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SHORTENING THE LEASH: EMOTIONAL SUPPORT ANIMALS UNDER THE FAIR HOUSING ACT

Katie Basalla

I. INTRODUCTION

Congress Enacted Title VIII of The Civil Rights Act of 1968, otherwise known as the Fair Housing Act (“FHA”),¹ to address the ongoing discrimination in America in the twentieth century. The FHA made it illegal to discriminate in renting or selling housing on the basis of race, color, religion, or national origin.² While the goal of the FHA was to protect classes of people that were often discriminated against, persons with disabilities did not become a protected class until 1988 with the enactment of the Fair Housing Amendments (“FHAA”).³ The debates surrounding the adoption of the FHAA focused on maintaining a proper balance between protecting persons with disabilities and public safety and economic concerns.⁴ The ultimate goal of the Act was to bring attention to “the discrimination faced by minority populations in the United States in housing and housing-related transactions on the basis of race, color, national origin, sex, familial status, disability, and religion.”⁵

For purposes of the Act, a disability includes any “physical or mental impairment which substantially limits one or more of such person’s major life activities.”⁶ The Act therefore covers mental disabilities, such as depression or Post-Traumatic Stress Disorder. If an individual’s mental disability could be mitigated by owning an animal, a doctor may recommend an emotional support animal. Because these animals are meant to serve medical purposes and are not merely pets, they qualify under the “reasonable accommodations” provision of the Act.⁷ However, the boundaries of protection for emotional support animals under the Act are unclear, leaving many landlords and tenants uncertain of their rights. Many landlords may overlook or unnecessarily pry into a request for an accommodation they deem to be illegitimate, even if it is legitimate. Conversely, tenants who do not have a disability may seek an accommodation to bypass paying a pet deposit or fee. Both are abuses of

1. 42 U.S.C. §§ 3601-3631 (2019).

2. 42 U.S.C. § 3604(a) (2019).

3. The FHA and FHAA will be referred to collectively as the “Act.”

4. 134 CONG. REC. S19721(daily ed. Aug. 01, 1988) (statement of Sen. Harkin).

5. H.R.J. Res. 714, 114th Cong. (2016) (enacted).

6. 42 U.S.C. § 3602(h)(1) (2019).

7. *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011).

the broad language of the Act and both perpetuate one another. The more tenants try to circumvent “no pet policies” using illegitimate means, the more landlords will assume accommodation requests are illegitimate.

Courts have tried to fix this unclear standard to no avail.⁸ The main problem is that there is no uniform standard tailored to this specific situation. Because the FHAA is a federal act, there should be one uniform standard. The standards that currently exist leave too much room for interpretation and abuse. Additionally, the current standards try to fit emotional support animals within an already vague standard for other disability claims. There should be a uniform standard that courts specifically apply to emotional support animal cases. This standard should be laid out as an amendment to the Act.

For an illustration of how unclear the law currently is, consider an apartment complex that charges \$30 a month for a pet fee. Tenant A has anxiety. He has been seeing a licensed physician about it for the past year, who witnessed an improvement in the tenant’s anxiety that he attributes to the presence of the tenant’s dog. The physician has described this improvement in a document and has given it to Tenant A. Tenant B believes that he has anxiety, and just last week he filled out an online survey that confirmed his feelings and produced a document stating that he may benefit from having a therapy animal. He purchased this document for \$59.99. Tenant C does not believe he has anxiety. However, he does not want to pay the apartment’s pet fee. He also fills out an online survey, but lies and checks the boxes he thinks will indicate he has anxiety. He purchases the document that states that he may benefit from having a therapy animal. All three tenants submit their documents to the landlord and ask to have the pet fee waived.

It may seem obvious that Tenant A is entitled to a fee waiver, Tenant C is not, and Tenant B may be if the landlord receives more information. However, this is not how current interpretations of the Act treat this situation. Current law looks at the presence of a disability and whether the landlord knew of that disability. While this may be an effective means for determining whether a landlord violates the Act as it relates to physical disabilities, it becomes more complicated when applying the Act to mental disabilities. How much information must a tenant give a landlord to inform him that he has a disability? May the landlord ask personal questions about the tenant’s disability? Must he accept the documentation at face value? At what level does the landlord know or reasonably know that the tenant has a disability? Does the letter suffice for reaching this standard? None of these questions are answered by current applications

8. See *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267 (10th Cir. 2001); *DuBois v. Ass'n of Apartment Owners*, 453 F.3d 1175 (9th Cir. 2006).

of the Act.

Therefore, the Act should be amended to provide a clearer standard on this issue. This new standard should require tenants to provide legitimate documentation of an animal's certification as an emotional support animal before a landlord can be expected to make reasonable accommodations. Much like a prescription, this certification must be from a tenant's personal doctor, but need not give details of the disability that the tenant may wish to keep private. The doctor must be retained for a purpose other than merely producing a document linking the tenant's disability to an emotional support animal.

This Comment argues that the current standards for applying the Act to emotional support animal cases are vague, and these vague standards subsequently hurt both landlords and tenants. The vagueness of the law leads to abuses of rights and, in many cases, unnecessary litigation. Part II of this Comment discusses how emotional support animals fit into the Act's framework under the reasonable accommodations provision. It also discusses how vague standards have been adopted by various courts and state legislatures. Part III argues that a reworked, uniform standard will achieve the intent of the Act for both landlords and tenants. Finally, Part IV argues that requiring tenants to present a prescription-like document with their accommodation request will clarify the law in this area.

