

Publications

Vicious Service Animals and Use of Human Models in Advertising Materials

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The Growling Hearing Ear Dog

Q. Our question concerns a misbehaving "hearing ear dog." We have a recent resident at our facility whose dog is misbehaving in our dining room. She is not keeping it under control. At a recent meal, it stuck its nose in our salad cart and we had to replace all of the salads. More recently, it has been barking and growling at other residents. In addition, a visitor to the facility left the dining room after the dog growled menacingly at him. The resident has indicated that she is presently suing a restaurant in the area over issues regarding this dog so we want to proceed with caution as she is apparently litigious. We are getting quite a few complaints regarding this animal. What can we do?

A. RCFEs are subject to federal laws that prohibit discrimination based on disability. The Fair Housing Amendments Act (FHAA) imposes requirements on providers of housing and the Americans with Disabilities Act (ADA) imposes requirements on "public accommodations." RCFEs are apparently subject to a hybrid analysis, with the FHAA pertaining to the residential portions of a community and the ADA applying to "public areas" such as the dining room. (The fact that an RCFE is a private business does not exempt it from the public accommodations provisions of the ADA.) For most purposes, the legal requirements of the FHAA and the ADA are substantially similar.

The ADA requires public accommodations to modify their policies and procedures to permit people with service animals to have the same access to their facilities as those without disabilities. Service animals are defined as any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability.

Therefore, an RCFE must permit disabled residents to have service animals, and must permit these animals to have access to all common areas of the community. The fact that you may have a policy general restricting pets does not matter. Service animals are not considered pets. A hearing ear dog utilized by a hearing impaired person clearly qualifies as a "service animal."

This does not mean, however, that an RCFE must tolerate unruly or dangerous behavior by a service animal. First, the ADA specifically states that a public accommodation is not required to supervise or care for a service animal. Moreover, the ADA recognizes a general safety exception and holds that a public accommodation may "impose legitimate safety requirements that are necessary for safe operation." However, "safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalities about individuals with disabilities."

Although there are no specific regulations dealing with unruly or vicious service animals, the Department of Justice deals with this issue in its website pertaining to ADA issues. (www.usdoj.gov/crt/ada/qasrvc.htm). The website poses the question, "What if a service animal barks or growls at other people, or otherwise acts out of control?" The response from the Justice Department is as follows:

"You may exclude any animal, including a service animal, from your facility when that animal's behavior poses a direct threat to the health or safety of others. For example, any service animal that displays vicious behavior towards other guests or customers may be excluded. You may not make assumptions, however, about how a particular animal is likely to behave based on your past experience with other animals. Each situation must be considered individually."

In light of the foregoing, an RCFE would have the right under the ADA to exclude a service animal that is "growling menacingly" at residents, staff or visitors. Providers have a clear obligation under RCFE regulations to provide a safe and healthful environment. Specific instances of misbehavior by the dog should be documented (a videotape would be ideal). This will help you to defend your actions if the dog owner files a complaint. The provider should advise the resident in writing that service animals are welcomed in the community, but that hers is not due to specifically delineated instances of misbehavior.

In addition, it is permissible to charge a resident for damage caused by a service animal as long as it is the regular practice of the community to charge non-disabled residents for the same types of damages.

Human Models in Ads and Brochures

Q. I have heard that assisted living communities have gotten into trouble for using all-white models in their advertising. Our assisted living community uses photographs of actual residents in our marketing materials. Are we safe?

A. No. The most prominent discrimination cases in the seniors housing marketing arena have involved print advertisements and brochures in which the selection of people to appear in photographs was alleged to indicate a racial bias in the property's admission practices. Stated simply, the use of all-white models is an invitation to a lawsuit. Some advertising discrimination claims have led to significant judgments or settlements against assisted living and other seniors communities, including a 1997 settlement with a Michigan retirement community for \$569,000.

The federal Fair Housing Act (as well as state law) prohibits racial discrimination in the sale or rental of dwellings. The law clearly applies to assisted living communities. A number of court decisions have held that a plaintiff need not show actual intent to discriminate. Numerous successful

claims have been brought simply by showing that the use of white-only models in advertising has the effect of discouraging prospective minority residents from applying for admission.

The fact that you use actual residents as opposed to models does not provide you with any defense, because the effect of such advertising can be the same as an intentionally discriminatory publication. Moreover, the fact that all of your residents may be white may tend to prove that the alleged policy of discrimination exists and has been effective.

It is important to note that the inclusion of non-white employees in your marketing materials will not help in defending an allegation of racial discrimination in violation of the Fair Housing Act. In fact, if non-white employees are depicted in subservient positions, their inclusion may actually hurt rather than help your cause.

In order to avoid allegations of racial discrimination, your marketing materials should reflect the racial diversity of the metropolitan area (not the particular town) in which you are located.

We are aware of lawsuits that have been brought against assisted living or continuing care retirement communities located in the metropolitan areas of Los Angeles, Dallas, New Orleans, New York City, Washington, D.C. and Boston. In most of these situations, the lawsuit was filed by a nonprofit, fair housing advocacy group. In each case, the lawsuits were brought based solely upon brochures or published advertisements that depicted 100% Caucasian residents. In one case, the community in question was careful to include actual minority residents in the photographs in its brochures and advertisements, but failed to check its website.

Providers can take some common sense steps to reduce the risks of a claim of advertising discrimination, including:

1. Assuring that human models used in advertising reasonably reflect the racial diversity of the surrounding metropolitan area;
2. Including the Equal Housing Opportunity slogan, logo or statement in all advertising copy; and
3. Taking affirmative steps to place advertising in minority-oriented media.

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