

# Legal Briefings

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## Service Animals Under the ADA

This Legal Briefing will discuss the use service animals under the Americans with Disabilities Act (“ADA”) in public accommodations<sup>2</sup> under Title III and as applied to the services, activities, and programs of public entities under Title II.<sup>3,4</sup> This brief analyzes relevant statutory language, federal regulations, case law, and settlement agreements set forth by the U.S. Department of Justice (DOJ), the agency authorized by Congress to enforce Titles II and III of the ADA, draft the ADA’s corresponding administrative regulations, investigate complaints, initiate and mediate complaints, and monitor settlement agreements.<sup>5</sup>

Note that challenges brought under the ADA regarding service animals are highly fact specific, often requiring a case-by-case inquiry into the details of the individual’s needs as a person with a disability, the services that an animal provides, the defendant’s policies, practices, or procedures that give to rise to the alleged discrimination, and any defenses raised by the defendant.

The ADA and court cases are clear that policies and practices must be modified to allow individuals with disabilities to be accompanied by their service animals. The greatest area of dispute arises as to whether an animal is a *service* animal and whether a health and safety risk is present. The outcomes of such cases undoubtedly turn on the particular facts presented in each case

### WHAT IS A SERVICE ANIMAL?

Under the ADA, a “service animal” is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Under the new DOJ regulations, “*other species of animals*, whether wild or domestic, trained or untrained, *are not service animals* for the purpose of this definition.” 28 C.F.R. § 36.104 and 28 C.F.R. § 35.104 (emphasis added).

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The only animal that can qualify as a “service animal” under the ADA, therefore, is a dog. However, the ADA also requires that reasonable accommodations be made to permit the use of a miniature horse by an individual with a disability so long as it has been “individually trained to do work or perform tasks for the benefit of the individual with a disability.” 28 CFR § 36.302(c)(9)(i) and 28 C.F.R. § 35.136(i) (A). In order to determine whether reasonable accommodation can be made to allow miniature horses in a facility, entities must consider the following four factors:

1. The miniature horse’s type, size, and weight and whether the facility can accommodate these features;
2. Whether the handler has sufficient control;
3. Whether the miniature horse is housebroken; and
4. Whether the miniature horse’s presence in a specific facility compromises the legitimate safety requirements that are necessary for safe operation. *Id.*

## WHAT TYPE OF WORK OR TASKS CAN A SERVICE ANIMAL DO?

The work or tasks performed by a service animal must directly relate to the handler’s disability. However, the ADA does not limit the kind of work or tasks that can be performed.<sup>6</sup> Examples include but are not limited to:

- Assisting individuals who are blind or have low vision with navigation and other

tasks;

- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds;
- Providing non-violent protection or rescue work;
- Pulling a wheelchair;
- Assisting an individual during a seizure;
- Alerting individuals to the presence of allergens;
- Retrieving items such as medicine or the telephone;
- Providing physical support and assistance with balance and stability to individuals with mobility disabilities; and,
- Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. 28 C.F.R. § 36.104; 28 C.F.R. § 35.104.

## ARE EMOTIONAL SUPPORT or “COMFORT” ANIMALS SERVICE ANIMALS?

The provision of emotional support, well-being, comfort, or companionship is not the type of “work or tasks” considered in the ADA’s definition of service animal.<sup>7</sup> 28 C.F.R. § 36.104; 28 C.F.R. § 35.104. However, if an animal was individually trained to perform work or tasks for the benefit of an individual with a disability *in addition to* providing comfort or support, it may still be considered a “service animal.”

## WHO IS ENTITLED TO USE A SERVICE ANIMAL UNDER THE ADA?

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The ADA authorizes the use of service animals for the benefit of individuals with disabilities. While the ADA does not limit the type of disability one must have in order to use a service animal, there must be a direct link between the task an animal performs and the person with a disability. The ADA defines disability to include a “physical or mental impairment that substantially limits one or more major life activities of such individual.” [42 U.S.C. § 12102\(1\)\(A\)](#).<sup>8</sup>

In *Access Now, Inc. v. Town of Jasper*, 268 F. Supp. 2d 973 (E.D. Tenn. 2003), a Tennessee district court determined that a nine-year-old girl with spina bifida and hydrocephalus did not have a disability under the ADA. The girl’s family had previously requested a reasonable modification to the town ordinance that prohibited animals within 1000 feet of any residence without a permit from the town health officer. Specifically, the family requested a permit to keep a miniature horse at their residence, describing the horse as a service animal that helped the girl stand, walk, and maintain her balance, and that also picked up unspecified objects off the floor for her. After the town denied issuance of the permit, and the family was declared guilty of violating the town’s municipal ordinance, the family filed suit in federal court pursuant to Title II of the ADA. The issue in dispute was whether the girl had a disability. The family contended that she was substantially limited in three major life activities: walking, standing, and caring for herself. However, the district court found that the girl did not have an ADA disability because the majority of the evidence demonstrated that the girl could adequately walk, stand, balance, and care

for herself without assistance from the horse. A primary fact for the court was that the girl did not use any other device to assist her in walking, standing, or otherwise moving or traveling outside of her residence where the horse never left. Furthermore, the girl’s treating physician testified that he would not recommend the use of the horse as a service animal and stated she did not need one.

