Statement, *supra* n. 47, at 4–5 (explaining that housing providers are not required to make reasonable accommodations when doing so would pose a direct threat, and that to determine whether a direct threat exists, the housing provider must have reliable objective evidence about several factors: "(1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat." In making such direct threat determinations, housing providers may evaluate a recent history of overt acts and whether the individual involved is receiving intervening treatment, such as medications, to eliminate the direct threat.).

(4) the housing provider denied or unreasonably delayed the plaintiff's request for a reasonable accommodation.[74]

a. Reasonable Accommodation for Assistive Animals

"Assistive animal" is a broad term used to describe an animal that assists persons with disabilities and includes both service animals[75] and emotional support animals.[76] HUD defines "assistive animals" as ones that "assist, support or provide service to persons with disabilities."[77] HUD's assistive animal definition encompasses animals which provide "emotional support" to alleviate one or more identified symptoms or effects of a person's disability.[78] Whether a housing provider has an obligation to waive a no-pet policy in order to allow an individual with a disability to have an assistive animal as a reasonable accommodation depends on the highly fact-specific reasonable accommodation analysis.[79]

D. Selected Court Cases Interpreting Assistive Animals under the FHA's Reasonable Accommodation Analysis

Relatively few cases have analyzed the FHA's reasonable accommodation provision as it pertains to assistive animals, since the FHA

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[74] *HUD v. Dutra*, H.U.D.A.L.J. 09-93-1753-8, 1996 WL 657690 at *8 (H.U.D.A.L.J. Nov. 12, 1996) (providing the prima facie elements in a case alleging a failure to make a reasonable accommodation in violation of the FHA).

[75] *See* 28 C.F.R. § 35.104 (2011) (defining a service animal as "any dog that is individually trained to do work or perform tasks for the benefit of a person with a disability"); *see also Allergies, Longevity Among Rationales for Miniature Horse Use*, 42 Disability Compl. Bull. 1 (Nov. 18, 2010) (discussing the DOJ's final rules which amended Title II and Title III of the ADA of 1990 by changing the service animal definition to "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability"). The DOJ explained in the *Federal Register* that its new definition of a service animal is intended to "rein in 'the variety of animals . . . promoted as service animals after the adoption of the ADA 1991 regulations." 28 C.F.R. at § 35.104. Yet the DOJ allowed one exception for miniature horses, which may be used as an alternative to a service dog where a person with a disability either has allergies to dogs or has religious beliefs that preclude the use of dogs. *Id.*

[76] *See* Huss, *Why Context Matters*, *supra* n. 7, at 1177–79, 1195, 1200 (discussing the many different definitions given to "emotional support animals"); Ligatti, *supra* n. 2, at 142 (describing an emotional support animal as an animal that can treat certain psychiatric disorders through its presence); *see generally* Bernard Rollin, *Ethics and Breed-Discriminatory Legislation*, in *A Lawyer's Guide to Dangerous Dog Issues* XXI (ABA 2009) (coincidentally explaining the concept of emotional support animals where he notes that dogs can be a source of friendship and company, provide comfort to the antisocial, and give some persons a feeling of being needed).

[77] 24 C.F.R. § 960.705 (Oct. 27, 2008).

[78] 73 Fed. Reg. at 63834; *see* Marley J. Eichstaedt, *Assistance Animals in Housing—New HUD Guidance Regarding Assistance Animals* 1 (N.W. Fair Hous. Alliance) (available at http://www.fhco.org/pdfs/hud_guidance_service_animals.pdf (accessed Apr. 8, 2012)) (explaining that HUD regulations make clear that assistive animals are a reasonable accommodation in accord with the FHA).

[79] *Supra* pt. II(C)(2).

was enacted in 1988.[80] Nevertheless, passage of the FHA demonstrates congressional acceptance for support animals in private housing.[81] Congress has acknowledged the substantial psychological and medical evidence showing that emotional support animals are effective forms of treatment for various disabilities.[82] However, not all courts have been accepting of emotional support animals and the relatively recent medical studies validating the effective uses of these assistive animals.[83] Courts take divergent approaches when determining whether and under what circumstances waiving a no-pet policy for a person with a disability is a reasonable accommodation within the meaning of the FHA.[84] There is a "judicial tendency to misconstrue the meaning of the FHA's reasonable accommodation clause" by interpreting it as a "reasonableness standard."[85] Thus, when a person with a disability seeks to maintain an animal in an otherwise no-pet property as a reasonable accommodation, some courts will consider whether the request is "reasonable" in light of the training and skills of the animal in question,[86] while other courts do not require the animal to have special training or skills.[87] Inconsistent court decisions have confused te-

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[80] *See* Huss, *No Pets Allowed*, *supra* n. 40, at 97 (noting that due to the relatively recent effective date of the Act, there is limited case law on point).

[81] *See id.* (explaining that legislatures are beginning to accept evidence demonstrating the importance that companion animals can have for persons).

[82] *See id.* at 93–94 (citing the legislative history from Pet Ownership in Public Housing Act, which notes that pet ownership can add to a person's quality of life).

[83] *Id.* at 97; *see also* Danon, *supra* n. 2, at 22 (noting that persons "in the field" have confirmed through studies that emotional support animals give some mentally ill persons the confidence and security needed to access the outside world); John Ensminger & Frances Breitkopf, *Service and Support Animals in Housing Law,* 26 GPSolo 48, 53 (July/Aug. 2009) (discussing the "phenomenal growth" of support animals as well as the substantial and well-researched medical and psychological literature demonstrating the medical benefits of support animals).

[84] *See* Eisner, *supra* n. 11, at 440 (discussing how the reasonable accommodation clause of the FHA is "ill-understood" and "chameleon-like," as it lacks a precise definition); Everly, *supra* n. 7, at 50–51, 53 (noting that while some circuit courts have adopted similar approaches, much uncertainty and many inconsistencies persist, and that part of the problem is the ambiguous statutory language); Ligatti, *supra* n. 2, at 155 (discussing problem cases cited as "precedents" for cases involving emotional support animals, where the courts intermingled the ADA and the FHA—two distinct federal statutes).

[85] *See* Malkin, *supra* n. 12, at 818, 820–21 (explaining that when courts interpret the FHA's reasonable accommodation clause as a reasonableness standard, it distorts the Act's purpose and changes the plain meaning of its words: "'A refusal to make . . . accommodations' is the language of action—it is not the language of degree.").

[86] *See* Frank W. Young, *Service and Emotional Support Animals as Reasonable Accommodations Under the Fair Housing Act*, 2 John Marshall L. Sch. Fair & Affordable Hous. Commentary 5, 12 (2010) ("While courts noted that the nexus analysis was fact-specific, courts created rules stating whether specific training was necessary for an animal to be a reasonable accommodation.").

[87] *See infra* pt. II(D)(2) (examining cases where the courts considered whether housing providers are required to waive otherwise valid no-pet policies as a reasonable accommodation for a person with a disability who seeks to maintain an animal); Young, *supra* n. 86, at 13 (reiterating that the FHA does not impose a requirement for certifica-

nants, landlords, practitioners, and subsequent courts as to what the proper test should be when a person with a disability seeks to maintain an animal in a no-pet property as a reasonable accommodation.[88]

Part II(D)(1) examines court cases that required evidence that the animal at issue had training or certification before finding that waiver of a no-pet policy is reasonable, requiring accommodation under the FHA. In contrast, Part II(D)(2) reviews the alternative approach, where courts have not required any special training or certification before finding that an animal is an emotional support animal and that a no-pet policy should be waived as a reasonable accommodation under the FHA.

1. Training Approach

There are two key court cases that restrict the FHA's reasonable accommodation test: *In re Kenna* and *Prindable v. Assn. of Apartment Owners*.[89] These cases are cited in almost all subsequent emotional support animal case law and commentary.[90] Both cases impose additional factors into the FHA reasonable accommodation test that are not found in the statute, regulations, or legislative history.[91]

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tion or training for an animal to be considered a reasonable accommodation); *see also* Kristin M. Bourland, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals,* 48 U. Louisville L. Rev. 197, 211 (2009) (explaining that there is much confusion regarding whether and what type of training is required under the FHA).

[88] *See generally* Everly, *supra* n. 7, at 51–53 (explaining that part of the problem is the ambiguous statutory language which has caused both uncertainty and inconsistencies between circuit courts in the application of the FHA's reasonable accommodation test); Huss, *No Pets Allowed*, *supra* n. 40, at 85 (noting the problem that there is "no standard or precise measurement to determine whether a proposed accommodation" is reasonable); Eisner, *supra* n. 11, at 440 (discussing the ambiguity of the FHA's reasonable accommodation requirement).

[89] *Prindable v. Assn. of Apt. Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1245 (D. Haw. 2003); *In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787, 790 (W. Va. 2001) [hereinafter *Kenna*]; *see generally* Young, *supra* n. 86, at 16–17 (discussing *Kenna* and *Prindable*).

[90] *See e.g. Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850, 857–58 (S.D. Ohio 2009) (disagreeing with *Prindable* and *Kenna*); *Hawn v. Shoreline Towers Phase I Condo. Assn., Inc.*, 2009 WL 691378 at *5 (N.D. Fla. Mar. 12, 2009) (discussing *Prindable*); *Lucas v. Riverside Park Condos. Unit Owners Assn.*, 776 N.W.2d 801, 808 (N.D. 2009) (citing *Prindable*, 304 F. Supp. 2d at 1254); *Prindable*, 304 F. Supp. 2d at 1254 (discussing *Kenna*); *see also* Ligatti, *supra* n. 2, at 157 (discussing *Prindable* as "the most widely-cited" precedential emotional support animal case).