II. BACKGROUND

Congress enacted the FHA with the goal of providing "fair housing throughout the United States."⁹ Part II(A) discusses how the FHAA expanded this goal to encompass persons with disabilities. Part II(B) discusses how emotional support animals can potentially serve this goal under the Act, and thus may require reasonable accommodations. Part II(C) discusses how courts have interpreted the Act in the context of emotional support animals. Specifically, this part discusses the conflicting standards set forth in *Keys Youth Services, Inc. v. City of Olathe*¹⁰ and *DuBois v. Association of Apartment Owners of 2987 Kalakaua*¹¹ and how these inconsistent adoptions have created more uncertainty. Part II(D) discusses current state laws and proposals on this topic from Indiana, Utah, Florida, and Michigan, and how they comport with federal law.

A. *The FHAA—Expanding the Goals of the FHA*

As originally enacted in 1968, the FHA did not provide protection to

9. 42 U.S.C. § 3601 (2019).

10. 248 F.3d 1267 (10th Cir. 2001).

11. 453 F.3d 1175 (9th Cir. 2006).

persons with disabilities. It was not until Congress enacted the FHAA in 1988 that coverage was extended to persons with disabilities. Representative Harkin, a proponent of the FHAA, sought to realize the FHA's purported goals by extending protection to persons with disabilities, a group that was often discriminated against in the housing context.¹²

Although many legislators wanted to extend the FHA's coverage, others hesitated due to the practical implications of the proposed amendment. Some were concerned with the economic and safety implications of the FHAA.¹³ Congressman Henry Hyde addressed this hesitation by explaining that Congress needed to give "thoughtful and wide-ranging consideration to the needs of the handicapped person, balanced against the realities of public safety, economics and commonsense."¹⁴ The FHAA eventually became law on September 13, 1988, and successfully added persons with disabilities to the list of persons covered under the Act.

B. Emotional Support Animals and Reasonable Accommodations

When asserting a claim of discrimination on the basis of disability, the relevant portion of the Act is 42 U.S.C. § 3604 ("§ 3604"). § 3604 states that property owners and landlords may not discriminate against tenants with disabilities.¹⁵ For purposes of § 3604, discrimination includes "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."¹⁶ Therefore, the language does not automatically require landlords to make reasonable accommodations for tenants with disabilities and emotional support animals. Rather, landlords are only required to make reasonable accommodations when the animal may be necessary to afford the tenant equal opportunity to use and enjoy the housing. It is neither clear exactly what this language means, nor what § 3604 requires of the landlord.

Emotional support animals do not have the same legal protections as service animals. Service animals are protected under the Americans with Disabilities Act ("ADA").¹⁷ The main differences between service

12. 134 CONG. REC. S19719 (daily ed. Aug. 01, 1988) (statement of Sen. Harkin).

13. See 134 CONG. REC. S19880(daily ed. Aug. 02, 1988) (statement of Sen. Humphrey). "This bill will make housing, whether it is rental housing, housing for sale, more expensive." *Id.*

14. 134 CONG. REC. S19727 (daily ed. Aug. 01, 1988) (statement of Sen. Harkin) (quoting Rep. Hyde).

15. 42 U.S.C. § 3604(f) (2019).

16. 42 U.S.C. § 3604(f)(3)(b) (2019).

17. 42 U.S.C. §§ 12101-12213 (2019).

animals and emotional support animals are that service animals must be specially trained and that only limited types of animals qualify.¹⁸ Therefore, emotional support animals, comfort animals, and therapy animals are not service animals under the ADA.¹⁹ Conversely, the Act covers “all types of assistance animals, regardless of training.”²⁰ With very few requirements regarding the type and training of animals, the Act is broader in scope than the ADA. Rather than asking *what* is allowed, the Act instead asks *when* these animals are allowed.

Simply put, the Act requires landlords to provide reasonable accommodations²¹ for persons with disabilities when the accommodation may be necessary to afford such persons equal opportunity to use and enjoy a dwelling. The analysis focuses on both the existence of a disability and the nexus between that disability and the reasonable accommodation. Recent studies on the therapeutic benefits of animals have demonstrated an animal’s impact on a person suffering from an ongoing mental health condition, showing positive, negative, and neutral results.²² For purposes of this Comment, it will be accepted that the use of emotional support animals provides positive therapeutic benefits, and thus may afford persons with mental disabilities equal opportunity to use and enjoy their homes. The crux of the question then turns on when landlords should be aware that a tenant is in need of a reasonable accommodation for an emotional support animal; that is, when has a tenant made the landlord aware he has a disability, under the meaning of the Act, for which an emotional support animal would specifically aid?

18. Jacquie Brennan et al., *Service Animals and Emotional Support Animals, Where are they allowed and under what conditions?*, ADA NAT’L NETWORK (2014), <https://adata.org/publication/service-animals-booklet> [https://perma.cc/G99Y-693B].

19. *Id.*

20. *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011).

21. What constitutes as a reasonable accommodation is a separate area for analysis. In many of these emotional support animal cases, the tenants are seeking waiver of a no-pet rule or a pet deposit/fee. See *Bronk v. Ineichen*, 54 F.3d 425, 428-29 (7th Cir. 1995).