After finding that the girl was not disabled, the court held that the miniature horse was not a service animal because it did not assist and perform tasks for the benefit of a person with a disability.<sup>9 10</sup>

In *Proffer v. Columbia Tower*, 1999 WL 33798637 (S.D. Cal. 1999), a California district court found that a landlord did not violate the ADA because the plaintiff tenant could not demonstrate she was discriminated against by reason of her own disability. Although the tenant is an individual with paraplegia and uses a service dog for herself, her lawsuit was based on her landlord’s refusal to allow additional dogs in her apartment that she hoped to train for other individuals with disabilities. The landlord permitted the tenant to have her own service dog, but otherwise prohibited her from having the additional dogs, unless her own disability required her to have another service animal. The district court agreed with the landlord, finding no ADA violation since the additional dogs were not trained to perform tasks for the *tenant’s* benefit.

WHAT QUESTIONS CAN ENTITIES ASK TO DETERMINE WHETHER AN ANIMAL IS A SERVICE ANIMAL?

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According to the DOJ regulations, entities may ask two questions: (1) whether an animal is required because of a disability, and (2) what task or work the animal has been trained to perform. 28 C.F.R. §36.302(6); 28 C.F.R. §35.136(f). They cannot otherwise ask about the nature or extent of an individual's disability. *Id.* Furthermore, generally an entity may not ask these questions when it is "readily apparent that an animal is trained to do work or perform tasks for an individual with a disability." *Id.* For an example, the type of task or work an animal has been trained to perform might be "readily apparent" when the animal is observed performing such task. *Id.*

Although the regulations generally limit the scope of permissible questioning, courts have generally upheld additional questioning if it serves to clarify whether an animal is a service animal and/or if there is a reasonable suspicion that the animal is not a service animal.<sup>11</sup>

In *Grill v. Costco Wholesale Corp.*, 312 F. Supp. 2d 1349 (W.D. Wash. 2004), a Washington district court upheld a private membership club's written policy that required store employees to first look for visible identification that the animal was a service animal and, if no identification existed, to ask what task or function the animal performed that its owner could not otherwise perform. The club's policy otherwise prohibited employees from asking specific questions about the person's disability.

In *Dilorenzo v. Costco Wholesale Corp.*, 515 F.Supp.2d 1187 (W.D. Wash. 2007), the Washington district court discussed

the same policy upheld in *Grill*. In this case, the Plaintiff appeared at a Costco store with her husband and a puppy wearing a vest that said "service animal in training." While shopping, she began to carry her dog, Dilo, in her arms when a store manager approached her and asked on whose behalf the dog acted, as well as what tasks the dog performed. Plaintiff said the dog was hers and that he alerted her to spells. The company's lawyer sent a follow up letter asking Plaintiff to provide further information about the dog's training and the tasks it performs. Costco never asked Plaintiff to state her disability, or demanded proof of training. However, Plaintiff argued that Costco's questioning constituted harassment. The Court noted that, even though it was "highly questionable whether [the dog in question] was a service animal," the manner in which such questions are asked could in and of itself violate the ADA. However, the Court determined that, in this case, Costco did not violate the ADA, and that the inquiries were reasonable to seek clarification from Plaintiff.

In *Brown v. Cowlitz*, 2009 WL 4824010 (W.D. Wash. Dec. 9, 2009), *reconsideration denied* by 2009 WL 5214328 (W.D. Wash. Dec. 28, 2009), *motion for relief from judgment denied* by 2010 WL 1608876 (W.D. Wash. Apr. 19, 2010), a Plaintiff brought a lawsuit against a judge who was presiding over a separate matter Plaintiff was involved in. Although the judge had previously allowed Plaintiff to bring her dog to court, he later requested that Plaintiff provide proof of disability and her need for a service animal. A federal district court in Washington found these inquiries were

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permissible in light of “number of factors that led to legitimate suspicions” that the dog was not a service animal. The judge had noted that the dog had a significant odor such that individuals left the courtroom to avoid it, and that the dog was not controlled properly.

Courts have refused to find an ADA violation where the individual refuses to respond to legitimate inquiries. For example, in *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 (Del. Super. Ct. 2005), the Delaware Supreme Court held that a business could exclude a service animal if the owner refused to answer questions about its training. Although this case was brought under Delaware state law, the court stated that the state law and the ADA’s provisions regarding service animals were essentially the same. Also, the court relied on the fact that the business owner had contacted the Department of Justice’s ADA information line and confirmed that while the business owner could not ask the individual about his disability, he was permitted to ask about the dog’s training.

## CAN AN ENTITY REQUIRE AN INDIVIDUAL TO PROVIDE CERTIFICATION THAT THEIR ANIMAL IS A SERVICE ANIMAL AND NOT A PET?

No. An entity cannot require documentation (e.g. proof of certification, training, or licensure) that the animal is a service animal. 28 C.F.R. §36.302(c)(6); 28 C.F.R. §35.136(f).

Policies and practices that require proof of certification or similar documentation have been found to violate the ADA. In *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Or. 1998), an Oregon district court found that the county housing authority violated Title II of the ADA, the Fair Housing Amendments Act and the Rehabilitation Act of 1973<sup>12</sup> after the housing authority threatened to evict a tenant who was deaf for having a dog despite the tenant’s explanation that the dog was a service animal. The tenant had previously filed a request for a waiver of the housing authority’s blanket “no pets” rule explaining that the dog was a service animal that alerted the tenant to several sounds such as door knocks, the smoke detector, a ringing telephone, and cars arriving in the driveway. Despite the tenant’s claim that the dog was trained professionally as well as individually in the tenant’s residence, the housing authority claimed the dog was not a service animal because the tenant could not produce any verification or certification that the dog was trained as a hearing assistance animal by a certified trainer or other “highly skilled individual.” The Court held that the housing authority had no independent authority to determine whether the dog was a service animal as long as the dog was individually trained for the benefit of a person with a disability.