[91] *Prindable*, 304 F. Supp. 2d at 1256 (requiring an emotional support animal to be trained to provide emotional support); *Kenna*, 557 S.E.2d at 797 (requiring an emotional support animal to be "properly trained" to distinguish it from a pet); *see also* Everly, *supra* n. 7, at 55 (explaining that the ambiguous language of the FHA has allowed courts to develop their own standards that may or may not remain true to Congress's intent); Ligatti, *supra* n. 2, at 158 (noting the problem with the *Kenna* and *Prindable* cases is that they impose extra requirements into the FHA which are not found within the Act itself, its regulations, or its legislative history).

First, in *In re Kenna*, the West Virginia Supreme Court held that requiring an assistance animal to be "properly trained" does not violate the federal or state fair housing laws.[92] It reasoned that unless the animal at issue has proper training, certification, or licensing, it is merely a household pet.[93] Pets have no protection under federal law and can be prohibited in private housing.[94]

Following *In re Kenna*, the Hawaii District Court attempted to analyze the FHA's reasonable accommodation requirements as applied to a tenant's request to maintain an emotional support dog as a reasonable accommodation to the housing provider's no pet policy due to "poor sleep patterns [and] problematic aliments resulting from trauma from an earlier assault."[95] The *Prindabl*e court noted that following *In re Kenna*: "most animals are not equipped 'to do work or perform tasks for the benefit of an individual with a disability.' There must instead be something—evidence of individual training—to set the service animal apart from the ordinary pet."[96] The *Prindable* court reasoned that the animal in question must be peculiarly suited to ameliorate the

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[92] *Kenna*, 557 S.E.2d at 799; *see also* Huss, *No Pets Allowed*, *supra* n. 40, at 77 (discussing the *Kenna* holding in which the West Virginia court found that some type of certification process can be required for a service animal to be a reasonable accommodation under the FHA).

[93] *Kenna*, 557 S.E.2d at 799–800 (acknowledging that there is no uniform standard or credentialing criteria applicable to all service animals, but ruling that a tenant should make a bona fide effort to locate a certifying authority); *see* Huss, *No Pets Allowed*, *supra* n. 40, at 77–78 (noting that the housing corporation's requirement that service animals must be properly trained and certified for a particular disability in order to be allowed in private housing is at the outer limits of case law); *see also* Ligatti, *supra* n. 2, at 158 (explaining that the *Kenna* court reasoning was based on *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995), and *Green v. Hous. Auth. of Clackamas Co.*, 994 F. Supp. 1253 (D. Or. 1998), which were early housing cases where persons with disabilities sought to maintain service animals and were required under the ADA to provide evidence of individualized training, and that Kenna is clearly problematic because it relied on the ADA's service animal standard where a tenant was seeking to maintain an emotional support animal under the FHA); Young, *supra* n. 86, at 17 (discussing the reasoning of the West Virginia Supreme Court in *Kenna*).

[94] *See* Huss, *No Pets Allowed*, *supra* n. 40, at 72 (stating that absent an applicable federal statute like the FHA, landlords may restrict or prohibit the number or types of animals allowed on a property as well as any other requirements related to maintaining the animals); Young, *supra* n. 86, at 17 (explaining that according to the housing corporation in *Kenna*, if an animal has no training or certification, it is merely a household pet and lacks protection under the FHA).

[95] *Prindable*, 304 F. Supp. 2d at 1249–50 (internal quotation marks omitted); *see* Huss, *No Pets Allowed, supra* n. 40, at 79 (noting that the tenants' disabilities were primarily mental and emotional); Young, *supra* n. 86, at 17 (discussing the *Prindable* case).

[96] *Prindable,* 304 F. Supp. 2d at 1256 (quoting *Bronk*, 54 F.3d. at 429); *see also* Ligatti, *supra* n. 2, at 157–58 (discussing *Prindable* and noting that the court relied on *Bronk*, 54 F.3d. 425, and *Green*, 994 F. Supp. 1253*,* as authority for the training requirement, but in those cases the tenants sought to maintain services animals, which performed physical tasks in housing, and the courts properly required some evidence of training to verify the service animal status; in contrast the tenant in *Prindable* was seeking to maintain an emotional support animal under the FHA. Therefore, *Bronk,* 54 F.3d. 425, and *Green*, 994 F. Supp. 1253*,* should have had no precedential value.).

unique problems of the disability.[97] Taken together, *In re Kenna* and *Prindable* require plaintiffs to prove that their emotional support animal has some individualized training that is particularly suited to ameliorate the effects of their mental impairment. Further, plaintiffs may be required to furnish some form of training certification with a housing provider before the emotional support animal will be considered a reasonable accommodation.[98]

2. No Training Required Approach

In contrast to *In re Kenna* and *Prindable*, other courts have addressed the person with a disability's need for the assistive animal and have declined to apply a training requirement under the FHA analysis.[99] For example, in *Bronk v. Ineichen*, the Seventh Circuit vacated a jury verdict for a landlord after concluding that a jury instruction on reasonable accommodations may have caused the jury to "infer . . . that without school training, a dog cannot be a reasonable accommodation" when in fact, an accommodation of an assistive animal need only "facilitate a disabled individual's ability to function" and "survive a cost-benefit balancing that takes both parties' needs into account."[100] The

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[97] *Prindable*, 304 F. Supp. 2d at 1256–57 (stating further that "[u]nsupported averments from [plaintiff] and slight anecdotal evidence of service are not enough . . . to satisfy [the] Plaintiffs' burden in opposition to summary judgment" and that a plaintiff must produce more, such as an affidavit detailing the dog's training, a declaration from the dog's vet, or a certificate from any licensed training school to survive a motion for summary judgment); *see* Huss, *supra* n. 40, at 79 (discussing the *Prindable* court's rejection of the plaintiff's assertion that "canines (as a species) possess the ability to give unconditional love, which simply makes people feel better" because this assertion would permit no identifiable stopping point to distinguish between support animals and pets).

[98] *Prindable,* 304 F. Supp. 2d at 1256; *Kenna,* 557 S.E.2d at 791; *see also* Huss, *supra* n. 40, at 79, 81 (stating that the *Prindable* court agreed with the *Kenna* court that landlords may verify an alleged disability and/or the necessity of a requested accommodation and that "[i]f the standards set by *Kenna*, and adopted by *Prindable*, are supported by subsequent decisions interpreting the FHA, persons asserting their rights under the FHA will need to establish a clear record of their disabilities, as well as the status of the animal, to have a service animal in housing where a no-pets policy applies").

[99] *See e.g. Overlook Mut. Homes, Inc.*, 666 F. Supp. 2d at 861 (holding an emotional support animal can qualify as a reasonable accommodation under the FHA without individual training); *Janush v. Charities Hous. Dev. Corp*., 169 F. Supp. 2d 1133, 1135–36 (N.D. Cal. 2000) (stating that a prima facie claim of housing discrimination based on a refusal to make reasonable accommodations requires a showing that "(1) she suffers from a handicap as defined in the [FHA]; (2) defendant knew of the handicap or should reasonably be expected to know of it; (3) accommodation of the handicap may be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation." The court further stated that "even 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."); *Exelberth v. Riverbay Corp*., No. 02-93-0320-1, 1994 WL 497536 at *11 (HUD A.L.J. Sept. 8, 1994) (holding that the apartment corporation may not implement and enforce the no-pets rule against tenant with depression and other individuals with disabilities who require pets as a reasonable accommodation to their disability).

[100] *Bronk*, 54 F.3d at 430–31.

idea that a landlord may not shortcut the reasonable accommodation analysis by relying on an animal's training or lack thereof is an approach consistent with HUD's interpretation of the FHA.[101] HUD has taken the position that the service animal test from the Americans with Disabilities Act (ADA) is inapplicable to requests to maintain an animal in public or private housing as a reasonable accommodation, because the ADA serves a different purpose than the FHA.[102] Further, as the term "service animal" is not found anywhere within the FHA, some courts have refused to incorporate the ADA's service animal test into the FHA's reasonable accommodation analysis.[103] In *Exelberth v. Riverbay*, an administrative law judge found that a tenant diagnosed with depression should be allowed as a reasonable accommodation to maintain her dog as therapeutic support to alleviate her symptoms, without addressing the individual training or specific abilities of the dog.[104] Likewise, in *Crossroads Apartments Associates v. Leboo*, a New York court denied a landlord's motion for summary judgment where the tenant had a history of mental illnesses, including panic disorder with agoraphobia mixed with personality disorder, and was emotionally dependent on her cat.[105] Finally, in *Overlook Mutual Homes, Inc. v. Spencer*, the Southern District of Ohio stated that an emotional support animal is a reasonable accommodation required under the FHA,

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[101] 73 Fed. Reg. at 63835–36 (HUD believes that removing the animal training and certification requirements and conforming language will result in less confusion and improve the uniformity of its regulations. Although critics and landlords worry that removal of the training requirement will allow all animals in housing, in reality, only disabled tenants who can establish a nexus between their disability and animal will be permitted. HUD believes that removing the training requirement is important to ensure equal treatment of persons with disabilities who seek to maintain assistive animals.).

