



Welcome to the 2010 Legal Issues Webinar Series

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Service Animals and the ADA

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Overview

- Statute and Regulations including new DOJ Title II and III Regulations
- Service Animal Cases
 - ❖ Animal Qualifications - Individually trained to perform work or tasks
 - ❖ The Scope of Proper Inquiries – What can be asked?
 - ❖ Denial of Access
 - Reasonable Modification of “No pet” policies & fundamental alteration.
 - ❖ Direct Threat Defense
 - ❖ Title I Reasonable Accommodation Requirements
 - ❖ DOJ Settlements
 - ❖ Service Animals in Other Contexts
 - Schools (IDEA or § 504 Plans)
 - Housing (Fair Housing Act)
 - Air Travel (Air Carrier Access Act)



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Recent DOJ Regulations on Service Animals



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Service Animals: Recent Title II & III DOJ Regulations - Definitions

- **Definition:** “*Service animal* means 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.”
 - ❖ “Other species of animals ... are not service animals for the purposes of this definition.”
 - **BUT SEE** – Information on Miniature Horses (Info on slide 12)
- **Note:** Prior to the recent regulations, there was no explicit language in Title II pertaining to service animals. (Regs effective 3/15/11).
 - Title II Regulations: 28 C.F.R. §35.104,
http://www.ada.gov/regs2010/titleII_2010/titleII_2010_integrated.htm;
 - Title III Regulations: 28 C.F.R. §36.104,
http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_integrated.htm

DOJ Regulations: Work or Tasks

- **Work or Tasks Performed:** “must be directly related to the handler's disability.”
 - **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... people or sounds,
 - ❖ providing non-violent protection or rescue work,
 - **DOJ Comments:** The term, “non-violent protection” replaces the previous term, “minimal protection” in order to exclude so-called “attack dogs” or dogs with traditional “protection training” as service animals.
- Comments to 28 CFR Part 36 [Page 56266]

DOJ Regulations: Work or Tasks



• More Examples of Work or Tasks Performed:

- ❖ 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.
- ❖ **DOJ Note:** The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

Service Animals: Recent Title II & III DOJ Regulations

“(a) Generally, a [covered entity] shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

- (b) *Exceptions.* A [covered entity] may ask an individual with a disability to remove a service animal from the premises if
- (1) The animal is out of control and the animal's handler does not take effective action to control it; or
 - (2) The animal is not housebroken.”

Note: The term “covered entity” is used to include public entities and places of public accommodation.

Title II: 28 C.F.R. § 35.136 - Service animals;

Title III: 28 C.F.R. § 36.302 - Modifications in policies, practices, or procedures.

Service Animals: Recent Title II & III DOJ Regulations

- (c) *If an animal is properly excluded* - The [covered entity] “shall give the individual with a disability the opportunity to participate... without having the service animal on the premises.”
- (d) *Animal under handler's control*. A service animal shall be under the control of its handler.
- ❖ “... a harness, leash, or other tether, unless either the handler is unable because of a disability ... [or the tether] would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).
- (e) *Care or supervision*. A [covered entity] is not responsible for the care or supervision of a service animal.

Service Animal Regulations



- “(f) *Inquiries*. A [covered entity] shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal.
- A [covered entity] may ask if the animal is required because of a disability and
 - what work or task the animal has been trained to perform.
 - ❖ A [covered entity] shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.
 - ❖ Generally, a [covered entity] may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability
 - (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).”
 - **Note:** This provision incorporates prior DOJ guidance on inquiries.

Service Animal Regulations

- (g) *Access to areas of a [covered entity]* . Access to “all areas.”
- (h) *Surcharges*. A [covered entity] shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets.
- ❖ If a [covered entity] normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

Service Animals Regulations: Miniature Horses



- Only a dog can qualify as a “service animal” under the ADA Regs.
- However, Regs also require that reasonable modifications be made to permit the use of a miniature horse so long as it has been “individually trained to do work or perform tasks for the benefit of the individual with a disability.”
- Entities must consider the following four factors:
 - ❖ The miniature horse’s type, size, and weight and whether the facility can accommodate these features;
 - ❖ Whether the handler has sufficient control;
 - ❖ Whether the miniature horse is housebroken; and
 - ❖ Whether the miniature horse’s presence in a specific facility compromises the legitimate safety requirements that are necessary for safe operation.
- If access is appropriate, the miniature horse is treated as a service animal, (no surcharge, full access, must be under handler’s control, limited inquiry,...).