However, courts have required individuals to provide *some* evidence of training in order to demonstrate that their animal meets the “service animal” definition and to distinguish their service animal from an ordinary pet.

In *Timberlane Mobile Home Park v.*

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*Washington State Human Rights Commission*, 122 Wash. App. 896, 95 P.3d 1288 (Wash. App. 2004), a Washington State appellate court reversed a decision of the state's human rights commission which had previously found that a mobile home park discriminated against a resident by expelling her from a trailer park because she used a service animal. This case was brought under a Washington state law that, similar to the ADA, required that a service animal be "trained for the purpose of assisting or accommodating a disabled person's sensory, mental, or physical disability." The appellate court determined that the Plaintiff's dog, Spicey, was not so trained. Spicey had alerted people for help when Plaintiff had a migraine by "freaking out" and running, jumping, barking, scratching or pulling one's leg. She started doing this when she was seven to nine months old. After finding an individual to help, Spicey would then quietly watch the individual help Plaintiff and then would be called a "good girl" and maybe given a treat. The Court found Spicey to be indistinguishable from family pet.

In *Baughner v. City of Ellensburg, WA*, 2007 WL 858627 (E.D. Wash. 2007) a federal district court determined that an individual's dog was not a service dog because she failed to show her dog was trained to do any work or tasks. Plaintiff who has autism, panic attacks, a head injury, asthma, and is hard of hearing, filed a lawsuit against a convenience store and the police department for violating the ADA. While at a convenience store, a store clerk asked Plaintiff to keep her dog, Bun, away from the food, but offered to

help her retrieve food if desired. Plaintiff said that Bun was a service animal and alerted her to taking medications. A dispute followed, and the police arrived. Plaintiff was arrested for criminal trespass, handcuffed, and ultimately separated from Bun. She later filed a lawsuit seeking two million dollars in damages. Her claim against the convenience store was dismissed because there are no damages allowed under Title III of the ADA. As to Plaintiff's other claim, that the police failed to enforce her right to bring a service dog into a public accommodation, the court dismissed her claim, stating that Plaintiff failed to demonstrate that her dog was trained to do any work or tasks.

Defendant City argued that Plaintiff needed to show evidence of personal training, outside obedience training, and actual observance of the animal's learned behavior. The court disagreed with Defendant that documented evidence was required but did agree that there "must be some evidence to set a service animal apart from an ordinary pet." *Baughner* at 5. While Plaintiff stated that Bun's presence reminded her to take her medication or stay focused, and that Bun provided her "cues" to take her medication, she did not explain further what cues Bun provided, nor how Bun was trained to provide these cues. The court deemed that Plaintiff needed to demonstrate "something more than merely being a presence that provides comfort, companionship or interaction." *Id.*

At least two federal courts have allowed cases to continue despite a defendant's motion for summary judgment or dismissal when plaintiffs have offered some evidence of training.

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In *Vaughn v. Rent-A-Center*, 2009 WL 723166 (S.D. Ohio 2009), an individual with multiple sclerosis and spinal-chord injury filed a lawsuit against Rent-A-Center for refusing him entry into the store with his service dog, Hannibal, who he alleged helped him walk and stand. An Ohio federal district court denied the defendant's motion to dismiss finding that a reasonable jury could find that Hannibal was a "service dog." Citing to *Baugher*, Rent-A-Center filed a motion for summary judgment arguing that there was no evidence Hannibal was individually trained. The court, however, found the instant case distinguishable and denied Rent-A-Center's motion. Specifically, Plaintiff provided testimony that he took a class on service animal training and that he individually trained Hannibal. He further explained that Hannibal was specifically trained to help him keep his balance, navigate uneven ground and stairs, pick up things, and help him in and out of chairs, cars, beds, and showers.

In *Miller v. Ladd*, 2010 WL 2867808 (N.D. Cal. 2010), a California federal district court denied a defendant restaurant's motion for summary judgment, finding that Plaintiff had presented enough evidence to create a genuine issue as to whether her dog, Sati, was a service animal. Specifically in question was whether Sati had been trained to help Plaintiff, an individual with an anxiety disorder and post-traumatic stress disorder. Plaintiff provided testimony that she researched service animals, identified a shelter dog with shelter staff that was most suited for service animal work, trained Sati individually as well as with professional help, and trained Sati to alert her to panic,

anxiety, and sleep attacks.

## TO WHAT EXTENT ARE COVERED ENTITIES REQUIRED TO MODIFY THEIR "NO PETS" POLICIES, OR LIKE POLICIES, PRACTICES, AND PROCEDURES TO ALLOW THE USE OF SERVICE ANIMALS?

### In General

Covered entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public, unless the entity can demonstrate (1) that making such modifications would fundamentally alter the nature of the entity's goods, services, facilities, privileges, advantages, or accommodations, (2) the safe operation of the entity would be jeopardized, or (3) such modifications would result in an undue financial or administrative burden. 28 C.F.R. §§ 35.130(b)(7), 35.136, 35.150(a)(3), 35.164, 36.301(b), 36.302(c)(1), and 36.303(a). DOJ commentary suggests that Congress intended the ADA to allow service animals the "broadest feasible access" to public accommodations and public entities and to avoid unnecessarily separating service animals from their owners. 28 C.F.R. pt. 36, App. C.