[102] *Id.* at 63836 (stating that there is a valid distinction between the functions animals provide to persons with disabilities in places of public accommodation as compared to the benefits an animal provides in the home; as such, the ADA test is inapplicable to fair housing cases, and the training requirement used for service animals should not be applied to assistance animals like emotional support animals).

[103] *See e.g. Green,* 994 F. Supp. at 1256 (rejecting a landlord's argument that a plaintiff with a hearing impairment needed to have a dog with formal training because the court found that "[the housing authority's] requirement that an assistance animal be trained by a certified trainer . . . has no basis in law or fact"); *Overlook Mut. Homes, Inc.*, 666 F. Supp. 2d at 857, 861 (denying summary judgment for the landlord and ruling that an emotional support animal may be a required accommodation because "the types of animals that can qualify as reasonable accommodations under the FHA include emotional support animals, which need not be individually trained"); *Janush*, 169 F. Supp. 2d at 1134–36 (denying a motion to dismiss because the plaintiff's doctor testified that the animals "lessen the effects of" the plaintiff's mental disability and the defendants failed to establish that there is "no duty to reasonably accommodate non-service animals"); Ligatti, *supra* n. 2, at 158–59 (stating that the "ADA and FHA cover different properties, promote different objectives, and were implemented by different sets of regulations" and that they therefore cannot be used interchangeably).

[104] *Exelberth*, 1994 WL 497536 at **7–13.

[105] *Crossroads Apt. Assocs. v. LeBoo*, 578 N.Y.S.2d 1004, 1005 (N.Y. City Ct. 1991) (available at WL, NY-CS database).

without requiring proof of training or skills to set it apart from the average pet.[106]

The dueling approaches between various state and federal courts as to whether training is required for an emotional support animal to be a reasonable accommodation under the FHA have left many confused.[107] Litigation over tenants' requests to maintain emotional support animals in private housing as a reasonable accommodation under the FHA has increased substantially in the last decades.[108] As confusion prevails and more cases are likely to follow, Part III of this Article examines the benefits and detriments of the judicially created training requirement under the FHA.

III. ANALYSIS

Courts take differing approaches in determining whether an emotional support animal needs training to be considered a reasonable accommodation under the Fair Housing Act (FHA).[109] As more doctors prescribe emotional support animals and as persons with disabilities seek to maintain such animals, the question of whether an emotional support animal should be subject to the Americans with Disabilities Act's (ADA) service animal training requirements is crucial.[110] If landlords, practitioners, and courts apply the law incorrectly, tenants with disabilities will be disadvantaged, contrary to the FHA goals of housing equality.[111] Persons with disabilities often rely on their emotional support animals and may suffer significant harms if illegally coerced

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106 *Overlook Mut. Homes, Inc*., 666 F. Supp. 2d at 861.

107 *See* Eisner, *supra* n. 11, at 440 (noting that the reasonable accommodation clause of the FHA is "ill-understood" and "chameleon-like" as it resists a precise standard); Everly, *supra* n. 7, at 51–53 (explaining the ambiguous language in the FHA creates uncertainty and produces inconsistent results); Ligatti, *supra* n. 2, at 143 (discussing the confusion over whether housing providers are obligated under federal disability laws to allow tenants to maintain emotional support animals).

108 Ligatti, *supra* n. 2, at 143.

109 *Compare e.g. Overlook Mut. Homes, Inc.*, 666 F. Supp. 2d at 861 (holding an ESA is a reasonable accommodation required under the FHA and does not require individual training) *with e.g. Prindable,* 304 F. Supp. 2d at 1256–57 (requiring some evidence of individualized training to set the ESA apart from household pets in order to be a reasonable accommodation under the FHA); *see also* Huss, *Why Context Matters, supra* n. 7, at 1196 (asserting that in most FHA cases, the focus often shifts to the level of training the animal has had, and that the results are mixed).

110 *See* Ligatti, *supra* n. 2, at 143, 153 (noting an increase in litigation over whether an emotional support animal must be allowed in private housing as a reasonable accommodation due to confusing federal regulations and the increase in persons with disabilities who are prescribed emotional support animals. The confusion over what standard is applicable in housing cases has led to the denial of tenants' rights to maintain an emotional support animal, the failure to afford a person with a disability with an equal opportunity to use a dwelling, and actual or constructive eviction of tenants.).

111 HUD, *Promoting Fair Housing,* http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/promotingfh (updated Jan. 28, 2008) (accessed Apr. 8, 2012) (explaining that the purpose of the FHA is to promote non-discrimination and to ensure fair and equal housing opportunities for everyone, with those with disabilities falling under the class of people the FHA seeks to protect); *see also* Everly, *supra*

or forced to give up their support animals to maintain their homes.[112] Landlords and practitioners who think they know the law will engage in discrimination if they apply the wrong test, and as such, may be liable for compensatory and punitive damages and attorneys' fees.[113] In 2008, a Minnesota landlord was ordered to pay $82,500 in damages to a tenant for denying housing because the tenant's child relied on an emotional support animal.[114] Landlords and practitioners will want to avoid such judgments; therefore, a clear understanding of what the law is with regard to emotional support animals is imperative.[115]

Courts have taken such divergent views on the training requirements for emotional support animals under the FHA partly because of the Act's ambiguous language.[116] The ambiguity in the FHA allows courts to apply their own reasonable accommodation standards, which may or may not remain true to Congress's intent.[117] This Part analyzes whether training should be a required element in an FHA case

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n. 7, at 39 (explaining that if the FHA is to be successful in helping persons with disabilities integrate into housing, the judiciary must adopt a consistent approach).

112 *See* 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, 267 (2009) (noting that animals provide critical support to persons with disabilities and some persons would be subjected to a life of restriction and vulnerability without their animals).

113 *See e.g.* Consent Decree, *U.S. v. Bouquet Builders, Inc.* (D. Minn. filed Sept. 10, 2007) (Civ. No. 07-3927) (available at http://www.justice.gov/crt/about/hce/documents/bouquetsettle.pdf (accessed Apr. 8, 2012)) (ordering a landlord to pay $82,500 in damages for refusing to provide housing to a tenant because the tenant's child used an emotional support animal) [hereinafter *Bouquet Builders* Decree]; *see also* Huss, *Why Context Matters*, *supra* n. 7, at 1190 (explaining that failure to accommodate a person with a disability constitutes illegal discrimination in violation of federal disability law).

114 *Bouquet Builders* Decree, *supra* n. 113.

115 *See* Everly, *supra* n. 7, at 39 (explaining a consistent approach is needed in order for the FHA to be effective); Huss, *Why Context Matters*, *supra* n. 7, at 1189–90 (noting that one of the most common reasons discrimination against persons with disabilities occurs is a lack of proper training of employees with respect to service and support animal laws); Ligatti, *supra* n. 2, at 155 (stating that much of the confusion regarding the status of emotional support animals stems from the misapplication of federal laws in prior cases like *Prindable*).

116 *Compare e.g. Overlook Mut. Homes, Inc.,* 666 F. Supp. 2d at 861 (holding that an emotional support animal is a reasonable accommodation required under the FHA and does not require proof of certification or evidence of training) *with e.g. Prindable,* 304 F. Supp. 2d at 1256 (requiring some evidence of individualized training to set an emotional support animal apart from household pets in order for the court to find that the animal is a reasonable accommodation under the FHA); *see also* Eisner, *supra* n. 11, at 440 (explaining that the FHA's reasonable accommodation test is an "ill-understood" means for vindicating the rights of persons with disabilities because it lacks a precise definition and constant application); Everly, *supra* n. 7, at 50, 52–53 (explaining that the current state of disability discrimination law depends on the interpretation of the court that hears the case, and that many courts have confused the FHA's reasonable accommodation test partly because of the ADA's unclear language, which allows courts to inconsistently apply the reasonable accommodation test); Ligatti, *supra* n. 2, at 154 (noting that the FHA and its regulations do not mention emotional support animals).

117 Everly, *supra* n. 7, at 55, 57 (Lower courts simply rely on their circuit precedent in interpreting the FHA; therefore, if the circuit court is incorrect in its interpretation, the lower courts will also perpetuate the incorrect reasonable accommodation standard.).

for failure to make reasonable accommodations, where a person with a disability seeks to maintain an emotional support animal in private housing. First, Part III(A) discusses arguments for following the *Kenna–Prindable* approach by requiring some evidence of training for an emotional support animal in order to be a reasonable accommodation under the FHA. Second, Part III(B) discusses why the *Overlook* court approach is a more appropriate analysis for emotional support animals in claims for failure to make reasonable accommodations under the FHA.

A. Reasons for Requiring Training

Courts following the *Kenna* and *Prindable* approach require some evidence that an emotional support animal has training that sets the animal apart from a household pet.[118] The reasoning behind this judicial approach is to address landlords' concerns over emotional support animals.[119] Landlords cite several concerns about allowing emotional support animals in no-pet properties. First, landlords worry that allowing one untrained emotional support animal into private housing will open the floodgates, making it difficult to maintain no-pet policies when other tenants also seek to maintain animals for "emotional support."[120] Second, landlords worry that the presence of an emotional support animal in a no-pet building will confuse other residents because most emotional support and assistive animals are not visually distinguishable from regular pets.[121] Finally, landlords are concerned with damages to community property as well as to the interior dwelling.[122]

First, landlords worry that allowing emotional support animals in private housing to accommodate persons with disabilities will open the

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[118] *Prindable*, 304 F. Supp. 2d at 1256; *Kenna,* 557 S.E.2d at 799 (holding that a disabled person with an emotional support animal may need to show the animals is "individually trained"); *see also* Ligatti, *supra* n. 2, at 158 (explaining that both *Kenna* and *Prindable* impose an extra requirement with no basis under the FHA).

