

***** IAA receives many inquiries about the law for Emotional Support Animals (ESA) in Indiana. This is a reprint of an article that was written and submitted by Eric Welsh in 2018, the year IAA successfully changed the state's ESA law.**

The use of Emotional Support Animals has increased dramatically over the last several years. A simple internet search will reveal story after story of emotional support peacocks, snakes, bearded dragons, and other exotic animals being used by their owners for emotional support. While most of the stories are framed in a lighthearted, almost comical manner, for landlords trying to comply with the law and make reasonable accommodations for their tenants, Emotional Support Animals are no laughing matter.

A request to accommodate a tenant to allow an animal contrary to a facility's "no pet policy" used to be a rare occurrence. However, in the last few years, such requests have become common, and landlords and property owners have struggled with how to handle the requests so that those who truly need the assistance receive it, while those who simply seek to circumvent a no pet policy are vetted and denied. It has been a tightrope act with many property owners simply deciding that proper vetting was not worth the potential legal exposure. Unfortunately, the law on the subject was quite murky, leaving landlords with very little guidance in developing the proper procedure for evaluating the requests. As such, many landlords simply granted the request for fear of a complaint and the associated costs that come with such a complaint.

Indiana law defines an Emotional Support Animal as a "companion animal that a health service provider has determined provides a benefit for an individual with a disability, which may include improving at least one symptom of the disability." It is important to note that the law views an ESA as a tool, much like a wheelchair, a ramp, or handrails. An ESA is not a pet.

According to the law, an ESA is essential for the individual and assists with at least one major life activity. One's personal beliefs as to the benefit of the use of animals for emotional support are irrelevant and should never enter a landlord's decision-making process in granting a request to allow the animal into a no-pet rental unit. An objective approach is essential.

The difficulty in evaluating a request for accommodation arises when the disability is unknown to the landlord or is not apparent to the casual observer. In the typical case, a landlord is presented with a request for accommodation from a seemingly healthy individual. Under the Fair Housing Act, disability means "a physical or mental impairment which substantially limits one or more major life activities." A physical impairment can be relatively easy to identify; however, a mental or psychological disorder, which is equally protected under the law, can be much more challenging. In such a case, the tenant seeking the accommodation presents to the landlord a "prescription letter" from a physician, psychiatrist, social worker, or other mental health professional prescribing the use of an emotional support animal to assist the tenant with their disability. If the landlord determines that the information contained in the letter is reliable, the accommodation should be approved. However, if the information or the letter itself is suspect, the landlord is presented with a difficult decision; deny the request and face the possibility of a complaint or approve the request and possibly allow a non-disabled tenant to circumvent the landlord's no pet policy.

The problem facing property managers and landlords has been further exaggerated by the growth of a cottage industry that does nothing more than generate ESA prescription letters. A simple internet search will yield results for such services promising ESA letters in as little as five minutes, or "\$49.00 ESA letters, same day service." In the past, landlords weighing the risks and benefits of denial vs. accommodation would routinely grant the request as there was little if any

guidance as to how to handle “bogus” ESA prescription letters. Thankfully, for landlords in the state of Indiana, that has changed.

On July 1, 2018, after intense efforts by the Indiana Apartment Association to bring the issue of ESA prescription letter abuse to light, Indiana Code Section 22-9-7, the “Emotional Support Animals in Housing” act became effective. I.C. 22-9-7-9 establishes that in cases where the disability is not readily apparent, a landlord may require written verification from a health service provider that: the individual is an individual with a disability; there is a disability-related need for the emotional support animal to assist the individual, and; the emotional support animal assists the individual in managing the individual’s disability.

Further, under I.C. 22-9-7-10, if a tenant moves from another state, the tenant can provide a letter from a licensed mental health care professional provided that the tenant had an ongoing treatment relationship with the health service provider. The statute specifically rejects letters from a health service provider whose only service was to provide a letter in exchange for a fee. Additionally, if a health service provider verifies a tenant’s disability status and need for an emotional support animal without adequate professional knowledge of the tenant’s condition to provide a reliable verification or if the provider charges a fee for providing written verification of the disability status and need for an ESA and provides no other service to the tenant, the health service provider commits a Class A Infraction.

While the statute is a monumental step forward in reducing the use of bogus ESA prescription letters in the State of Indiana, it does little to provide guidance to the landlord who receives a letter and simply seeks to verify that the letter is not, in fact, one of the bogus letters the statute sought to eliminate. In many cases, landlords were given a tool many were still reluctant to

use. A recent decision by the Indiana Court of Appeals coupled with I.C. 22-9-7 now provides the guidance necessary to navigate the ESA waters.

In the case of *Gregory L. Wilson, Sr., in his Official Capacity as Executive Director of the Civil Rights Commission v. Douglas Furbee, Furbee Properties, LLC and Furbee Properties I, LLC*, a landlord was presented with a request for accommodation to allow the tenant's cat into the property.

In the Furbee case, the tenant signed a lease that stated the tenant shall "not allow dogs, cats, or other animals or pets on the premises." Several months later, the tenant provided Furbee with an unsigned letter purportedly from a Licensed Marriage and Family Therapist whose primary offices were more than 2 hours away from the property. Based upon the letter, the tenant asked Furbee to grant the tenant an accommodation to have an emotional support animal in the tenant's apartment, thereby exempting the tenant from the policy against animals being permitted on the premises.

The letter asserts that the Marriage and Family Therapist assessed the tenant and found that tenant "meets the functional limitations imposed by her disability." However, no specific disability was identified in the letter. The letter further stated that the tenant "has certain limitations regarding coping with symptoms that stem from her disability" without identifying what, if any, limitations the tenant may have had. Also, the letter did not list any specific symptoms or impacted life activities to assist Furbee in evaluating the tenant's request for an accommodation. Further, the letter did not state that any major life activity was substantially limited, much less that the therapist had in any way treated the tenant for a disability. The letter was not signed.