Covered entities that have blanket policies or practices that exclude service animals may be subjected to court orders or settlement agreements requiring modification of the relevant policy or practice. For example, following a complaint filed by three individuals who

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are blind after they were refused airport shuttle service unless their guide dogs were restrained in kennels, Budget Rent A Car Systems modified its car rental policies to allow individuals with disabilities to use service animals without being separated from them at any time.<sup>13</sup>

Businesses that have taken the initiative to modify their own policies and practices in effort to remedy past ADA violations may avoid court ordered injunctions and other sanctions. For example, in *Stan v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 119 (N.D. N.Y. 2000), a shopper who is legally blind filed suit against Wal-Mart and Sam's Club stores alleging the stores violated the ADA when store employees challenged her as she tried entered the stores with her guide dog, including one incident where an employee asked the shopper about her disability. A New York district court found that the shopper was unable to satisfy her request for injunctive relief to bar future harassment, which required a showing of irreparable harm and a likelihood of future discrimination. The New York district court found that while the shopper should not be subjected to embarrassing and humiliating personal questions about her disability, she could not demonstrate a likelihood of future harassment because the stores had already taken action to fix their policies and practices in compliance with the ADA by training their employees on service animals, placing signs at store entrances that welcomed service animals, and implementing policies permitting service animals as an exception to the stores' general "no pets" rule.

## **DEFENSES**<sup>14</sup>

Service animals do not have unfettered access to public accommodations and government entities. Rather, there are limits that can be imposed when the service animal is out of control, when health and safety risks are present, and when the presence of such animal may cause an undue burden or fundamental alteration.

### Animal is Out of Control or Not House Broken

A public accommodation may ask an individual to remove a service animal from the premises if the animal is out of control and the animal's handler does not take effective action to control it; or the animal is not housebroken. 28 C.F.R. §36.302(c)(2)(i)-(ii); 28 C.F.R. §35.136(b)(1)-(2). If a service animal is properly excluded for these reasons, the individual must be permitted to obtain goods, services or accommodations without the service animal. 28 C.F.R. §36.302(c)(3); 28 C.F.R. §35.136(c).

### *The Fundamental Alteration Defense*

Service animals may be excluded if the covered entity can demonstrate that the presence of such animal would fundamentally alter the nature of the entity's goods, services, facilities, privileges, advantages, or accommodations. It is the entity's burden to allege and prove the existence of a fundamental alteration. The outcome of



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such defense will depend on the distinct facts of each case.

For example, a California district court found that the California Center for the Arts violated the ADA when it refused to allow a patron with quadriplegia to continue attending music performances with her service dog that had previously yipped or barked during the intermission of two Center concerts. The district court ordered the Center to modify its “policies, practices and procedures such that they did not exclude a service animal who has made a noise on a previous occasion, even if such behavior is disruptive, if the noise was an intended to serve as a means of communication for the benefit of the disabled owner or if the behavior would otherwise be acceptable to the Center if engaged by humans.” The Center appealed the district court’s order and in *Lentini v. California Center or the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) the Ninth Circuit Court of Appeals<sup>15</sup> affirmed, finding it to be a reasonable and necessary accommodation under the ADA. The Center argued that the modified policy would fundamentally alter the Center’s services because permitting a dog to make noise may deter patrons and artists from coming to the Center. However, the Ninth Circuit stated that whether an accommodation causes a fundamental alteration is an “intensively fact-based inquiry” and the facts of this case showed that although the patron’s service dog did yip or bark twice, no patron ever complained and the two incidents did not cause a significant disturbance. The Center’s mere speculation of potential future disturbances was undercut by evidence

that demonstrated otherwise. Although no monetary damages are available for a violation of Title III of the ADA, the Ninth Circuit ordered damages under California state law against the Center, and also against the Director of Center Sales & Events and the house manager in their individual capacities.

In *Johnson v. Gambrinus Company/ Spoetzel Brewery*, 116 F.3d 1052 (5th Cir. 1997), the Fifth Circuit Court of Appeals<sup>16</sup> affirmed the district court’s decision that a brewery violated the ADA when it refused to permit an individual who is blind to take a public brewery tour with his guide dog. The Fifth Circuit also upheld the district court’s order that the brewery modify its policies to ensure that individuals with disabilities and their service animals have the “broadest feasible access” to the brewery tour consistent with the brewery’s safe operation. The brewery argued that permitting animals on the tour would fundamentally alter the nature of the tour and that the Food, Drug, and Cosmetics Act prevented the brewery from modifying its blanket “no animals” policy. The Fifth Circuit disagreed holding that the Act did not prevent the brewery from allowing guide dogs on at least part of the tour and that the risk of contamination posed by the few foreseeable service animal visits was minimal, if not altogether unlikely or impossible in certain locations within the brewery. Finally, the Court affirmed an award of monetary damages under state law that specifically prohibits businesses from excluding individuals with disabilities because of their use of an assistance dog or other specified assistive devices.

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## The Direct Threat to Health and Safety Defense

Neither government entities nor public accommodations are required to permit access to their services, programs, and/or activities when an individual poses a direct threat to the health or safety of others. 28 C.F.R. §36.208(a); 28 C.F.R. §35.139(a). A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. 28 C.F.R. §36.104; 28 C.F.R. §35.104. In determining whether a "direct threat" exists, an entity must make "an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids will mitigate the risk." 28 C.F.R. §36.208(b); 28 C.F.R. §35.139(b)

While a showing that health and safety will be jeopardized if an animal is present could serve as a basis for excluding a service animal, allegations of safety risk must be based on actual risks rather than on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. §36.301(b); 28 C.F.R. §35.130(h). A perceived threat without evidentiary basis will not likely support exclusion. Moreover, if other alternatives exist that can alleviate health and safety concerns while allowing service

animals to accompany their owners, then these alternatives should be considered before a blanket exclusionary policy is implemented.