[119] *See* Huss, *No Pets Allowed*, *supra* n. 40, at 114 (discussing a court opinion that addressed the substantial problems with housing an animal in an apartment); Ligatti, *supra* n. 2, at 152–53 (noting that courts are aware of housing providers concerns); *id.* at 140, 142–43 (stating that many housing providers are skeptical as to whether tenants truly need an emotional support animal to accommodate their disability).

[120] *See* Beth Landman, *Wagging the Dog, and a Finger*, N.Y. Times (May 14, 2006) (available at http://www.nytimes.com/2006/05/14/fashion/sundaystyles/14PETS.html (accessed Apr. 8, 2012)) (quoting a dog trainer who acknowledged that she had been approached by persons with small dogs falsely claiming that they were emotional support dogs even though they are not, and who described this as "a total insult to the disabled community" and that people making these false claims "are ruining it for the people who need it"); Ligatti, *supra* n. 2, at 152 (stating that some landlords worry that if they allow one tenant to have an emotional support animal, more tenants will bring disability claims against them).

[121] *See* Richard Siegler & Eva Talel, *Restraints on Boards' Pet Policies: Emotional Support Pets*, 237 N.Y. L.J. 3, 3 (Jan. 3, 2007) (noting that emotional support animals rarely wear vests or tags signifying their special status).

[122] *See id.* at 3 (discussing animals damaging common areas).

floodgates, making it difficult to maintain their no-pet policies altogether.[123] A prohibition of pets eliminates a major source of tension between tenants and the landlord, minimizes wear and tear on the rental property, and helps avoid landlord liability for dog bites and related injuries.[124] Despite the benefits from having a no-pet policy, a landlord must allow animals, even in no-pet buildings, where the tenant has a physical, psychological, or emotional need for the animal.[125] Landlords who adopt standard no-pet clauses should be careful to clarify that there is an exception for service and emotional support animals. Housing providers should also ensure that resident managers are trained on the requirements of the FHA and the rights of tenants with disabilities; both the housing provider and manger can be liable for compensatory and punitive damages, civil penalties, and attorney's fees if either continues to enforce a no-pet clause after being on notice that a tenant's animal is either a support animal or emotional service animal.[126]

While it is possible other tenants might try to pass off their pets as emotional support animals, imposters would still have to pass the FHA's reasonable accommodation analysis. More importantly, under the FHA reasonable accommodation analysis, an individual must es-

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[123] *See* Ligatti, *supra* n. 2, at 152 (noting that some housing providers fear that allowing a tenant to maintain an emotional support animal as a reasonable accommodation for his or her disability will open "the floodgates to pretextual disability claims" (internal quotation mark omitted)); *but see* 73 Fed. Reg. at 63835 (HUD does not believe that elimination of the training requirement will require landlords to allow all animals in no-pet properties because a tenant with a disability seeking to maintain an emotional support animal as a reasonable accommodation will still need to establish a nexus between the disability and animal.).

[124] Jay Zitter, *Effect, as Between Landlord and Tenant, of Lease Clause Restricting Keeping of Pets*, 114 A.L.R.5th 443, 443, 461 (2003) (reviewing reasons why a landlord would enact a policy to prohibit pets from rental properties, including that dogs are more likely to bark and bite thus disturbing other residents, but noting that the landlord could avoid some of these problems by charging residents additional rent and holding tenants liable for any bites or injuries). While landlords often believe restricting pets eliminates a source of complaints from other tenants who may move out if dissatisfied with neighbors' pets, they could attract a larger pool of potential tenants by allowing pets. *Id*.

[125] *See e.g. Janush*, 169 F. Supp. 2d at 1133 (denying landlord's motion for summary judgment where landlord failed to make a reasonable accommodation in its no-pet policy for a tenant with severe mental health disabilities); *Majors v. Hous. Auth. of the Co. of DeKalb Ga.,* 652 F.2d 454, 454 (5th Cir. 1981) (reversing summary judgment in favor of a low income housing authority where a tenant alleged she had a disability within the meaning of the Rehabilitation Act, which required the companionship of her dog, and argued that she had been discriminated against by the housing authority that enforced its pet ban as to her animal); Zitter, *supra* n. 124, at 500, § 21(a) (discussing cases where courts would not enforce lease clauses prohibiting pets because they were service animals).

[126] *See* Huss, *No Pets Allowed*, *supra* n. 40, at 89–91 (explaining that the administrative law judge in *H.U.D. v. Dutra,* 1996 WL 657690 at **1–3, awarded economic damages, including attorney's fees, against the landlord); Huss, *Why Context Matters*, *supra* n. 7, at 1190 (citing lack of proper training as a key reason for discrimination against persons with disabilities).

tablish that he or she is a person with a disability as defined by the Act and establish a nexus between his or her disabilities and need to maintain the animal in question.[127] This is not an easy test to fake because it requires medical evidence.[128] Landlords claim that some doctors will write whatever their patients ask them to write.[129] However, an imposter tenant falsely asserting a pet as an emotional support animal for the purpose of bypassing a no-pet housing policy would need medical proof of a disability and a nexus between the disability and animal; most doctors uphold the medical criteria necessary for a diagnosis.[130] This concern of landlords is consequently mitigated.

Second, landlords worry that the presence of non-trained and visually indistinguishable emotional support animals will confuse fellow residents as to what the pet policy is.[131] While traditional service animals are visually distinguishable from regular pets and are generally accepted by other residents, emotional support animals are not.[132] To other residents, an emotional support animal might appear like a regular pet. Landlords worry that the presence of an emotional support animal in a non-pet building will cause confusion among other residents as to what the pet policy is, and whether it is enforced.[133]

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127 *See* 73 Fed. Reg. at 63835 (noting that eliminating the training requirement for animals will not permit every animal, as a tenant will still need to establish a nexus between a disability and disability-related need for the animal); Eisner, *supra* n. 11, at 453 (stating that it is a "well-settled" principle that a tenant's need for an accommodation must arise out of his or her disability and not from a mere preference or convenience to the tenant).

128 *See* 42 U.S.C. § 3602(h) (1988) (defining a handicap—one factor under the FHA's reasonable accommodation test—and requiring that a person have "a record of having such an impairment"); 73 Fed. Reg. at 63835 (asserting that a person who is seeking reasonable accommodation for an emotional support animal may be required to show documentation from a physician).

129 *See* Landman, *supra* n. 120, at 6 (discussing a concern among landlords that tenants might falsely claim their animal as an emotional support animal and that some doctors are willing to do anything the patient asks); John Parry & Eric Y. Drogin, *Mental Disability Law*, *Evidence and Testimony* 1, 5–6 (ABA Publg. 2007) (explaining that many persons in authority believe mental impairments are manufactured to provide some kind of benefit to the person claiming to be impaired).

130 *See* 73 Fed. Reg. at 63835 (discussing the landlords' argument and reasons why it is not a valid concern); Ligatti, *supra* n. 2, at 152–53 n. 103 (noting housing providers' concerns with illegitimate or pretextual requests to maintain an animal in no-pet properties when it is not medically necessary).

131 *See* Siegler & Talel, *supra* n. 121, at 3 (noting that emotional support animals usually do not wear tags or vests).

132 *See id.*

133 *See e.g.* Fair Hous. Agencies of Wash. St., *Sample Service Animal Policy* 1, 5 (available at http://www.seattle.gov/civilrights/documents/policy_service_animals.pdf (accessed Apr. 8, 2012)) (explaining remedies for a landlord if tenants are confused about why there is an exception for a service animal); *but see* Huss, *No Pets Allowed*, *supra* n. 40, at 98 (quoting the HUD Secretary who stated in 2001 that "[the] benefits that can come to children and the elderly [from having a companion animal in housing] are far larger than the management problems" (first alteration in the original)); Huss, *Why Context Matters*, *supra* n. 7, at 1215 (noting the power of landlords to rectify any confusion or issues with respect to other tenants, including making reasonable rules to

The presence of an emotional support animal may confuse some tenants, but it should not establish precedent that allows other residents to keep animals if the animals do not assist with a person with a disability. The landlord simply needs documentation that the animal is only present in the no-pets building for the limited purpose of assisting a person with a disability.[134]

Landlords raise concern over damage to dwelling and common areas.[135] However, tenants remain liable for any actual damage done to their dwelling or common areas even if the animal is an emotional support animal.[136] When a tenant asks to maintain an assistive animal as a reasonable accommodation—whether as a service or emotional support animal—landlords may not assume that the animal will cause financially burdensome damage.[137] The landlord's concern is lessened because even if an emotional support animal causes damage, the tenant must bear the financial responsibility.[138]

Next, landlords object that because emotional support animals are not required to be trained, they may have behavioral problems, such as continuous barking or vicious propensities.[139] Property owners who are aware of a dog's vicious propensities may be found liable if the animal injures occupants or employees of the building;[140] therefore,

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allow the emotional support animal to use outdoor facilities for bathroom purposes, and communicating to other tenants that the animal is only present as an emotional support animal; thus there is no valid argument to support housing providers' position against accommodating support animals).

134 *See* Huss, *No Pets Allowed*, *supra* n. 40, at 80–81 (explaining that persons requesting an accommodation under the FHA will need to establish a clear record of their disability and the status of their animals, but stating that a plaintiff's attorney noted that a letter explaining the FHA in detail, along with substantive documentation from a medical professional, is sufficient to persuade a landlord to waive a no-pet policy).