22. Helen Louise Brooks et al., *The Power of Support from Companion Animals for People Living with Mental Health Problems: a Systematic Review and Narrative Synthesis of the Evidence*, BMC PSYCHIATRY, BIOMED CENT., (Feb. 5, 2018), www.ncbi.nlm.nih.gov/pmc/articles/PMC5800290 [https://perma.cc/3C4G-VXH9]. Experiment showing the “Quantitative evidence relating to the benefits of pet ownership was mixed with included studies demonstrating positive, negative and neutral impacts of pet ownership. Qualitative studies illuminated the intensiveness of connectivity people with companion animals reported, and the multi-faceted ways in which pets contributed to the work associated with managing a mental health condition, particularly in times of crisis. The negative aspects of pet ownership were also highlighted, including the practical and emotional burden of pet ownership and the psychological impact that losing a pet has.” *Id.*

C. Courts' Current Interpretations

Courts have struggled to define a clear standard for when landlords are required to provide reasonable accommodations for emotional support animals. Some courts have held that a landlord cannot be liable for refusing to grant a reasonable and necessary accommodation if the landlord “never knew the accommodation was in fact necessary.”²³ Other courts have held that a landlord “must know *or reasonably be expected to know* of the existence of both the handicap and the necessity of the accommodation.”²⁴

Many federal circuits have adopted the standard set forth by the Ninth Circuit in *DuBois*.²⁵ In *DuBois*, the court held that, in order to prevail on a claim for a violation of the Act, the tenant must show: (1) she suffers from a disability within the meaning of the Act; (2) the defendant knew or reasonably should have known of the disability; (3) the requested accommodation may be necessary to afford an equal opportunity to use the home; (4) the accommodation is reasonable; and (5) the defendant did not make the accommodation.²⁶ In *DuBois*, the tenants sought to keep their dog in their apartment as an emotional support animal, even though the apartment association’s bylaws stated that no animals should be kept on the premises.²⁷ One tenant submitted letters from his doctor stating that he would benefit from animal-assisted therapy.²⁸ The association granted temporary permission to keep the animal, pending review of submissions concerning the condition.²⁹ The tenants filed suit against the association for refusing to keep the dog as a reasonable accommodation under the Act.³⁰ The court held that since the apartment association never denied the requested accommodation, there was no violation of the Act.³¹

Other courts have followed the more strict standard set forth by the Tenth Circuit in *Keys*.³² In *Keys*, the plaintiff applied for a zoning permit to establish a group home for ten troubled adolescent males, which was denied.³³ The plaintiff argued that the city denied his request based on the

23. *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1275 (10th Cir. 2001).

24. *DuBois v. Ass'n of Apartment Owners*, 453 F.3d 1175, 1179 (9th Cir. 2006) (emphasis added).

25. See, e.g., *Astralys Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urban Dev.*, 620 F.3d 62 (1st Cir. 2010); *Olsen v. Stark Homes, Inc.*, 759 F.3d 140 (2d Cir. 2014); *Overlook Mut. Homes, Inc. v. Spencer*, 415 F. App'x 617 (6th Cir. 2011).

26. *DuBois*, 453 F.3d at 1179.

27. *Id.* at 1177.

28. *Id.* at 1178.

29. *Id.*

30. *Id.*

31. *Id.* at 1179.

32. See, e.g., *Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir. 2002); *Ely v. Mobile Hous. Bd.*, 605 F. App'x 846 (11th Cir. 2015).

33. *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1269 (10th Cir. 2001).

familial status and disabilities of the potential occupants in violation of the Act.³⁴ The disability claim was premised on the fact that the teens were “abused, neglected, or abandoned” and were part of a group that was labeled as “antisocial and aggressive.”³⁵ The plaintiff argued that he must house no less than ten teens in order to remain in business, but he never presented evidence to demonstrate his economic need for the accommodation.³⁶ The court held that since the city never knew the accommodation was in fact necessary, there was no violation of the Act.³⁷

Some courts use a completely different standard, or a confusing combination of multiple standards.³⁸ In addition to the uncertainty created by the application of different standards, the standards are so vague that even the federal circuit courts that purport to follow the same standard apply them differently. For example, the Eleventh Circuit, following the *Keys* standard, held that landlords may ask for documentation that is sufficient for review of the request before being required to make reasonable accommodations.³⁹ Even within the Eleventh Circuit, standards for “sufficient documentation” are inconsistently applied.⁴⁰ Meanwhile, other federal circuit courts following the *Keys* standard have not addressed the issue of documentation at all.⁴¹

Applying these already unclear standards to emotional support animals creates even more confusion. Particularly, courts struggle trying to establish when exactly a landlord should know or is reasonably expected to know that a tenant has a disability that an emotional support animal would aid. Should a landlord have to accept any document from a licensed professional certifying the animal as an emotional support animal? Should the landlord be able to ask in-depth questions regarding the disability to “verify” that the animal aids the tenant in some meaningful way? Neither *DuBois* nor *Keys* answers these questions. There are many online certification services that make it easy to register a pet as an emotional support animal. For example, websites such as Threapypet.org assure users that landlords will accept its letters certifying emotional

34. *Id.*

35. *Id.* at 1274.

36. *Id.* at 1275.

37. *Id.*

38. Courts that do not follow either standard tend to follow the following standard: “To prevail, one must prove that (1) he is disabled within the meaning of the FHA, (2) he requested a reasonable accommodation, (3) the requested accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the accommodation.” *Bhogaita v. Altamonte Heights Condo. Ass’n*, 765 F.3d 1277, 1285 (11th Cir. 2014).