In *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), the Ninth Circuit Court of Appeals found that, without reasonable modifications, the State of Hawaii's 120-day quarantine on carnivorous animals entering Hawaii, which was designed to prevent the importation of rabies, violated Title II of the ADA. Pursuant to Hawaii law, any person who entered, visited or returned to Hawaii with a dog, cat, or other carnivorous animal was required to have their animal quarantined for 120 days upon entering the State. Upon written request, a person with a disability seeking to bring a service animal into Hawaii could stay in the State without cost for the duration of the quarantine period in the quarantine station, a remote area within Hawaii. A class of plaintiffs who were blind or had low vision alleged that this restriction denied them the ability to make meaningful use of Hawaii's services, programs, and activities without their guide dogs. The plaintiff class also argued that separating the dogs from their owners rendered the animals susceptible to irretrievable loss of their training as service animals. The Ninth Circuit agreed, holding that reasonable modifications were necessary to avoid such discrimination unless they would fundamentally alter the nature of the service, program, or activity. Because plaintiffs contended that there were more effective means to prevent the importation of rabies by guide dogs such as a vaccine-based system, the Ninth Circuit sent the

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case back to the district court to determine whether plaintiffs' proposed alternatives were reasonable modifications or fundamental alterations.

In *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006), the court found that a public housing authority did not violate Title II of the ADA after the housing authority refused to allow the tenant to keep snakes, which the tenant maintained were service animals. The tenant provided two letters from his doctor to support his request. The first stated that the tenant had depression and that the snakes were "therapy pets" from which the tenant derived "much comfort and mental benefit." The second letter explicitly stated that the snakes were service animals. After the housing authority received the second letter, it allowed the tenant to maintain the snakes if he provided a declaration that the snakes were necessary and not poisonous or dangerous. The housing authority further required that the tenant keep the snakes in a cage when staff members were in his apartment or when he transported the snakes. The tenant refused to provide the requested declaration and continued to carry the snakes around the housing complex without a cage. The court stated that the housing authority made a reasonable request in asking for additional information to assess potential safety risks, and did not discriminate against the tenant.<sup>17</sup>

In *Lockett v. Catalina Channel Express*, 496 F.3d 1061 (9th Cir. 2007), the Ninth Circuit Court of Appeals affirmed the lower court's decision that a ferry operator's one

time refusal to allow an individual with a service animal in a section of the ferry which had previously been designated as dander-free did not violate the ADA. Prior to Plaintiff's arrival at the ferry, the ferry had received a request from a frequent passenger who claimed to be allergic to animals for a dander-free zone. The ferry designated the Commodore Lounge of the ferry to be that dander-free zone. When the Plaintiff, who is legally blind, sought a ticket with her guide dog for the Commodore Lounge, she was only permitted a general passenger ticket, and could not go into the Commodore Lounge. The ferry had to decide at that moment whether it should expose passengers to animal dander or to ask Plaintiff to ride in the general passenger area. However, two weeks later, the ferry company changed its policy to allow service animals in the Commodore Lounge. The Ninth Circuit determined that the ferry was allowed to make an individualized assessment as to the health and safety risks potentially posed by the presence of Plaintiff's guide dog and that its decision to exclude Plaintiff from the Commodore Lounge that one time was a "reasonable judgment." The Court based its analysis primarily on the portion of the ADA regulations which require public accommodations to "make an individualized assessment, based on reasonable judgment \* \* \* to ascertain: the nature, duration, and severity of the risk."

The health and safety defense has been discussed in numerous cases involving a hospital setting. In its commentary following the September 15, 2010 publication of the ADA regulations, the DOJ stated that

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“...a healthcare facility must also permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. See Centers for Disease Control and Prevention, Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee (June 2003), available at [http://www.cdc.gov/hicpac/pdf/guidelines/eic\\_in\\_HCF\\_03.pdf](http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf) (last visited June 24, 2010). A service animal may accompany its handler to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without taking added

precautions.<sup>18</sup>

All of the cases discussed below occurred before this commentary was published. However, the DOJ’s position has been fairly consistent over the decades.<sup>19</sup> Still, it is possible that some of the cases cited below, in particular those that came before the above-referenced 2003 CDC guidelines, would have a different outcome under the current ADA regulations.

In *Pool v. Riverside Health Services, Inc.*, 1995 WL 519129 (D. Kan. 1995), a Kansas district court held that a hospital did not violate the ADA when it refused to allow a service dog to accompany its owner who uses a wheelchair and who was visiting her fiancé in the hospital. The hospital subsequently adopted a written policy permitting the presence of service animals in public areas, but excluding them from non-public areas such as the emergency room. The court found this policy reasonable based on the hospital’s medical testimony that explained the purpose of the partial exclusion was to safeguard infection control, cross-exposure, and allergic reactions.

In *Smith v. Moorman*, 2002 WL 31182451, (6th Cir. 2002), the Sixth Circuit Court of Appeals held that the Veterans Administration Medical Center did not discriminate based on disability under the ADA by refusing the veteran’s request to keep his dog with him during the veteran’s hospitalization. Without much elaboration, the Sixth Circuit found that the record showed Smith received medical treatment and his disability played no part in the Medical Center’s decision to prohibit the

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dog from staying with him.