135 *See generally* Siegler & Talel, *supra* n. 121, at 2 (discussing landlord concerns about damage).

136 *See id.* (stating that tenants with disabilities remain responsible for their emotional support animal's care and maintenance); J. David L. Bazelon Ctr. for Mental Health L., *Fair Housing Information Sheet # 6, Right to Emotional Support Animals in "No Pet" Housing* 5 (available at http://www.bazelon.org/issues/housing/infosheets/fhinfosheet6.html (accessed Apr. 8, 2012)) [hereinafter *Fair Housing Information*] (explaining that if an assistive animal does cause significant damage, the tenant should be held financially liable).

137 *See Fair Housing Information*, *supra* n. 136, at 5 (explaining that it would be contrary to the purpose of the FHA to allow a landlord to charge a deposit at the outset in the absence of any significant damage, just as it would be improper to charge a tenant who uses a wheelchair a deposit for potential damage to carpeting).

138 *See* Huss, *No Pets Allowed*, *supra* n. 40, at 88 (explaining that tenants remain responsible for actual damage their emotional support animals may do in their housing units).

139 *See* Siegler & Talel, *supra* n. 121, at 2 (defining vicious propensities as behaviors like biting, growling, lunging, or snapping).

140 *See e.g. Baker v. Pennoak Props., Ltd.,* 874 S.W.2d 274, 277 (Tex. App. 1994) (discussing cases establishing that "under the common law, a landlord has the duty to keep the common areas of his property reasonably safe, including protecting tenants from known vicious dogs . . . where a two prong test is met: (1) the injury must have occurred

landlords want to limit their liability.[141] Although to landlords this is a valid objection, the landlord may evict a tenant whose emotional support animal is particularly disruptive, or if the tenant fails to take proper measures to ensure that the animal does not bother other tenants.[142] Therefore, this concern is also easily mitigated.[143]

B. Reasons Not to Require Training

There are three reasons why courts should follow the court's *Overlook* approach and not require training as a factor in the FHA reasonable accommodation test. First, guidance from the Department of Housing and Urban Development (HUD) clearly establishes that training is not required for emotional support animals and thus, the ADA training requirements are inapplicable to fair housing cases.[144] Second, both the *Kenna* and *Prindable* courts applied the wrong test, confusing emotional support animals with service animals; therefore, neither case has significant precedential value.[145] Third, restricting

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in a common area under the control of the landlord; and (2) the landlord must have had actual or imputed knowledge of the particular dog's vicious propensities").

141 *See* Huss, *No Pets Allowed*, *supra* n. 40, at 126 (noting that landlords' liability for dog bites is limited to situations where the landlord had knowledge that the animal was dangerous or had control over the animal); Siegler & Talel, *supra* n. 121, at 2 (explaining that a tenant with disabilities who maintains an emotional support animal with vicious propensities may be required to take extra measures of care, including keeping the animal leashed and muzzled, whenever the emotional support animal encounters building occupants, guests, or employees).

142 24 C.F.R. at § 5.303(b)(3) (stating that nothing in this section impairs the rights that landlords have to regulate animals under federal, state, or local laws); *see e.g*. *Woodside Vill. v. Hertzmark*, ___ A.2d ___, 1993 WL 268293 at **1, 2, 6 (Conn. Super. June 22, 1993) (holding that a federally assisted housing complex did not violate the FHA by evicting a mentally ill resident for failing to walk his dog in the designated area and using a pooper-scooper; soon after the disabled tenant began living in his dwelling, problems regarding his dog became apparent, and the tenant was unable to take advantage of the landlord's reasonable attempts to accommodate him); *see also* Eisner, *supra* n. 11, at 453–54 (discussing the *Woodside* case); Huss, *No Pets Allowed*, *supra* n. 40, at 115–16 (explaining that a landlord may evict a tenant whose animal is a nuisance, and providing case law examples of when an animal has been found to be a nuisance in rental housing).

143 *See* Fair Hous. Agencies of Wash. St., *supra* n. 133, at 5 (explaining possible ways for a landlord to remedy tenant confusion over the presence of an emotional support animal in a no-pet building); *Woodside*, 1993 WL 268293 at **2, 6 (explaining that after the defendant made reasonable efforts to accommodate the defendant, eviction was allowable when the dog among other things bothered other tenants).

144 *See generally* Everly, *supra* n. 7, at 57 (noting that it is "ill-advised" for courts to blend the requirements of the FHA with the ADA because the statutes serve different purposes and utilize different tests, that courts should therefore be careful to examine and rely only on language from the applicable statute at hand, and that case law may not be reliable as older cases frequently comingled the ADA test into fair housing cases).

145 *See* Huss, *Why Context Matters*, *supra* n. 7, at 1201–02 (stating that both the *Prindable* and *Kenna* courts ignored studies showing a direct link between mental disabilities and the benefits an emotional support animal can provide, and in addition dismissed prior mental and emotional disability cases that precluded summary judgment when the tenant claimed to be emotionally or physically dependent upon the animal.

animals in rental housing has a significant impact on persons with disabilities, which differs from discrimination in employment or other areas; such restrictions are contrary to Congress's intent when it passed the FHA.[146] Each of these reasons will be analyzed in detail.

First, HUD regulations clearly establish that emotional support animals are protected under the FHA and training is not a required element.[147] Notwithstanding the HUD regulations, many courts have applied the ADA's service animal definition in fair housing cases.[148] The application of the ADA's service animal definition is a problematic error.[149] Scholars suggest that the ADA and FHA are distinct statutes and cannot be intertwined because each serves a different purpose.[150] Unlike a service animal, an emotional support animal receives protection under federal laws regardless of training, because emotional support animals benefit persons with disabilities through their presence

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Most importantly, both *Prindable* and *Kenna* directly contradict HUD's position, which treats emotional support animals as reasonable accommodations required under the FHA.).

146 *See id.* at 1210, 1265, 1269 (noting disability discrimination in housing and employment varies, as does the impact it has on persons with disabilities).

147 *See* HUD, *Questions and Answers About Fair Housing*, http://www.hud.gov/local/shared/working/r10/fh/questions.cfm?state=ak (accessed Apr. 8, 2012) (providing an example illustrating that an emotional support animal is a reasonable accommodation required under the FHA, regardless of its training)*; see also* Joint Statement, *supra* n. 47, at 6 (providing an example of a reasonable accommodation to include waiving a no-pet policy in order to allow a tenant with a disability to maintain an assistive animal).

148 *See* Doris Day Animal League & the Mass. Socy. for the Prevention of Cruelty to Animals, *Best Friends For Life: Humane Housing for Animals and People* 2, 20 (Lisa Gallo et al. eds., 2001) (available at http://www.ddal.org/pdf/bffl.pdf (accessed Apr. 8, 2012)) (noting under both the FHA and Rehabilitation Act there is no requirement for assistive animals to have any training; however, as the ADA does require training, courts often adopt the ADA's definition); *Americans with Disabilities Practice & Compliance Manual* § 14:50 (Thomson/West 2007) (stating that "service animal" is not a term defined by the FHA; however, the ADA's definition of service animal is appropriate for the FHA reasonable accommodation analysis); *see also* Huss, *No Pets Allowed*, *supra* n. 40, at 75–76 (explaining that some courts will consider whether the animal has had any professional training in determining whether a reasonable accommodation is required under the FHA, although the federal statute does not require professional training); Huss, *No Pets Allowed*, *supra* n. 40, at 81 (stating that *Kenna* and *Prindable* fail to recognize the distinction between service and emotional support animals, because they ignore earlier cases involving mentally and emotionally disabled tenants that set out standards precluding summary judgment if there was an emotional or psychological dependence on the animal or if the animal in question lessened the effects of the disability by its companionship).

149 *See* Young, *supra* n. 86, at 16–18 (discussing cases where the animal's status as a service animal or emotional support animal was in question due to the fact that the FHA does not define these terms).

150 Everly, *supra* n. 7, at 57; *see also* Huss, *No Pets Allowed*, *supra* n. 40, at 81 (arguing that when courts like *Kenna* and *Prindable* require tenants with disabilities to establish a clear record of their disabilities, the status of their animals' training determines if the tenants can keep their animals in no-pet housing, and that these cases fail to make a distinction between service animals that perform physical tasks and emotional support animals that provide companionship).

and interactions alone.[151] Training emotional support animals is not necessary.[152] Because emotional support animals rarely have sufficient training to pass the stringent ADA service animal test, when courts apply the ADA service animal definition to an FHA case, a plaintiff with a disability will almost always lose.[153]

As previously discussed, the FHA was passed to integrate disabled persons into the mainstream and increase their opportunities for independent living.[154] The objectives of the Act cannot be achieved if disabled persons are denied housing.[155] Congress did not enact the FHA with the intent of defeating disability discrimination claims before they could reach trial or making such actions difficult to maintain.[156] HUD regulations clearly establish that the ADA's training require-

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[151] *See e.g. Overlook Mut. Homes, Inc.*, 666 F. Supp. 2d at 858–60 (holding that an emotional support animal is a reasonable accommodation required under the FHA and does not require proof of certification or evidence of training); *see also* Huss, *No Pets Allowed, supra* n. 40, at 81 (supporting this idea); Landman, *supra* n. 120, at 2 (noting that it is well recognized that animals are major antidepressants).