39. *Hawn v. Shoreline Towers Phase 1 Condo. Ass’n, Inc.* 347 F. App’x 464, 468 (11th Cir. 2009).

40. *See Sun Harbor Homeowners’ Ass’n, Inc. v. Bonura*, 95 So. 3d 262, 270 (Fla. Dist. Ct. App. 2012) (holding that documents that are insufficient to establish a disability may prevent the landlord from conducting a meaningful review).

41. *See, e.g., Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442 (3d Cir. 2002).

support animals because of the Act.⁴² This blanket statement creates a state of confusion for both landlords and tenants alike, leaving both parties unsure of their rights.

These unclear standards are not clarified by application in case law. For example, in *Bhogaita v. Altamonte Heights Condo. Ass'n*,⁴³ a condominium association refused to accept an accommodation request to waive the association's 25-pound dog weight limit.⁴⁴ Over the course of six months, the association sent multiple letters to the tenant asking him detailed questions about his request, including "[w]hy does it require a dog over 25 pounds to afford you an equal opportunity to use and enjoy your dwelling?"⁴⁵ The association also sent letters to the tenant's doctor, asking further detailed questions about the tenant's "total number of hours and sessions of mental health treatment" and whether his "condition [was] permanent or temporary."⁴⁶ The court held the association had constructively denied the tenant's request and that no reasonable fact finder would have concluded that it was still conducting a meaningful review.⁴⁷ The court also held that the requested information exceeded that which was necessary for the association to make an informed decision.⁴⁸

Similarly, in *LaRosa v. River Quarry Apartments, L.L.C.*,⁴⁹ a tenant requested that his apartment complex waive the pet fee on the grounds that his dog was an emotional support animal.⁵⁰ The parties battled over this request for approximately one month.⁵¹ The apartment complex sent him several forms to fill out, including a form to be signed by his doctor. They also called his doctor and asked him questions about the tenant's diagnosis.⁵² Once the tenant provided the apartment complex with the signed form, the office proceeded to call the doctor to ask about it, fearing the signature was forged.⁵³ Ultimately, the apartment complex agreed to waive the pet fee.⁵⁴ Regardless, the tenant claimed that the apartment complex had made unreasonable restrictions on the process of approving

42. *Frequently Asked Questions About ESA's*, THERAPYPET, <https://therapypet.org/faq> [<https://perma.cc/ZAS5-WFC2>]. "A person who is prescribed an ESA must be offered reasonable accommodations. There are very few exceptions to this rule. The letter also allows you to bypass breed and size restrictions, and not be forced to pay additional rent and/or pet security deposits." *Id.*

43. 765 F.3d 1277 (11th Cir. 2014).

44. *Id.* at 1281.

45. *Id.* at 1282.

46. *Id.* at 1283.

47. *Id.* at 1286.

48. *Id.* at 1287.

49. No. 1:18-cv-00384-BLW, 2019 U.S. Dist. LEXIS 35315 (D. Idaho Mar. 4, 2019).

50. *Id.* at *2.

51. *Id.* at *2-7.

52. *Id.* at *4-5.

53. *Id.* at *5-6.

54. *Id.* at *6.

a support animal by making “unlawful inquiries into the nature and severity of residents' disabilities.”⁵⁵ The court disagreed, holding that since the dog was permitted without any fees, there was no violation of the Act.⁵⁶

Therefore, application in case law does not clarify the uncertainty surrounding the federal standards. Both *Bhogaita* and *LaRosa* focus on landlords seeking more information to confirm a request, but do not consistently illustrate at what point a landlord becomes aware or constructively aware of a tenant's disability. Additionally, in both cases, the landlords spent extra time conducting an in-depth inquiry into the tenants' request. The Act does not address whether this is required, permitted, or prohibited by the law.

D. States' Attempts to Clarify the Issue

State legislatures have attempted to rework the stigma surrounding emotional support animals by enacting and proposing laws that punish people who falsify their need for an emotional support animal and heighten the standard for granting reasonable accommodations.⁵⁷ The main issue with these state actions is that the Act is a federal law. Therefore, individual state standards, whether they are more or less forgiving of tenants' animal requests, simply add to the confusion. Sara Pratt, former Assistant Secretary for Fair Housing at the United States Department of Housing and Urban Development, warned state lawmakers to be careful about the message they were sending to landlords, who are at risk of receiving federal fines for violating the Act.⁵⁸ Although the current state laws add to the confusion when trying to determine the federal standard, they are helpful places to look for considering a new standard.

For example, Utah passed a bill in 2019 that makes it a class C misdemeanor to intentionally and knowingly falsely represent an animal as a support animal.⁵⁹ The Indiana State Senate passed a bill in 2018 that requires tenants to produce medical documentation certifying an animal as an emotional support animal. This documentation may not be from a medical provider “whose sole service to the individual is to provide

55. *Id.* at *2.

56. *Id.* at *13-14.

57. See H.R. 43, 63d Leg., 2019 Gen. Sess. (Utah 2019); S. 240, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018); H.R. 721, 2019 Leg., 121st Reg. Sess. (Fla. 2019); and S. 663, 99th Leg., 1st Reg. Sess. (Mich. 2017).

58. Farah Stockman, *People are Taking Emotional Support Animals Everywhere. States are Cracking Down*, N.Y. TIMES, June 18, 2019, <https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html> [https://perma.cc/83DY-FJBM].

