University of Nebraska at Kearney Article (Submission Version)

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In 2011, the Justice Department sued the University of Nebraska at Kearney (UNK) and several of its officials under the Fair Housing Act (FHA). DoJ alleged two basic claims – the defendants unlawfully denied requests by two students to permit emotional support animals in campus housing as accommodations for depression, anxiety, and PTSD, and the school had a pattern and practice of disability discrimination against students seeking to live with emotional support animals as accommodations for psychiatric disabilities. Both the government and UNK recently have sought summary judgment on liability issues. Some issues are specific to this particular case – were the two students individuals with a disability under the FHA, which uses the more restrictive pre-ADA Amendments Act definition of disability, and did they provide sufficient evidence to the school? But others have broader significance, and because both sides have invested great resources in the lawsuit, they seem likely to be resolved by a court decision rather than a settlement.

The government’s pattern and practice claim asserts UNK violated the FHA by publishing a no pets policy for campus housing, including within that policy a specific exemption for students with service animals, but failing to similarly exempt emotional support assistance animals. UNK counters that it complied with the FHA by including within its policy a general provision inviting students to submit requests for housing accommodations, arguing that provision was sufficient to encompass requests to live with emotional support animals. UNK further argued that Title Two of the ADA makes service animal exemptions mandatory, requiring special treatment within its policy, while the FHA requires emotional support animal exemptions, like all other FHA accommodations, to be sought and determined on a case by case basis, so that no special policy for emotional support animals was required.

Building on the distinction between service animals and emotional support animals, UNK has argued that exemptions for emotional support animals are not necessarily a reasonable accommodation for psychiatric impairments. Even assuming a student can establish that an emotional support animal alleviates a symptom of a psychiatric impairment, UNK asserts a student must further show that alleviation of that symptom is necessary to enable the student to have equal opportunity to use and enjoy the housing. It relies on an earlier court of appeals decision that states:

> The ‘equal opportunity’ element limits the accommodation duty so that not every rule that creates a general inconvenience or expense to the disabled needs to be modified. Instead the statute requires only accommodations necessary to ameliorate the effect of the plaintiff’s disability so that she may compete equally with the non-disabled in the housing market.

The government counters with a ruling from a different court of appeals that an accommodation is necessary if it “affirmatively enhances [an individual’s] quality of life by ameliorating (or reducing) the effects of [a] disability”. UNK also claims in later filings that, without more evidence of necessity, emotional support animals do for their owners exactly what pets do for their non-disabled owners. To back its argument, UNK relies on an expert in human animal relationships who opines that no scientific studies have documented the therapeutic value of emotional support animals, and Veterans Administration Rules adopted in 2012 that provide VA...
benefits for service dogs but deny VA benefits for emotional support / mental health dogs “based upon a lack of evidence to support a finding of mental health service dog efficacy.” In explaining its refusal to provide benefits for mental health dogs, the VA wrote “we do not discount commenters' personal experiences, but we cannot reasonably use these subjective accounts as a basis for the administration of VA benefits.” UNK argues that although emotional support animals may alleviate stress and anxiety for students with disabilities, pets do exactly the same thing for all students who live with them, and without more, they cannot be shown to be necessary to afford equal opportunity to use and enjoy housing.

Finally, UNK contends that it did not violate the FHA by imposing more rigorous documentation requirements on students who sought accommodations for psychiatric impairments than for visible physical disabilities. It seems axiomatic that a school may require more documentation for an invisible psychiatric impairment than for, say, the visible absence of a limb, but what seems at issue is whether UNK went too far in demanding excessive documentation for psychiatric disabilities.

Future columns will address rulings as they are forthcoming, but this appears to be a case worth watching.