[152] *See* 73 Fed. Reg. at 63836 (noting that emotional support animals relieve depression and anxiety by their nature and do not require training); 24 C.F.R. at § 5.303 (stating that project owners and public housing agencies may not apply or enforce any policies against animals that assist persons with disabilities).

[153] *See e.g. Prindable*, 304 F. Supp. 2d at 1256 (finding for the housing provider where an emotional support animal lacked evidence of training); *Kenna*, 557 S.E.2d at 800 (finding for the housing provider where an emotional support animal had not been certified); Huss, *No Pets Allowed*, *supra* n. 40, at 81 (explaining that based on the findings in *Prindable*, it can be especially difficult for tenants to establish the status of an animal to accommodate a mental or emotional disability); Elisabeth Shuster, *What the General Practitioner Needs to Know About Pennsylvania Animal Law*, 77 Pa. B. Assn. Q. 71, 72 (2006) (discussing a case that applied the ADA service definition used in *Prindable*, where Spicey, a dog who alerted the owner's husband that the owner was having a migraine, was deemed not a service animal. The court noted that emotional support animals should be particularly suited to ameliorate the unique problems of the mentally disabled and that "[j]ust because the federal laws do not require certification or training by a licensed professional, it does not follow that any animal will automatically be recognized as a service animal."); *see also* Susan Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 Barry L. Rev. 39, 46–47 (2002) (explaining that service and emotional support animals encounter resistance in no-pet housing even though they are protected under federal laws and are not simply pets).

[154] *See* Robert G. Schwemm & Sara K. Pratt, *Disparate Impact Under the Fair Housing Act: A Proposed Approach* 1, 12–13 (available at http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf (updated Dec. 1, 2009) (accessed Apr. 8, 2012)) (discussing the legislative history of the FHA and explaining that the goal of Congress was to lessen the burden of proof for people making claims under the Act).

[155] *Id.*

[156] *See* Everly, *supra* n. 7, at 65 (discussing public policy reasons why the FHA reasonable accommodation test should be viewed "relatively light[ly]"); Ligatti, *supra* n. 2, at 146–47 (stating that two reasons for the passage of the FHA were to provide victims of housing discrimination with more enforcement options and to expand the class of protected persons to include the disabled).

ment is not applicable to fair housing cases; courts should not interject it into the reasonableness test.[157]

Second, although the *Kenna* and *Prindable* cases are commonly cited as emotional support animal precedent, these two cases should not be given precedential value because they applied the wrong test.[158] Both the *Kenna* and *Prindable* courts confused an emotional support animal with a service animal.[159] A service animal performs a physical task for the benefit of a person with a disability.[160] Service animals are granted access to places of public accommodation and therefore require sufficient training.[161] In contrast, an emotional support animal benefits a person with disability through its presence and interactions alone.[162] As such, emotional support animals do not need to be trained before a person with a disability may maintain an emotional support animal as a reasonable accommodation.[163]

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[157] 24 C.F.R. at § 5.303 (stating that "[p]roject owners and [public housing agencies] may not apply or enforce any policies established under this subpart against animals that are necessary as a reasonable accommodation"); *see also* Everly, *supra* n. 7, at 65 (arguing that Congress did not intend to create an impossible obstacle to bringing reasonable FHA accommodation claims and that to effectuate the purpose of the FHA and support public policy reasons, plaintiffs should only have to establish the FHA's statutory considerations); Ligatti, *supra* n. 2, at 162–63 (explaining that the *Overlook* court drew a distinction between the FHA and ADA, relying in part on recent HUD regulatory changes allowing emotional support animals in public housing, which provided a strong argument that the FHA does not require that animals serving as reasonable accommodations meet the ADA definition of service animal).

[158] *See* Ligatti, *supra* n. 2, at 158–59 (discussing *Kenna* and *Prindable* and explaining that both cases impose extra requirements not found in the FHA, its regulations, or its legislative history and,therefore are incorrect law).

[159] *Kenna*, 557 S.E.2d at 792, 799 (holding that a landlord could require persons with disabilities to prove that their emotional support animal was trained or certified); *Prindable*, 304 F. Supp. 2d at 1255–56 (applying the ADA's service animal test where a plaintiff with a disability sought to maintain an emotional support animal as a reasonable accommodation under the FHA); *see also* Ligatti, *supra* n. 2, at 158 (noting that in both cases, the courts relied on *Bronk,* 54 F.3d. 425, and *Green*, 994 F. Supp. 1253*,* as authority, but that those were early housing cases where persons with physical disabilities sought to maintain service animals and so the animals' training was appropriately considered).

[160] *See* Ligatti, *supra* n. 2, at 154 (stating that service animals are trained to perform tasks such as guiding individuals with impaired vision or alerting individuals with impaired hearing).

[161] *See* 73 Fed. Reg. 63834, 63836 (As HUD explained, "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 reduce stress-induced pain in persons with certain medical conditions affected by stress."); Ligatti, *supra* n. 2, at 165 (quoting HUD's recognition of the valid distinction between the functions that a service animal and emotional support animal provide).

[162] *See* Ligatti, *supra* n. 2, at 165 (explaining that emotional support animals by their nature may relieve depression and anxiety).

[163] *See id.* (defining emotional support animals and explaining that unlike service animals, an emotional support animal does not need training because it benefits persons with disabilities through its presence and interactions alone); *see also id.* at 161 (explaining that HUD administrative law judges find that emotional support animals are a reasonable accommodation without evidence of training; for example, *H.U.D. v.*

For example, in *Kenna*, the plaintiffs requested permission to keep their dogs to alleviate their physical and mental disabilities.[164] The West Virginia Supreme Court considered whether a person with a disability is entitled to "own a 'service animal' where animals are otherwise prohibited."[165] The court concluded that under the ADA's service animal test, the plaintiffs' dogs had not received any specialized training to alleviate their disabilities, and that therefore the plaintiffs were prohibited from maintaining them.[166]

Likewise, in *Prindable*, the tenant requested to maintain his dog as a reasonable accommodation to a no-pets policy for the benefit of his disability.[167] The *Prindable* court applied the ADA's service animal test and the *Kenna* court's reasoning in denying the tenants' request.[168] Both *Kenna* and *Prindable* misapplied the ADA's service animal test to determine whether allowing an emotional support animal is a reasonable accommodation under the FHA. Therefore, neither case holds precedential value.[169] Further, it is important to note that after the adjudication, the *Kenna* defendant agreed under a consent decree to change its housing policy to allow emotional support animals and service animals as reasonable accommodations for persons with disabilities.[170] The *Kenna* and *Prindable* courts erred in applying the ADA service animal test to the FHA's reasonable accommodation analysis, and subsequent courts should not rely on *Kenna* or *Prindable* as precedent.

Third, when landlords apply the wrong standard, the impact on tenants is significant. The "experience of discrimination . . . is unique, and uniquely painful . . . [when] the pressures and burdens of discrimination cause breakdowns, despair, or anger, [and] are attributed to the person's condition."[171] It is estimated that 54 million people in the

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Dutra, 1996 WL 657690 at **1–3, allowed a tenant with anxiety to maintain his companion cat as a reasonable accommodation for his disability).

164 *Kenna*, 557 S.E.2d at 792 (describing the plaintiffs' request for permission to keep their dogs in their apartment because they suffered from Still's Disease, high blood pressure, and depression).

165 *Id.* at 795.

166 *Id.* at 799–800.

167 *Prindable,* 304 F. Supp. 2d at 1255–56 (noting that the tenant sought to maintain his dog as a means of therapeutic support for his depression, anxiety, and HIV).

168 *Id.* at 1256.

169 *See* Ligatti, *supra* n. 2, at 158–59 (explaining that *Prindable* and *Kenna* impose extra requirements with no basis in the FHA, its regulations, or its legislative history).

170 *See Overlook Mut. Homes, Inc*., 666 F. Supp. 2d at 860–61 (discussing the consent decree entered into by the defendants in *Kenna* as one reason why subsequent cases should not significantly rely on that case); *see also* Ligatti, *supra* n. 2, at 159 (noting the consent decree under which the *Kenna* defendant agreed to change its policy to allow both service and emotional support animals as reasonable accommodations for persons with disabilities who require either assistive animal).

171 Ligatti, *supra* n. 2, at 152 (quoting Stefan, *supra* n. 20, at 5); *see also* Eisner, *supra* n. 11, at 465 (noting society's history of discrimination against persons with disabilities based on unsubstantiated and unfounded fears).

U.S., or 18% of the population, have a disability.[172] Many disabilities are "invisible," meaning that they are neither immediately apparent to casual observers nor visible to the naked eye.[173] Housing providers may react with surprise and suspicion when a tenant seeks an accommodation for an invisible disability.[174] This type of discrimination is attributable to the general lack of knowledge and acceptance of how the benefits emotional support animals (even without specific training) can provide persons with psychological disabilities.[175] Until invisible disabilities and all types of assistive animals, from service to emotional support animals, are commonly accepted, discrimination will persist and these cases will continue to be decided haphazardly.[176] A wrongful interpretation of the FHA can result in an illegal eviction of a tenant,

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172 *See* William H. Grignon, *Invisible Disabilities in the Workplace: 10 Facts About Invisible Disability (ID)*, in ABA. *The Second National Conference on the Employment of Lawyers with Disabilities: A Report from the American Bar Association for the Legal Profession* 55, 55 (John W. Parry & William J. Phenlan, IV eds., ABA 2009) (available at http://new.abanet.org/disability/PublicDocuments/09report.pdf (accessed Apr. 8, 2012)) (noting that this percentage is probably an underestimation and stating further that approximately 26 million of these disabilities are severe, but almost all are hidden); *see also* Everly, *supra* n. 7, at 66 (explaining that millions of Americans are mentally or physically disabled and suffer discrimination in their day-to-day lives).