59. H.R. 43, 63d Leg., 2019 Gen. Sess. (Utah 2019).

verification letter in exchange for a fee.”⁶⁰ This language speaks directly to letters purchased from websites like Therapypet.org. Again, such websites assure users that purchasing a letter protects them under the Act—an assurance that the caselaw under the Act calls into question.⁶¹ Under these state laws, however, a purchased letter would not be sufficient. The apparent conflict between the federal and state law simply creates more confusion.

Utah’s standard does not clarify the issue because it is still difficult for a landlord to determine if a tenant is “intentionally and knowingly falsely represent[ing]”⁶² the document certifying the animal as an emotional support animal without further investigation. Consider again Tenant A, Tenant B, and Tenant C. How might the landlord prove that Tenant B is not “intentionally and knowingly” falsely representing, but Tenant C is? Indiana’s standard provides more clarity on this by requiring bona fide medical documentation. Tenant A would unquestionably be entitled to the reasonable accommodation of a pet fee waiver. Both Tenant B and Tenant C would not be. However, this law does not completely bar Tenant B from obtaining a fee waiver. Rather, it requires Tenant B to obtain a different form of documentation that was not simply purchased from the Internet for the sole purpose of obtaining an accommodation.

Other states have proposed similar standards to both the Indiana and Utah bills. Florida proposed language similar to the Indiana law, but this proposal recently failed.⁶³ Michigan proposed a standard that required (1) the tenant to provide documentation establishing the disability, (2) the physician to have treated the patient for at least six months, and (3) a nexus between the disability and the need for a support animal.⁶⁴ This proposed legislation also failed.

At face value, it may seem as if some of these state laws or proposals directly conflict with federal law and could be resolved simply by adopting the federal standard.⁶⁵ However, because the federal law is also

60. S. 240, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

61. *Frequently Asked Questions About ESA’s*, THERAPYPET, <https://therapypet.org/faq> [<https://perma.cc/ZAS5-WFC2>]. See also WAGGY, www.waggy.pet [<https://perma.cc/4Z8D-EAYG>]. “Emotional Support Animal (ESA) letter from a licensed therapist is all you need to gain legal access to airline cabins and pet restricted housing without extra fees and deposits.” *Id.*

62. H.R. 43, 63d Leg., 2019 Gen. Sess. (Utah 2019).

63. “The written documentation . . . may not be prepared by a health care practitioner whose exclusive service to the individual with a disability is preparation of the written document in exchange for a fee.” H.R. 721, 2019 Leg., 121st Reg. Sess. (Fla. 2019).

64. S. 663, 99th Leg., 1st Reg. Sess. (Mich. 2017).

65. See CHARLES S. ZIMMERMAN, PHARMACEUTICAL AND MEDICAL DEVICE LITIGATION § 15A:4 (2018). “The Supreme Court has concluded that the Supremacy Clause of the United States Constitution provides the basis for Congress’s power to preempt state law. . . . The Supremacy Clause provides the constitutional authority for the proposition that conflicts between federal and state law are resolved in favor of federal law.” *Id.*

unclear, it is not actually that simple. Although websites like TherapyPet.org assure users that purchasing a letter protects them under the Act,⁶⁶ the Act itself does not guarantee this protection. It is not clear which standard best aligns with the intent of the Act. Ultimately, this lack of clarity causes uncertainty for both tenants and landlords alike.

III. ANALYSIS

The law governing emotional support animals should unambiguously inform both tenants and landlords of their respective rights. The current standards for prevailing on a discrimination claim under the Act are unclear. Applying these unclear standards to emotional support animals creates further ambiguity. Although some states may be heading in the right direction, the Act is a federal law; therefore, inconsistent state standards simply create more ambiguity. The goals of the Act would be better achieved if the Act established a uniform standard that applied specifically to emotional support animals. Under this uniform standard, tenants should be required to provide legitimate documentation of an animal's certification as an emotional support animal before a landlord is expected to make reasonable accommodations for the animal. Much like a prescription, certification must be signed from a doctor who has personally examined the tenant for purposes other than merely providing a verification letter. In addition to furthering the Act's goals, this standard would harmonize many current state standards with the Act.

While certain cases suggest that internet documentation is insufficient to require a landlord to make reasonable accommodations for emotional support animals, websites such as TherapyPet.org assure users that internet documentation will allow for them to "bypass breed and size restrictions, and not be forced to pay additional rent and/or pet security deposits."⁶⁷ This creates many problems: a landlord may accept this letter, uncertain if he may be permitted to challenge it; a landlord may reject the letter, immediately brushing it off as illegitimate; or a landlord may ask the tenant invasive questions about his disability before providing the accommodation. To complicate matters further, when a landlord receives a letter from a tenant's personal, long-time physician clearly certifying the animal as an emotional support animal, the landlord still may unnecessarily pry into the request. Determining what actions are permissible under the Act is far from clear. Ultimately, what is permissible currently depends on which jurisdiction has dominion over the parties.

66. *Frequently Asked Questions About ESA's*, THERAPYPET, <https://therapypet.org/faq> [<https://perma.cc/ZAS5-WFC2>].

67. *Id.*

Part III of this Comment focuses on how this proposed standard would promote the Act's goals. Part III(A) discusses how the proposed standard would afford the Act's desired protections to tenants with disabilities who would benefit from an emotional support animal. Part III(B) discusses how the standard would restore the Act's desired balance of disability protections against the economic rights of landlords. Finally, Part III(C) discusses how the proposed standard should be applied in emotional support animal cases specifically.