Upon receiving the letter, since the tenant's disability was not readily apparent, Furbee determined that additional information was needed before approving the accommodation to allow the animal onto the premises. Two letters were sent to the tenant. The first letter contained questions to be answered by the tenant, the second to be answered by the therapist. The tenant refused to answer the questions or sign the waiver to allow Furbee to discuss the matter with the tenant's therapist. Further, the tenant refused to provide any additional information regarding the disability or the disability-related need for an emotional support animal. Instead, the tenant moved the cat into the property. Furbee provided a notice that the cat violated the no pet policy. When the tenant refused to remove the animal, Furbee evicted the tenant.

The tenant filed a complaint with the Indiana Civil Rights Commission, who in turn filed a lawsuit against Furbee alleging "discrimination on the basis of disability and handicap in violation of the Indiana Fair Housing Act" as well as failure to grant a reasonable accommodation to the tenant.

The trial court agreed with the Indiana Civil Rights Commission, determining that the questions asked by Furbee were overly broad. However, the Indiana Court of Appeals reversed holding:

Here, the designated evidence shows that [Therapist's] letter—the only documentation that Tenant gave Landlord to support her request for an emotional-support animal—provides that Tenant "meets the definition of disability"; however, it identifies no disability. [Therapist's] letter also provides that Tenant "has certain limitations regarding coping with symptoms that stem from her disability." Again, the letter identifies no limitations or symptoms of the "disability." **Landlord, at the very least, was entitled to know Tenant's disability and disability-related need for the animal.** *Emphasis added*

Central to Furbee's case was the holding in Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, which held that "If a landlord is skeptical of a tenant's alleged disability or the landlord's

ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.” The Indiana Court of Appeals reinforced this requirement and mutual obligation of communication by stating:

A party that fails to communicate, by way of initiation or response, may be acting in bad faith. Here, Tenant did not respond at all to Landlord, causing a breakdown in the process. Without information about Tenant’s disability and disability-related need for the animal, Landlord could not meaningfully review Tenant’s request for an emotional-support animal. We therefore reverse the trial court and remand with instructions for the court to enter summary judgment in favor of Landlord.

The full decision in *Douglas Furbee, Furbee Properties, LLC, Furbee Properties I, LLC v. Gregory L. Wilson, Sr. in his Official Capacity as Executive Director of the Indiana Civil Rights Commission, and Shelly Linder*, 19A-PL-1756 may be found at <https://www.in.gov/judiciary/opinions/pdf/03302001nhv.pdf>.

EVALUATING EMOTIONAL SUPPORT ANIMAL REQUESTS AFTER I.C. 22-9-7 AND THE *FURBEE* DECISION

For landlords and property managers, it is essential to formulate a formal process for the review of ESA accommodation requests. While each accommodation request may be different, the review process should not. It is important to remember that these requests must be reviewed objectively. The landlord’s belief as to the value of an ESA should never enter the decision-making process. The landlord can never act as the judge or jury in weighing whether he or she believes that an ESA is necessary. That determination should be left to the health care professionals.

However, that does not mean that the landlord is not allowed to objectively evaluate the request. The landlord is not simply required to approve every request. If the disability is not readily

apparent, the landlord can request written verification. If the landlord is skeptical as to the validity of the verification, the landlord is required to open a dialogue with the tenant.

As was shown in the *Furbee* decision, it is important to document the efforts made by the landlord in obtaining relevant information. If the written verification or “prescription letter” does not contain the most basic information, that is, the tenant’s disability and disability-related need for the animal, the landlord should make a written request to the tenant for that information.

A landlord is entitled to make its decision based on reliable information. If the prescription letter itself is less than reliable, additional follow-up may be necessary. As the HUD Notice, *assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act* at 11 (Jan. 28, 2020), stated:

Some websites sell certificates, registrations, and licensing documents for assistance animals to anyone who answers certain questions or participates in a short interview and pays a fee. Under the Fair Housing Act, a housing provider may request reliable documentation when an individual requesting a reasonable accommodation has a disability and disability-related need for an accommodation that are not obvious or otherwise known.³⁵ In HUD’s experience, such documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal.

For example, if a tenant who has resided in an apartment for two years asks if he/she may have a pet is reminded of the no-pet policy presents a prescription letter the next day from a therapist in Costa Rica, that letter could be determined to be unreliable. In such a case, requesting additional reliable information regarding the disability and disability-related need for the ESA is appropriate.

For the last several years, many landlords have felt helpless when presented with ESA requests. Such is no longer the case. Through the efforts of the Indiana Apartment Association with the codification of I.C. 22-9-7 and the recent *Furbee* decision, landlords are now armed with

the tools necessary to make decisions that comply with the law, allow accommodations to those who are legally entitled to them, and to weed out those who are not. For more information regarding the HUD guidelines regarding emotional support animals, all landlords and property owners are encouraged to review the HUD Notice Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act (Jan. 28, 2020), which can be found online at <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>.

About the Author:

Eric C. Welch is the Managing Member of Welch & Company, LLC, a full-service creditor's rights law firm that provides representation to Landlords across Indiana. Mr. Welch was lead counsel in the case of Douglas Furbee, Furbee Properties, LLC, Furbee Properties I, LLC v. Gregory L. Wilson, Sr. in his Official Capacity as Executive Director of the Indiana Civil Rights Commission, and Shelly Linder, 19A-PL-1756 representing Douglas Furbee, et al. Mr. Welch testified before the Indiana Legislature to secure passage of I.C. 22-9-7.