173 *See* Grignon, *supra* n. 172, at 55 (Depression, learning disabilities, psychiatric disabilities, chronic fatigue syndrome, multiple sclerosis, seizure disorders, and cancer are among some of the most prevalent invisible disabilities in America today. Symptoms of an invisible disability may include extreme fatigue, dizziness, disorientation, pain, weakness, and other cognitive impairments. These symptoms may be the result of birth disorders, injuries, genetics, chronic illnesses, chronic pain, and chronic stressful environments, as well as the side effects of medication.).

174 *See* Parry & Drogin, *supra* n. 129, at 5 (explaining the widespread belief that mental impairments are manufactured for the individual's own benefit); *see also* Eisner, *supra* n. 11, at 465 (noting that housing discrimination occurs based on unfounded and unsubstantiated fears of persons with disabilities, and that this invidious housing discrimination against persons with disabilities has segregated them from mainstream housing options); Ligatti, *supra* n. 2, at 152 (stating that many housing providers are reluctant to recognize psychiatric disorders as "real disabilities" and that housing providers often react with disbelief and suspect ulterior motives when a tenant with an invisible disability seeks an accommodation; further explaining that the very nature of an invisible disability may cause conflict and the housing provider may consider the person with a disability to be "a troublemaker or disruptive force" because the tenant seeks an accommodation contrary to the housing provider's standard policies).

175 Eisner, *supra* n. 11, at 465 (explaining that discrimination against persons with disabilities is often "based on unsubstantiated and unfounded fears about their disabilities").

176 *See id.* at 468–69 (concluding that the FHA will be successful at eliminating discrimination if it is applied liberally, and that this largely depends on how courts interpret reasonable accommodation); Grignon, *supra* n. 172, at 55 (listing depression, learning disabilities, psychiatric disabilities, chronic fatigue syndrome, multiple sclerosis, seizure disorders, and cancer as among some of the most prevalent invisible disabilities in the U.S. today).

and the landlord can be subject to compensatory and punitive damages, as well as attorney's fees.[177]

Disability discrimination is not only more pervasive than other forms of bias; it is also very difficult to prove.[178] Congress did not pass the FHA with an intent to make fair housing claims more difficult to bring or easier to dismiss before trial;[179] rather, Congress hoped to empower persons with disabilities to bring and maintain actions where they suffered wrongful housing discrimination on account of their disabilities.[180] Courts should "tip the scales in favor of the handicapped residents except in the most extreme circumstances," and plaintiffs with disabilities should be able to bring actions without difficult or impossible burdens.[181] Judicial requirements for emotional support animals to have proof of training contradicts the purpose of the FHA and public policy and puts a heavy burden on persons with disabilities.[182] It is not necessary to train an emotional support animal, because the benefits it provides to persons with disabilities flow naturally from their interactions.[183]

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[177] *See e.g.* Huss, *Why Context Matters*, *supra* n. 7, at 1190 (explaining that failure to accommodate a person with a disability constitutes illegal discrimination in violation of federal disability law).

[178] *See* Eisner, *supra* n. 11, at 466 (stating that housing discrimination against persons with disabilities is "invidious"); Everly, *supra* n. 7, at 68 (explaining that under the FHA, the plaintiff has a difficult burden of proof in order to establish a prima facie case of discrimination).

[179] *See* Eisner, *supra* n. 11, at 435–38 (describing the purpose of FHA as giving persons with disabilities protected status against housing discrimination); Schwemm & Pratt, *supra* n. 154, at 1, 11–13 (describing legislative history of the FHA, with the goal of Congress being to lessen the burden of proof for those making claims).

[180] *See* Eisner, *supra* n. 11, at 465–68 (explaining that the FHA was passed to combat invidious housing discrimination against persons with disabilities in order to protect the guaranteed Constitutional rights of persons with disabilities to have equal availability and enjoyment in housing, and arguing that courts should construe it liberally to send a powerful statement that the needs of persons with disabilities must be accommodated and that stereotyping based on disability is intolerable. The reasonable accommodation test is an affirmative obligation, which is intended to make integration of persons with disabilities into mainstream housing easier by avoiding "even handed treatment."); Everly, *supra* n. 7, at 65, 67 (explaining that if disability discrimination were ended or even significantly reduced, this would benefit all Americans because preclusion of persons with disabilities from living independently imposes a tremendous societal cost that decreases overall productivity and efficiency. The FHA, therefore, was enacted to remove traditional barriers to integration and to change archaic stereotypical thinking.).

[181] Eisner, *supra* n. 11, at 468 (quoting F. Willis Caruso, *Fair Housing Modifications and Accommodations in the '90s*, 29 J. Marshall L. Rev. 331, 343 (1996)); *see also* Everly, *supra* n. 7, at 65 (explaining that plaintiffs should not be discouraged from bringing claims of housing discrimination).

[182] *See* Everly, *supra* n. 7, at 66 (suggesting that courts should not apply their own reasonable accommodation standards because they might defeat or frustrate the public policy concerns and the clear purpose that Congress attempted to address when it enacted the FHA).

[183] *See* 73 Fed. Reg. at 63834, 63836 (As HUD explained, "emotional support animals provide very private functions . . . . [E]motional support animals by their very nature,

For the reasons discussed above, training should not be an added requirement in fair housing cases. HUD established that training is not a necessary element for emotional support animals.[184] Further, the training test is taken from the ADA, a separate statute, and should not be interchanged with the FHA because each statute serves a distinct purpose.[185] Neither the *Kenna* nor *Prindable* cases hold precedential value for subsequent emotional support animal cases because each applied the ADA service animal test in which plaintiffs with disabilities sought to maintain emotional support animals in housing.[186] Finally, because Congress did not intend to make housing discrimination cases more difficult for persons with disabilities, courts should not impose an additional training factor.[187] Part IV of this Article proposes changes to the FHA, which will ensure consistent court interpretations and proper application of the FHA. The changes aim to protect the interests of both landlords and persons with disabilities and to reduce the amount of litigation before courts.

IV. CONTRIBUTION

It is surprising and disturbing that Fair Housing Act (FHA) reasonable accommodation cases are vigorously defended years after the FHA was enacted.[188] The similar language used in the Americans with Disabilities Act (ADA) and FHA often creates confusion among litigants and courts as to when a reasonable accommodation should be made in housing in favor of a tenant with a disability who seeks to maintain an assistive animal as an accommodation for his or her disability.[189] As discussed, courts have taken two divergent approaches with respect to reasonable accommodation requests for emotional sup-

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and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress.").

184 *Id.*; *see* Ligatti, *supra* n. 2, at 161–62 (discussing HUD cases where administrative law judges held that an emotional support animal is a reasonable accommodation required under the FHA, regardless of the animal's training).

185 HUD Memo., *New ADA Regulations and Assistance Animals as Reasonable Accommodations Under the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973* (Feb. 2011) (available at http://www.iaohra.org/storage/service_animal_%20memo.pdf (accessed Apr. 8, 2012)); Ligatti, *supra* n. 2, at 158–59.

186 *See* Ligatti, *supra* n. 2, at 158 (explaining that *Prindable* and *Kenna* imposed an extra requirement that has no basis in the law).

187 *See* Eisner, *supra* n. 11, at 456–68 (explaining Congress's intent to have the FHA open housing opportunities for persons with disabilities); Everly, *supra* n. 7, at 66 (suggesting that courts should not apply their own reasonable accommodation standards because they might defeat or frustrate the public policy concerns and the clear purpose that Congress attempted to address when it enacted the FHA).

188 *See* Eisner, *supra* n. 11, at 465–66 ("'Prejudice, once let loose, is not easily cabined.'" (quoting J. Marshall in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985)); Huss, *No Pets Allowed*, *supra* n. 40, at 82 (noting the emotional distress that a tenant would incur if forced to give up an animal); Semmel, *supra* n. 153, at 48 (discussing the difficulty with obtaining a legal victory under the ADA or FHA).

189 *See* Everly, *supra* n. 7, at 51–53 (discussing the ambiguous language of the ADA and problems it caused with respect to various court interpretations).

port animals in no-pet housing.[190] Some courts closely follow the FHA's reasonable accommodation analysis.[191] In contrast, other courts add the ADA service animal test's training requirement to the FHA reasonable accommodation analysis.[192] When the service animal test is applied to emotional support animals, the person with a disability almost always loses.[193] This runs contrary to the purpose of the Act.[194]

A. Model Statute Requiring Housing Providers to Complete Online Training

Congress could adopt the proposed model statute to ensure that housing providers understand their obligations under the FHA. The purpose of this proposal is to reduce emotional support animal litigation and, most importantly, to reduce housing discrimination against tenants with emotional support animals. The proposed statute will help to educate housing providers, which is the key to reducing disability discrimination.[195]

Model Statute for Applicable FHA Housing Providers

> All housing providers who would be liable under the Fair Housing Act (FHA) shall be required to complete a yearly online training exercise to ensure basic understanding and competence in the Act's provisions, including its reasonable accommodation provision. The United States Department of Housing and Urban Development (HUD), Office of Fair Housing and Equal Opportunity shall be responsible for implementing the online assessment and has authority to enforce the proscribed monetary penalties against any housing provider who fails to complete the assessment.
> Any housing provider who fails to take the test shall be fined $1,500.00 for the first offense, $5,000.00 for the second offense, and $15,000.00 for the third and subsequent offense(s). In addition, HUD may revoke its federal financial assistance to a housing provider who fails to complete the yearly online training.