A. Achieving the Act's Goals—Rights of the Tenant

The purpose of the Act, and the later Amendments, was to provide fair housing to all Americans.⁶⁸ Although a narrower standard may at first seem like a setback for tenants, it would ultimately grant them the rights that the Act seeks to protect. Under current standards, tenants are uncertain of what they must do to put their landlords on notice about their disabilities. Is online certification sufficient? May the landlord be permitted to call the tenant's doctor and ask personal questions? Federal caselaw is inconsistent on these issues.

Under an ambiguous standard, the rights of the tenant also become ambiguous. As more landlords receive unfounded requests for reasonable accommodation, tenants suffering from mental disabilities are subjected to heightened review processes to ensure legitimacy. A worker for the Florida Apartment Association summed up this dilemma: "Obviously, you want to accommodate people with legitimate requests, but that's harder to do when you have so many bogus requests."⁶⁹ The uncertainty in the law, which allows for this large volume of fraudulent requests, ultimately forces tenants with disabilities to shoulder the societal burden of this dilemma.

While some states have taken it upon themselves to set clearer standards, the federal standard is still ambiguous. Under the Act, it is not clear how much information a tenant has to disclose before a landlord is on notice about a mental disability. A tenant may respond to invasive requests, assuming the landlord better understands the law. A tenant may be unduly threatened with eviction and forced to move or get rid of the animal, without being sure if the landlord is legally correct or not.⁷⁰ Even

68. 42 U.S.C. § 3601 (2019).

69. Farah Stockman, *People are Taking Emotional Support Animals Everywhere. States are Cracking Down*, N. Y. TIMES, June 18, 2019, <https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html> [<https://perma.cc/83DY-FJBM>].

70. *See id.* Wayne Myers suffered from anxiety ever since he was young. He obtained a duck as an emotional support animal. He explained that the duck, Primadonna, reminded him that he matters in the world and immensely improved his mental state. Myers's landlord refused to accept documents from a therapist that Myers video chatted with and a note from a counselor who Myers and Primadonna met with

if the tenant has a legal right to a reasonable accommodation for his emotional support animal, many times this requires a lot of unnecessary effort on the part of the tenant to prove. Many tenants may be unjustly injured due to lack of knowledge or resources and may simply succumb to the landlord's demands.

Consider Tenant A, who possesses a doctor's note certifying A's need for an emotional support animal. Under current standards, it is not clear if a note is enough to waive the pet fee. The landlord may ask A to produce more information. The landlord may outright deny the request, or may threaten to evict A if the animal is not removed. Tenant A, who is unquestionably entitled to a reasonable accommodation under the Act, given the intent of the Act, may simply comply with the landlord's demands to avoid losing housing. Whether this is due to lack of knowledge of the tenant's rights or lack of resources to challenge the landlord, the most significant takeaway is that the current standards allow for many different results. Considering the goals of the Act, Tenant A's situation should result in a clear grant of reasonable accommodations. The fact that it does not necessarily work out this way highlights the issues with the current standards under the Act.

The purpose of extending the Act to persons with disabilities was to afford them the opportunity to use and enjoy housing in the same manner as persons without disabilities. While a broad, unclear standard may allow for many tenants with disabilities to easily benefit from the Act, it also allows for many tenants without disabilities to wrongfully benefit from the Act. Without a clear standard for how to address this issue, tenants with disabilities are subjected to accommodation denials by landlords trying to protect against fraudulent emotional support animals requests.

B. Reaching the Act's Goals—Rights of the Landlord

When coverage of the Act was expanded to persons with disabilities in 1988, the focus was on maintaining a balance between protecting the rights of tenants and the realities of public safety, economics, and common sense.⁷¹ Current standards disrupt this balance. While in some cases, an unclear standard may violate a tenant's rights, in other cases it may violate a landlord's rights. The economic and safety incentives of a landlord are the exact economic and safety concerns at the forefront of

in person. His landlord allowed cats in the building, but not ducks. He threatened eviction if Myers did not remove Primadonna from the building. After retaining counsel, Primadonna was permitted to remain in the building with Myers. *Id.*

71. 134CONG. REC. S19727 (daily ed. Aug. 01, 1988) (statement of Sen. Harkin) (quoting Rep. Hyde).

the conversation when the FHAA was originally passed.⁷² Landlords are required by law to ensure the buildings they rent comply with safety regulations.⁷³ They are also permitted by law to make economic gains from their leases, such as by charging a pet fee.⁷⁴

Consider Tenants B and C. If the landlord must accept documentation from both of them without asking further questions, the landlord may not charge the pet fee for either tenant. Over the course of one year, the landlord would lose out on \$30 a month per tenant, which totals \$720 annually. While this economic loss is reasonable when it is necessary to afford a person with a mental disability fair housing, the purpose of the Act was not to deny landlords the right to regulate and gain economic incentives.