Unlike the *Pool* and *Moorman* cases, in *Branson v. West*, 1999 WL 1129598 (N.D. Ill. 1999), amended memorandum opinion and order at 1999 WL 1186420 (N.D. Ill. 1999), an Illinois district court held that a Veterans Administration hospital violated the federal Rehabilitation Act when it refused to permit its employee, a physician with a spinal chord injury, use of service dog while at work. The physician, who became paraplegic following a horseback riding accident, used the service dog primarily to pull her manual wheelchair so the physician would not overuse her upper extremities. The hospital was unable to demonstrate any threat to health or safety because it already permitted seeing-eye dogs in its facility and other Veterans Administration hospitals allowed individuals with disabilities to be accompanied by their service animals except where a significant health risk existed or the animal's behavior became disruptive. The court ordered the hospital to allow the physician use of her service dog. The court further ordered that the hospital refrain from attempting to minimize the presence of the dog unless a qualified medical professional determined with specificity the reason the dog would pose a threat to health or safety in the hospital that a human would not pose.

In *Roe v. Providence Health System-Oregon*, 655 F. Supp. 2d 1164 (D. Or. 2009), a patient with a neurological illness filed suit against a hospital alleging it had violated the ADA with respect to plaintiff's use of her service dog. An Oregon federal district court found that the hospital did not

violate the ADA, but rather that Plaintiff's service animal posed a direct threat to health and safety of hospital patients, visitors, and staff because of the dog's "putrid odor" which resulted in patient transfers, the indication that the dog may have had an infection, the dog's size and growling response which made it difficult for staff to assist patient in and out of her bed, and the fact that there was not a handler always available to relieve the dog while Plaintiff was bedridden. Hospital staff had offered a compromise by requesting that the patient close her door while the dog was present and offered to provide a HEPA filter, but Plaintiff refused. In addition to dismissing Plaintiff's case, the Court further enjoined her from bringing any service animal to the hospital if she planned to return there.

## WHO IS RESPONSIBLE FOR THE SUPERVISION AND CONTROL OF THE SERVICE ANIMAL?

In *Rose v. Springfield Greene County Health Dept.*, 668 F. Supp. 2d 1206 (W.D. Mo. 2009), a Missouri federal district court addressed whether the monkey of Plaintiff caused a direct threat to public health. The court found that defendant engaged in an extensive inquiry to make an individualized assessment as to whether the monkey was a direct threat including consultation with an infectious disease physician. Among the health risks noted were the high risk of zoonotic disease transmission and the risk of violent unpredictable behavior.<sup>20</sup>

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A service animal must be under the control of its “handler” and have a harness, leash, or other tether, unless the handler is unable to use one because of a disability or such use would interfere with the animal’s safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler’s control by way of voice control, signals, or other effective means. 28 C.F.R. §36.302(4); 28 C.F.R. §35.136(d). While the type of “control” a handler has may vary, it is clear that no entity is responsible for the care or supervision of a service animal. 28 C.F.R. §36.302(5); 28 C.F.R. §35.136(e).

In a case brought under the Montana Human Rights Act, the defendant employer argued that it was not responsible for providing non-skid floors for the benefit of an employee’s service animal that had repeatedly slipped and fell on the employer’s tile floors. The employer argued that providing this accommodation was akin to providing care for the animal, which the ADA did not require. The Montana Supreme Court rejected this argument, distinguishing an individual’s obligation to supervise and care for her own service animal from an employer’s obligation to provide a reasonable accommodation to a qualified employee who needed such accommodation so she could use her service animal effectively in the workplace. See *McDonald v. Dept. of Environmental Quality*, 2009 WL 1680784 (Sup. Ct. Mon., June 17, 2009). See also *K.D. v. Villa Grove Community Unit Sch. Dist. No. 302*, 2010 WL 3450075 (Ill. App. 4 Dist.)(August 24, 2010)(Illinois Appellate court held school district violated Illinois

School Code by denying a student with autism the use of service animal at school functions.).

## WHAT IF A STATE LAW CONFLICTS WITH THE ADA REGARDING SERVICE ANIMALS?

The ADA must prevail over any conflicting state law unless the state law provides greater or equal protection for individuals with disabilities than is provided by the ADA. For example, in *Green v. Housing Authority of Clackamas County*, the court determined that an Oregon state law requiring hearing assistance animals to be on an orange leash was more restrictive than the ADA’s requirements for service animals. In that instance, the ADA prevailed over Oregon law. Because plaintiff’s hearing assistance dog still met the ADA definition for service animal even though it did not have an orange leash, the housing authority was required to modify its policy to allow for plaintiff’s use of the dog.

## IF A COURT FINDS A BUSINESS VIOLATED THE ADA, WHAT KIND OF RELIEF CAN BE GRANTED?

The remedy for an ADA violation under Title III is injunctive relief, which means the court can order the defendant to do (or refrain from) an action like modifying a policy or providing an auxiliary aid or service. Monetary damages are not recoverable under Title III unless the United States brings the complaint or the

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defendant consents to pay damages in a settlement agreement. Remedies for an ADA violation under Title II are the same as those provided under Section 504 of the Rehabilitation Act, including injunctive relief and the possibility of compensatory damages. Attorney's fees for the prevailing party are available under both Title II and III. Moreover, complaints may be made through the U.S. Department of Justice which may seek civil penalties.