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190 *See supra* pts. II–III (discussing how confusion over the standards for burden of proof has led to inconsistent court applications).

191 *See e.g. Overlook Mut. Homes, Inc*., 666 F. Supp. 2d at 857 (holding that an emotional support animal is reasonable accommodation required under the FHA without proof of certification or evidence of any training).

192 *See e.g. Kenna,* 557 S.E.2d at 797 (holding that an emotional support animal cannot be a reasonable accommodation under the FHA without proof of specialized training).

193 *See* Huss, *No Pets Allowed*, *supra* n. 40, at 81 (indicating that it will be difficult for an individual with a disability to establish the status of an animal as a service animal under the extra requirements imposed by the *Kenna* and *Prindable* courts).

194 *See generally* Eisner, *supra* n. 11, at 465–69 (explaining that the FHA is intended to "empower" persons with disabilities and eradicate disability discrimination that segregates the disabled in housing and make it easier for tenants with disabilities to bring and maintain housing discrimination claims); Everly, *supra* n. 7, at 67 (noting that the purpose of the Act is to remove traditional barriers and eliminate discrimination for individuals with disabilities).

195 *See* Everly, *supra* n. 7, at 48 (highlighting the impact proper training can have in eradicating disability discrimination against persons using service and support animals).

> The property manager, landlord, or other individual owner or employee with the authority to grant or deny requests for reasonable accommodations shall complete the online training assessment.

B. Commentary

The proposed model statute will require all applicable FHA housing providers (i.e., any provider who could be liable under the Act for discriminatory conduct) to partake in a yearly online training exercise. The online test will be created and implemented by HUD and should take no more than fifteen minutes to complete. As it is an online test, there is no substantial cost to the government to implement the program, and it is eco-friendly. Any housing provider who fails to complete the training exercise by midnight on May 1st of each year will be fined $500 for the first offense, $1,500 for the second offense, and $5,000 for the third and subsequence offenses. In addition, HUD may revoke its federal financial assistance to any housing provider who fails to complete the online training. All fees collected under the proposal will go to future FHA education, training, and enforcement efforts.

The purpose of the training exercise is twofold. First, it ensures that the housing provider understands tenants' rights as well as their obligations under the FHA. Second, it provides uniform education to all housing providers in hopes that it will reduce housing discrimination. "'[N]o 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.'"[196] Therefore, the proposed training exercise aims to educate landlords and change their attitudes about invisible disabilities.

V. CONCLUSION

Under the current legal structure, Alex, the tenant-victim of housing discrimination in Part I of this Article, was fortunate to reach a solution with her landlord; however, not all tenants are in such a position.[197] Many landlords strongly reject the notion that they must allow an emotional support animal in a housing complex that has a no-pets policy—particularly because it is likely that the tenant's disability is invisible,[198] the emotional support animal has not been trained,[199] and

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[196] Ligatti, *supra* n. 2, at 151 (quoting Perlin, *supra* n. 4, at 20).

[197] *See e.g. Prindable*, 304 F. Supp. 2d at 1620, 1622 (granting a landlord entitled to summary judgment because there was no genuine issue of fact to whether or not the support animal was trained); *Kenna,* 557 S.E.2d at 798 (holding that because a support dog was not trained it was permissible for the landlord to prohibit it).

[198] *See e.g. Kenna,* 557 S.E.2d at 792–93 (describing how a housing department declined to allow service animals without imposing additional reasonable accommodation requirements); Grignon, *supra* n. 172, at 55 (listing depression, learning disabilities, psychiatric disabilities, chronic fatigue syndrome, multiple sclerosis, seizure disorders, and cancer as among some of the most prevalent invisible disabilities in America today).

[199] *See e.g. Kenna,* 557 S.E.2d at 792 (stating that the housing department enacted a rule that disallowed providing a reasonable accommodation "*unless* the dogs at issue

the animal is not visually distinguishable from a household pet.[200] As many tenants are unaware of their rights and many landlords are unaware of their obligations, discrimination is all too frequent.[201] Even courts have had trouble implementing the reasonable accommodation factors established in the Fair Housing Act (FHA);[202] therefore, the model statute in this Article proposes a solution that incorporates the Air Carrier Access Act test.[203]

Under the proposed modification to the FHA's reasonable accommodation test in section 3604(f), a landlord must accept that an emotional support animal is a reasonable accommodation to an otherwise enforceable no-pets policy when the landlord is presented with a letter from a tenant's doctor or mental health professional asserting that the tenant is disabled within the meaning of the FHA and has a medical need to maintain the animal. The landlord may evict a disabled tenant whose emotional support animal is a substantial nuisance or threat to the health or safety of others; however, this cannot be a speculative standard. Landlords will need sufficient proof, validated by neutral third parties, in order to win an eviction proceeding against a disabled tenant because the tenant houses an emotional support animal in violation of a no-pet policy. The proposed changes are important because they clearly establish that an emotional support animal is protected under the federal law and is not the same as a service animal. In addition, the proposed mandatory online training is beneficial because it ensures uniformity in the education of housing providers who will be liable under the FHA for violations.

Animals enrich our lives on a daily basis.[204] Persons who rely on their animals for emotional support receive immeasurable benefits from their animals.[205] Some persons with disabilities need their emotional support animal in order to live, breathe, sleep, eat, and work.[206] Studies continue to validate the effectiveness of animals in treating physical and mental illnesses, and emotional support animals have

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are properly trained, certified for a particular disability, licensed, and an authorization request from a physician specializing in the field of the subject disability is produced") (emphasis in original).

200 *See Prindable*, 304 F. Supp. 2d at 1256 (requiring evidence of training in order set a support animal apart from a regular pet).

201 Everly, *supra* n. 7, at 52–53.

202 *Id.* at 53.

203 49 U.S.C. § 41705 (2006); *see* Stuart A. Hindman, Student Author, *The Air Carrier Access Act: It Is Time for an Overhaul*, 1, 3–4 (available at http://digitalcommons.law.umaryland.edu/student_pubs/18/; *select* "download" (accessed Apr. 8, 2012)) (explaining the enactment of the Air Carrier Access Act and the threshold test a person must meet to be covered by it).

204 *See* Earl Blumenauer, *The Role of Animals in Livable Communities*, 7 Animal L. i–ii (2001) (stating that it is well documented that animals can have a positive effect on human behavior and health).

205 *See id.* (explaining that "a livable community" promotes the humane treatment of animals because animals enrich our lives on a daily basis).

206 73 Fed. Reg. at 63834 (providing examples of disability-related functions of "support animals").

been proven to decrease depression, stress, and anxiety.[207] As research continues to acknowledge their usefulness, more doctors will prescribe emotional support animals as a form of treatment for disabled patients.[208] Landlords must know what an emotional support animal is and what the law requires—specifically, that emotional support animals do not require any specialized training. Neither *Kenna* nor *Prindable* should have precedential value in subsequent cases.[209] A housing provider must make the accommodation so long as the disabled tenant can show a nexus between his or her disability and the need to maintain the animal.[210] A letter from the disabled tenant's treating physician stating that the animal is necessary as part of the tenant's treatment is sufficient under the current reasonable accommodation test.[211] Landlords should be careful not to violate the Act because the FHA allows for injunctive relief, compensatory damages, civil penalties, and attorney's fees.[212] As mentioned, in 2008, a Minnesota landlord was fined $82,500 for violating the FHA when a tenant sought to maintain an emotional support animal as a reasonable accommodation for a mental illness.[213] To avoid such judgments, landlords should recognize that waiving a no-pet policy for disabled tenants is necessary and will not fundamentally alter the nature of their operations. Landlords should make the accommodation as simple as possible for the disabled tenant. As Honorable Drew Days III, former U.S. Solicitor General best explained, "At its base, civil rights is about making it unacceptable to exclude people . . . . It is about making clear that everybody counts. Civil rights matter[ ] because when we deny people these rights, we cause real harm to their lives."[214]

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[207] *See e.g.* Atkins, *supra* n. 2, at 1–3; Landman, *supra* n. 120, at 2; Ligatti, *supra* n. 2, at 141–42 (providing examples of studies of effective illness treatment using animals).

[208] Ligatti, *supra* n. 2, at 141–42, 167.

[209] *See id.* at 158–59 (discussing *Kenna* and *Prindable* and explaining that both cases impose extra requirements not found in the FHA, its regulations, or legislative history, and, therefore are incorrect law).

[210] *See id*. at 159–63 (providing examples of cases that allow emotional support animals with proof of necessity).

[211] *See* Hudak, *supra* n. 3 (discussing the use of doctor's letters as sufficient to meet the requirements for reasonable accommodations).

[212] *See e.g. Dutra*, 1996 WL 657690 at **1–3 (awarding injunctive relief, actual damages, attorney's fees, and a civil penalty where a landlord sought to enforce its no-pets policy).

[213] *Bouquet Builders* Decree, *supra* n. 113.

[214] Hon. Drew S. Days, III, Untitled Speech (New Eng. Sch. of L. 1995) in 30 New Eng. L. Rev. 397, 403 (1996).