Current news coverage on the topic focuses on the burden fraudulent emotional support animals place on landlords. Some recent news headlines include: *Lying to landlords about emotional supporting animals would be a crime under Michigan House bills*,⁷⁵ *Florida bill combating abuse of pets as emotional support animals*,⁷⁶ and *New plan aims to curb phony emotional support animals in Michigan*.⁷⁷ Again, the means of fixing the problem are focused on enacting state laws. While these state laws seem to protect landlords' rights and further the goal of the Act, they simply create more confusion. Ultimately, attempting to fix the problem in state legislatures may actually subject landlords to heavy fines under federal law.⁷⁸

Therefore, to reach the goal of inclusive housing, the Act should provide clear guidelines for both tenants and landlords to abide by. Once a tenant produces a document certifying the he or she has visited a doctor

72. *Id.*

73. See OHIO REV. CODE ANN. § 5321.04 (LexisNexis 2020). "Landlord obligations. (1) Comply with the requirements of all applicable building, housing, health, and *safety* codes that materially affect health and *safety*." (Emphasis added).

74. State law on this topic varies. For example, California has rent control laws that prohibit landlords from charging over a certain amount as a deposit. See CAL. CIV. CODE § 1950.5(c) (Deering 2020).

75. Lauren Gibbons, *Lying to landlords about emotional support animals would be a crime under Michigan House bills*, MLIVE (Oct. 23, 2019), <https://www.mlive.com/public-interest/2019/10/lying-to-landlords-about-emotional-support-animals-would-be-a-crime-under-michigan-house-bills.html> [https://perma.cc/VZ6M-DBQR].

76. Forrest Saunders, *Florida bill combating abuse of pets as emotional support animals makes headway*, ABC ACTION NEWS (Nov. 14, 2019), <https://www.abcactionnews.com/news/state/florida-bill-combating-abuse-of-pets-as-emotional-support-animals-makes-headway> [https://perma.cc/2X4B-QY4U].

77. Mikenzie Frost, *New plan aims to curb phony emotional support animals in Michigan*, UPNORTHLIVE (Oct. 23, 2019), <https://upnorthlive.com/news/local/new-plan-aims-to-curb-phony-emotional-support-animals-in-michigan-10-23-2019> [https://perma.cc/K9RS-URW9].

78. Even if a landlord is complying with state fair housing laws, the same action may violate the federal fair housing laws, which may subject the landlord to fines. See Zimmerman, *supra* note 65.

who confirmed that the tenant has a disability that would be aided by an emotional support animal, the landlord must accept that request. A landlord should be permitted to verify the legitimacy of a document. However, landlords should not be allowed to ask further detailed questions about an underlying disability.

C. Uniform Federal Standard Specific for Emotional Support Animals

By applying a standard that is specific to emotional support animals, courts would resolve much of the Act's ambiguity regarding emotional support animals. Currently, to prevail on a discrimination claim, in most states, a tenant must show: (1) she suffers from a disability under the meaning of the Act; (2) the landlord knew or reasonably should have known of the disability; (3) the requested accommodation may be necessary to afford an equal opportunity to use the home; (4) the accommodation is reasonable; and (5) the landlord did not make the accommodation.⁷⁹ For cases involving emotional support animals, the relevant question is whether the landlord knew or should have known of the tenant's disability.

This language has a completely different application in cases dealing with physical disabilities as compared to mental disabilities. Determining when a landlord is on notice that reasonable accommodations for a tenant in a wheelchair are necessary is a different analysis than determining when a landlord is on notice that a tenant has anxiety and would benefit from an emotional support animal. Although physical disabilities are not more deserving of accommodations than mental disabilities, physical disabilities may be more readily visible by a landlord and a landlord can grant the accommodation without as much confusion. Landlords may readily provide reasonable accommodations for tenants with physical disabilities but may require tenants with mental disabilities to go through more steps to verify their disability, such as producing more documents or calling their doctors to question their disability.

Even with state laws such as the ones enacted in Utah⁸⁰ and Indiana,⁸¹ the purpose of the Act is still undermined by the inconsistent standards in different states. The only way to achieve the Act's true purpose is to have a uniform federal standard that applies to all cases involving emotional

79. *DuBois v. Ass'n of Apartment Owners*, 453 F.3d 1175, 1179 (9th Cir. 2006).

80. It is a class C misdemeanor to intentionally and knowingly falsely represent an animal as a support animal. H.R. 43, 63d Leg., 2019 Gen. Sess. (Utah 2019).

81. Tenants must produce medical documentation that certifies an animal as an emotional support animal, and such documentation may not be from a medical provider "whose sole service to the individual is to provide verification letter in exchange for a fee." S. 240, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

support animals. Whether a landlord knows or should have known of a tenant's mental disability is determined at the time the tenant provides the landlord with legitimate documentation of an animal's certification as an emotional support animal. This documentation must be produced by the tenant's personal doctor explaining that the tenant has a disability and would benefit from the animal. A landlord may call the doctor to ensure the doctor had physically seen the patient and that the main purpose of the visit was not merely to obtain the document. The landlord may not ask invasive questions such as the nature or extent of the tenant's disability.

While this standard may require more out of a tenant, like physically going and receiving a diagnosis of a disability, it ultimately restores the balance of rights the drafters of the Act sought to protect. Under this standard, landlords would not be able to subject tenants with mental disabilities to strung-out, invasive investigations. Additionally, tenants without disabilities, who are simply trying to circumvent paying a pet fee, would be less likely to abuse the Act.