In *Thompson v. Dover Downs, Inc.*, 2003 WL 22309082 (D. Del. 2003), a Delaware district court dismissed a service animal case brought under Title III of the ADA because the plaintiff's only requested relief was \$500,000 in punitive damages and an apology. Since punitive damages are not an available remedy under Title III, and Plaintiff only sought punitive damages, the court dismissed the case. However, individuals have had some success obtaining monetary relief by bringing ADA complaints through the U.S. Department of Justice.<sup>21</sup> For example, when the Department initiated a suit in *USA v. Top China Buffet, Inc.*, Cause No. IP 02-1038 C Y/F (S.D. Ind. 2003), a consent order required the defendant restaurant to pay monetary damages to the plaintiff family and a monetary penalty to the DOJ as a result of the restaurant's refusal to modify its "no pets" policy to permit the family's service animal in the restaurant.<sup>22</sup> In another government initiated settlement agreement, a taxi company agreed to send a complainant 25 free fare certificates after one of its drivers refused to pick up the complainant and her service animal.<sup>23</sup> Monetary damages and other relief may also be granted pursuant to other state and

federal laws.<sup>24</sup>

Individuals with disabilities and their service animals may have additional protections and remedies under other laws including the Fair Housing Act, the Rehabilitation Act of 1973, the Air Carrier Access Act, as well as state civil<sup>25</sup> and criminal<sup>26</sup> statutes and local anti-discrimination ordinances. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d. 1173 (11th Cir. 2007) is one case brought under both the ADA and Section 504 of the Rehabilitation Act. In *Sheely*, a mother who is legally blind and uses an 80 pound Labrador retriever as a guide dog filed a lawsuit against an imaging center after she was prohibited from accompanying her minor son to a "holding area" outside of his examination room. The defendant's stated policy prohibited animals beyond the waiting room. At time the lawsuit was filed, no written service animal policy was in place. Plaintiff sought declaratory and injunctive relief under Title III of ADA, as well as non-economic compensatory damages under Section 504 of the Rehabilitation Act. Nine months into the lawsuit, defendant wrote and implemented a Service Animal Policy, then moved for summary judgment claiming that Plaintiff's ADA claim was moot. The federal district court agreed with the defendant and found plaintiff's claims for injunctive and declaratory relief moot because defendant stopped its challenged behavior by voluntarily creating a service animal policy. However, the Eleventh Circuit Court of Appeals<sup>27</sup> reversed, holding that defendant can't claim mootness merely to deprive the court of jurisdiction. The Court further found that defendant's refusal to

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accommodate plaintiff was not an isolated incident, but rather the result of “years-long policy created by MRN’s owner, communicated through MRN’s ranks, and enforced on multiple occasions, sometimes vehemently.” *Id.* at 1185. The Court further noted that Defendant’s implementation of a policy was not based on a change of heart, but rather a desire to avoid liability. *Id.* at 1186. The Court also determined that defendant could not demonstrate absolutely that its alleged wrongful behavior could not reasonably be expected to reoccur even with a new written policy. The Court further determined, as a matter of first impression, that under the Rehabilitation Act, emotional (non-economic) damages<sup>28</sup> were recoverable and remanded the case back to the federal district court.

## NOTES

1. Equip for Equality Legal Advocacy Director Barry Taylor and Senior Attorney Alan Goldstein assisted in the preparation of this Legal Briefing.
  2. Title III of the ADA governs public accommodations including businesses that serve the public such as restaurants, retail establishments, offices of service providers, taxicab services, and hotels. 28 C.F.R. § 36.101 *et seq.*
  3. Title II of the ADA governs public entities which includes any state and local government, any department, agency, special purpose district, or other instrumentality of a State or State and local government, the National
4. Railroad Passenger Corporation, and any commuter authority. 28 C.F.R. § 35.101 *et seq.*
  5. Because the ADA regulations on service animals are essentially the same for public accommodations under Title 3 and government entities under Title 2, this legal briefing will refer generally to public accommodations and government entities as “entities.” If there is a reason to distinguish the two, such distinction will be noted in the briefing.
  6. The Department of Justice issued updated regulations on service animals on September 15, 2010, which become effective on March 15, 2011. This Legal Briefing is written from the perspective that the regulations are currently effective.
  7. See, e.g., Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and Skyway Group, Inc., d/ b/a Arizona Shuttle Service, Tucson, Arizona: DJ 202-8-36. [www.usdoj.gov/crt/ada/skywayse.htm](http://www.usdoj.gov/crt/ada/skywayse.htm)(In this administrative settlement reached with the US Department of Justice, Arizona Shuttle Service agreed to adopt a new written policy broadening its definition of service animals which was previously limited to seeing eye dogs.)
  8. The ADA similarly states that “the crime deterrent effects of an animal’s presence” is not the type of “work or tasks” that would satisfy the service animal definition. 28 C.F.R. § 36.104; 28 C.F.R. § 35.104.
  9. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,



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bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. It also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2)(A)-(B)

