

# Can "Tweety" be a Service Animal?

The story is actually more interesting than just whether Tweety could be considered a "service animal."

The issue arose when a resident in a high rise condominium suspended a bird feeder over the balcony railing to feed wild birds. The condominium declaration specifically prohibited affixing or hanging objects from the balconies. The birds were creating a messy debris field of bird feed and feces on Units below, so the association wrote to the resident requiring the bird feeder be removed. The resident responded that the bird feeder helped to mitigate her emotional and mental health related issues, and therefore the feeder should be allowed because the birds assisted to alleviate her health concerns. The resident even found a doctor to write a letter confirming that the wild birds that would come to feed on her balcony made her "happy", and therefore the feeder should be allowed to remain as a reasonable accommodation.

Really? A wild bluebird that you named Tweety that comes and goes as it pleases should be considered a service animal and the bird feeder a reasonable accommodation?

As you might expect, the association's response declined the request, and pointed to the law to support its position. Both the Federal and State Fair Housing Acts prohibit an association from discriminating against residents that require reasonable accommodations. Florida Statutes Section 760.23(9)(b) defines discrimination as "a 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."

In order to qualify for a reasonable accommodation, a person must first show that he/she has a handicap, which is defined in Florida Statutes Section 760.22(7) as "a physical or mental impairment which substantially limits one or more major life activities". Once it is determined that a handicap exists, the individual asking for a reasonable accommodation must also show that the handicap substantially limits one or more major life activity, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

Assuming that an individual does have a handicap that affects a major life activity, the association must reasonably accommodate the person by approving a request for a service animal, if the animal is shown to assist with the handicap. Whether a requested accommodation is required by law is highly fact-specific, requiring case-by-case determination. If the reasonable accommodation is denied, the person requesting an accommodation can win a claim for failure to make



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the accommodation if the person can establish (1) that he is disabled or handicapped, and that the defendants knew or should have known of that fact; (2) that the defendants knew that an accommodation was necessary to afford him equal opportunity to use and enjoy the dwelling; (3) that such an accommodation is reasonable; and (4) that the defendant refused to make the requested accommodation.

So if an association receives a request from a resident to have a dog in a no-pet community, what can the association ask to veri-

fy that the dog really is a service animal? The Board may request appropriate documentation to decide whether it believes a handicap exists. Case law has held that associations must be given an opportunity to make a final decision with respect to a request for accommodation, which necessarily includes the ability to conduct a meaningful review of the request to determine if such an accommodation is required by law and the association should be presented with sufficient evidence to conclude that the accommodation requested is necessary. For this purpose, it is reasonable to require the opinion of a physician who is knowledgeable about the subject disability and the manner in which a service animal can ameliorate the effects of the handicap. The questions may be posed as follows:

- Are you the Patient's treating medical professional with knowledge of the person's medical condition and history?

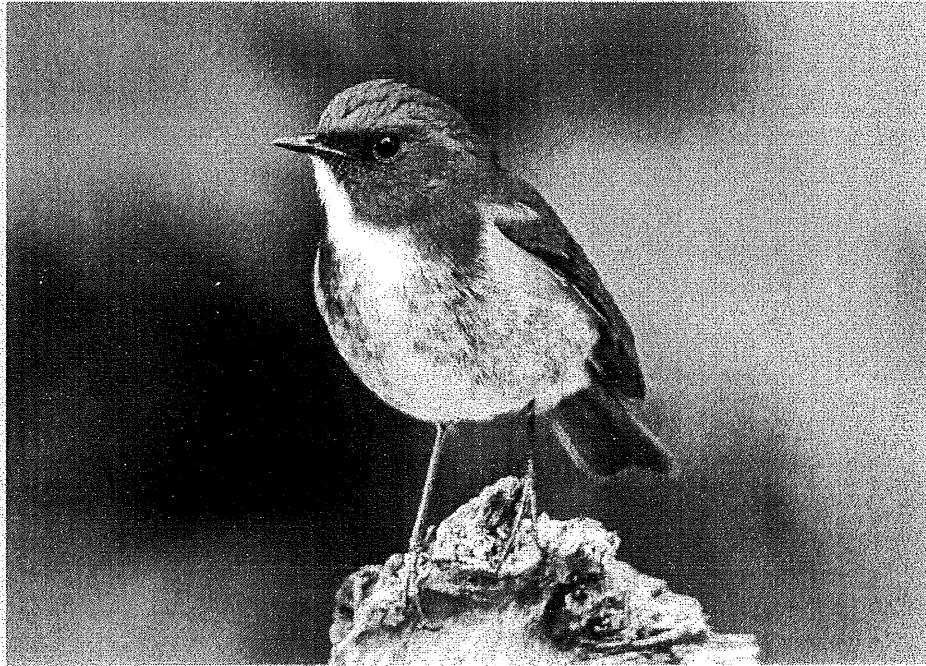
- Does the Patient have a physical or mental impairment?
- Does the impairment substantially limit one or more of the patient's major life activities?
- If you answered "Yes", please describe the impairment and how it affects the Patient's major life activities.
- In your professional, medical opinion, is an animal necessary in order for the patient to have an equal opportunity to use and enjoy the unit within the community as a person with a disability?
- If you answered "Yes", please describe how the requested animal lessens the effects of the Patient's impairment or facilitates the Patient's ability to function.

If the physician's letter provides sufficient inherent information to support the assertion that the individual has a disability and that the dog is necessary then the request should be approved as a reasonable accommodation. If the Board determines that the request does not meet the requirements and denies the request, the association should be prepared to defend its position. The resident could file a complaint with the Florida Commission on Human Relations, or if a condominium, with the Division of Florida Condominiums, Timeshares and Mobile Homes. The association has a better chance of obtaining a fair and impartial determination, if challenged, if it is heard by the Division, as the Florida Commission tends to be very protective of the rights of the animal owners and is far more likely to find the association to be discriminating than if the case were heard by the Division.

A couple of points to consider: the law does not require that a service animal be licensed in order to qualify as a reasonable accommodation. Therefore, the decision of whether to approve or deny a request should not hinge on whether the animal is licensed as a service animal. Additionally, the privacy rights of an individual can be violated if an association continues to ask too many probing questions.

If the documentation from the resident and the physician provide a plausible explanation of the handicap that affects a major life activity and how the animal assists with the handicap, then it is probably best for the association to take the facts at face value and approve the request. If the correspondence from the resident states that she needs the bird feeder because she has bonded with "Tweety" when he flies to her balcony in the mornings, go ahead and tell the resident to fly the coop and take her bird feeder with her.

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