A physical examination from a doctor is best suited to protect both landlords' and tenants' rights. While online certifications may be convenient for those suffering from a mental disability, they are easy to falsify. All a user has to do is check the boxes that equate to anxiety or depression and then pay a fee to receive the document. While a patient may be able to similarly "check boxes" while physically visiting a doctor, doctors are better positioned to verify the legitimacy of a patient's disability than an online questionnaire. The doctor can then ask follow-up questions and conduct a thorough examination. After the examination, if the doctor believes the patient would truly benefit from an emotional support animal, the doctor may choose to give the patient the appropriate documentation. This diagnostic process is completely absent from online certifications.

Application of this standard in both *LaRosa*⁸² and *Bhogaita*⁸³ would have resulted in consistent outcomes. In *Bhogaita*, rather than spending six months investigating the request, the apartment association could have simply informed the tenant that he had to provide documentation from his doctor stating that he had a medical condition that an emotional support animal would have aided, or the request would be denied. If the tenant produced such documentation, the association may have authenticated it by confirming the doctor saw and diagnosed the tenant, but could not have asked either the tenant or the doctor invasive questions such as "[w]hy does it require a dog over 25 pounds to afford you an equal opportunity

82. *LaRosa v. River Quarry Apartments, L.L.C.*, No. 1:18-cv-00384-BLW, 2019 U.S. Dist. LEXIS 35315 (D. Idaho Mar. 4, 2019).

83. *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277 (11th Cir. 2014).

to use and enjoy your dwelling?”⁸⁴ Although the tenant in *Bhogaita* ultimately prevailed, the process of obtaining the reasonable accommodations could have been easier for both parties under this uniform standard. This simplified standard likely could have helped both parties avoid litigation altogether.

The process in *LaRosa*⁸⁵ was closer to conforming with this Comment’s suggested standard. However, the process in *LaRosa* was still more drawn out than necessary. While it was appropriate for the apartment complex to request the tenant to produce a signed form from his doctor, the apartment complex also called the doctor’s office to inquire about the diagnosis. This was invasive and unnecessary. It should be doctors who assess an individual’s disability, not landlords. Under this new standard, the apartment complex should have waited for the tenant to produce the signed form before calling the doctor’s office. Upon receiving the form, the landlord would have been permitted to call the doctor’s office to ensure the form was legitimately signed by the tenant’s doctor.

Consider again Tenant A, Tenant B, and Tenant C. Under this proposed standard, the requirements of the landlord more are clear. The landlord may call the signing doctor on Tenant A’s request to ensure that he is a licensed physician and verify the document. The landlord may not ask further questions about the tenant’s disability. If the doctor verifies the document, the landlord must waive the pet fee for Tenant A. The landlord may ask Tenant B and Tenant C for further documentation to ensure the tenants physically visited the doctor and received a diagnosis. If Tenant B had a personal doctor confirm that he has anxiety that will be aided by an emotional support animal, the landlord must also waive the pet fee for Tenant B. The landlord may ask the same of Tenant C, who will ultimately not be able to obtain that documentation because he does not have anxiety. The landlord may then deny Tenant C’s request.

IV. CONCLUSION

To restore the balance intended by the Act, emotional support animals should be treated like other medical remedies to mental disabilities. An individual who is experiencing depression cannot simply print off a prescription for antidepressants from the Internet. He or she must see a doctor in person, receive a diagnosis, and acquire a prescription. The standard should be no different for emotional support animals. This is not to say that in order for an individual to receive relief from an emotional

84. *Id.* at 1282.

85. 2019 U.S. Dist. LEXIS 35315.

support animal for a mental disability, that individual must first be physically examined and diagnosed by a doctor. Animals can provide therapeutic effects to their owners regardless of official diagnosis. However, in order to maintain the proper balance between a tenant's rights and the economic and safety rights of the landlord, this individual must first go through the proper steps to make the landlord aware of their disability and the connection of the emotional support animal to that disability in order to obtain reasonable accommodations.

The current trend followed by landlords is to assume that emotional support animals are illegitimate. This issue is not exclusive to the housing context, and is also prevalent in areas such as airplanes and college dormitories.⁸⁶ As the problem grows in more areas outside the housing context, it becomes increasingly important to set a clear standard that will help prevent abuse. Setting a clear standard in the housing context will create an example that will help clear up the law in other areas as well. While the broad language of the Act may have succeeded in providing fair housing to many tenants with disabilities, it has also resulted in many fraudulent situations. Current responses to the rise of fraudulent situations have overshadowed the positive impacts that the Act has had on tenants with mental disabilities.

The standards governing the Act should highlight the Act's goals and its positive impact on every class of people it seeks to protect, especially tenants with disabilities. To achieve these goals, it is necessary to take measures to halt the granting of fraudulent requests for emotional support animals and protect the legitimate requests. Therefore, in order for a tenant to obtain a request for accommodations for an emotional support animal, the tenant must provide legitimate documentation of an animal's certification. Much like a prescription, certification must be from a tenant's personal doctor, but need not give details of the disability that the tenant may wish to keep private. The doctor must be retained for a purpose other than merely producing a document linking the tenant's disability to an emotional support animal. This standard would better protect both landlords and tenants and would restore the balance originally intended by the Act.

86. For a case dealing with emotional support animals on airplanes, see *Diveroli v. Am. Airlines, Inc.*, No. 19-cv-23251, 2019 U.S. Dist. LEXIS 190519 (S.D. Fla. Nov. 1, 2019). For a case dealing with emotional support animals in college dorms, see *United States v. Kent State Univ.*, No. 5:14CV1992, 2016 U.S. Dist. LEXIS 133468 (N.D. Ohio Sep. 20, 2016).