9. See also *Satterwhite v. City of Auburn*, 945 So.2d 1076, (Ala.Crim.App. 2006) (Defendant who was charged with criminal trespass for refusing to leave a bookstore with her dog – who defendant claimed was a service animal - could not invoke the ADA as a defense to her actions because she did not present sufficient evidence during trial that she was a person with a disability as defined by the ADA.)
10. This case was decided before the ADA Amendments Act of 2008 which revised the definition of disability thereby putting the validity of this court's analysis as to whether the Plaintiff had a disability is in question. Under the ADAAA, it is likely that more people will be deemed to have a disability, and therefore, more people will likely be able to get past that part of the service animal analysis.
11. The cited cases in this section were all decided before the Department of Justice published the September 15, 2010 regulations specifically stating what questions may be asked of individuals with alleged service animals. However, the current regulations codify longstanding guidance previously issued by the Department as outlined in two Department publications, Commonly Asked Questions about Service Animals in Places of Business (1996), available at <http://www.ada.gov/qasvc.htm>, and ADA Guide for Small Businesses (1999), available at <http://www.ada.gov/smbustxt.htm>. Therefore, the cited cases are still useful in analyzing the scope of permissible inquiries
12. The Rehabilitation Act of 1973, which applies to programs receiving federal financial assistance, is the predecessor statute to the ADA. Therefore, although this case was not brought under the ADA, the analysis is virtually identical and courts may look to Rehabilitation Act cases for guidance in determining like cases brought under the ADA.
13. See, e.g., Settlement Agreement Under the Americans With Disabilities Act of 1990 Between the United States of America and Budget Rent A Car Systems, Inc., DJ 202-79-16, 202-79-42, and 202-79-50. (1997). <http://www.ada.gov/budget.htm>
14. Mistake or misunderstanding as to an entity's legal obligations is not a defense. See, e.g., *Brown v. Lopez*, 2003 WL 21918587 (Tex.App. 2003), in which a Texas appeals court reversed and remanded a trial court's ruling that "mistake or misunderstanding" was a defense after Plaintiff sued Defendant for failing to allow Plaintiff's service dog in its restaurant. Defendant argued that the waitress never told him that Plaintiff was blind or that his dog was a service animal when the waitress asked him if dogs were allowed in his restaurant. The court found that the "mistake" was

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likely in part was due to lack of training and the fact the restaurant had no policies or procedures in place for accommodating individuals with disabilities.

15. The Ninth Circuit covers the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, and Oregon.
16. The Fifth Circuit covers the following states: Louisiana, Mississippi, and Texas.
17. This case was brought before the ADA regulations were amended to limit the type of animal protected under the Act. Therefore, a snake can no longer be considered a service animal under the ADA even without regard to safety risks. However, a snake might be considered a reasonable accommodation under the Fair Housing Act or other laws which do not place limits on types of animals.
18. See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 CFR Part 36, [CRT Docket No. 106; AG Order No. 3181-2010] RIN 1190-AA44, U.S. Department of Justice, Civil Rights Division, Final rule, Published September 15, 2010, effective March 15, 2011, at page 56272.
19. The DOJ opined in a 1993 technical assistance letter that the presence of a service animal could pose a significant health risk in certain areas within a hospital. In such situations, the DOJ stated that determination of such risk should be based on a decision made by appropriate medical personnel who, upon finding of such risk, should list specific areas where exclusion is appropriate (e.g., intensive care unit), and permit the service animal in all other areas. See DOJ Technical Assistance Letter, Doc. 302, May 10, 1993, Danforth, John C., service animals in hospitals.
20. Under the new ADA regulations, a monkey would no longer be considered a service animal, regardless of whether it posed a direct threat.
21. A number of complaints brought to the U.S. Department of Justice have resulted in settlement agreements requiring defendants to implement a service animal policy, train employees on such policy, pay damages to the aggrieved party, and pay a civil penalty to the U.S. Treasury. Unlike cases brought directly in federal court by an individual Plaintiff under Title III of the ADA, the Department is authorized to seek damages and civil penalties. See, e.g., [www.ada.gov/golden\\_cab](http://www.ada.gov/golden_cab), [www.ada.gov/lehouillier.htm](http://www.ada.gov/lehouillier.htm), [www.ada.gov/blockbuster\\_sa.htm](http://www.ada.gov/blockbuster_sa.htm), [www.ada.gov/sheraton\\_sacramento.htm](http://www.ada.gov/sheraton_sacramento.htm), and <http://www.ada.gov/walmart.htm>.
22. See [www.usdoj.gov/crt/ada/topchina.htm](http://www.usdoj.gov/crt/ada/topchina.htm) for a copy of the Consent Order
23. See, e.g., Settlement Agreement under the Americans with Disabilities Act of 1990 between the United States of America and Yellow Cab Drivers Association, Inc., of Salt Lake City, Utah, DJ 202-77-34 (2003) <http://www.ada.gov/yellocab.htm>
24. While not exactly the type of relief ordinarily sought in a service animal case, in *Doe v. Los Angeles West Travelodge*, 2009 WL 5227898 (C.D. Cal. 2009), a judge ordered defense

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counsel to complete 30 hours of volunteer work with a disability rights organization, including two hours of training on disability bias and/or sensitivity for antagonizing and irritating Plaintiff by repeatedly petting his service dog despite requests that they not do so.

25. For example, in Illinois, its a civil rights violation for a landlord to refuse to sell, rent, negotiate the sale or rental of, discriminate against, require an extra charge, or otherwise make unavailable or deny any property to any person who is blind, hearing impaired, or has a physical disability, because such person uses a guide, hearing, or support dog. 775 ILCS 5/3-104.1. Also, see *K.D. v. Villa Grove Community Unit Sch. Dist. No. 302*, 2010 WL 3450075 (Ill. App. 4 Dist.) (August 24, 2010)(Illinois Appellate court held school district violated Illinois School Code by denying a student with autism the use of service animal at school functions.).
26. For example, in Pennsylvania, an owner, manager, or employee of a public accommodation may be found guilty of violating the Pennsylvania Crimes Code if he or she refuses, withholds, or denies access to an individual with a disability who is using a guide, signal, or service dog, or other aid animal certified by a recognized authority. 18 Pa. C.S.A. § 7325.
27. The Eleventh Circuit Court of Appeals covers the following states: Alabama, Georgia, and Florida.
28. Non-economic or “emotional” damages generally includes monetary compensation for pain and suffering as opposed to economic losses like loss

of wages, medical bills, and damage to property.