28 CFR § 36.302(c)(9)(i) and 28 C.F.R. § 35.136(i)(A)

Service Animals: DOJ Comments

- **No size, weight, or breed restrictions:** DOJ declined to have the ADA defer to state regulations so as not to limit federal rights.
- **Other laws:** "... there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's Title III regulations may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHA and the Air Carrier Access Act (ACAA)."
 - ❖ Comments explain that a emotional support animal may be allowed plane access, but not necessarily access to an airport restaurant.

Comments to 28 CFR Part 36 [Page 56240, 56268]



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DOJ Comments – Service Animals and Psychiatric Disabilities

- An animal that is, "trained to 'ground' a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability.
- It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal.
- The process must have two steps: Recognition and response.
 - ❖ E.g., if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event."

Comments to 28 CFR Part 36 [Pages 56267, 56268]



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New Webinar Feature – Surveys

- The new software allows voting by participants.
- **Query:** Will these regulations be helpful to covered entities?
Please vote Yes or No.
- **Query:** Will these regulations be helpful to people with disabilities?
Please vote Yes or No.



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Service Animal Cases



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Service Animal Cases: Animal Qualifications – *Pruett*

Pruett v. Arizona, 606 F. Supp. 2d 1065 (D.Ariz. 2009)

- Person with diabetes had a chimpanzee service animal.
- Previously, she used to use a Tonkean ape trained to retrieve sugar and press her medical alert button.
- After the ape died, no service animal for one year.
- Claimed the chimpanzee was needed to monitor her blood sugar levels and retrieve sugar.
 - ❖ There was no evidence the animal was trained to do this.
- **Court:** No proof she needed the chimpanzee to do individualized tasks for her that she could not do on her own – therefore it was not a service animal.
- **Note:** Chimpanzees are not considered service animals under the new regulations.



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Service Animal Cases: Animal Qualifications – Timberlane



Timberlane Mobile Home Park v. Washington State Human Rights Commission, 122 Wash. App. 896, 95 P.3d 1288 (2004)

- Resident expelled from a mobile home park due her dog, Spicey.
 - ❖ Brought under state law that required that a service animal be “trained for the purpose of assisting or accommodating a ... disability.”
- 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.
- **Court:** Spicey, was not trained, therefore not a service animal.
 - ❖ Spicey was indistinguishable from a family pet.



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Service Animal Cases: Animal Qualifications & Police Action - *Baughner*

Baughner v. City of Ellensburg, WA, 2007 WL 858627 (E.D. Wash. 3/19/07)

- 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 with autism, panic attacks, a head injury, asthma, and is hard of hearing, stated that Bun was a service animal that alerted her to taking medications.
- A dispute followed, the police arrived, and 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.
 - ❖ Plaintiff also claimed that the police failed to enforce her right to bring a service dog into a public accommodation.



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Service Animal Cases: Animal Qualifications & Police Action - *Baughner*

- **Court:** Dismissed her claim as she failed to demonstrate that her dog was trained to do any work or tasks.
- Defendant claimed Plaintiff needed evidence of personal training, outside of obedience training, and actual observance of the animal's learned behavior.
 - ❖ **Court:** Documented evidence is not required but there "must be some evidence to set a service animal apart from an ordinary pet."
 - ❖ 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.
 - ❖ Plaintiff needed to demonstrate "something more than merely being a presence that provides comfort, companionship or interaction."



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Service Animal Cases: Animal Qualifications & Proper Inquiries –

Vaughn v. Rent-A-Center, 2009 WL 723166 (S.D. Ohio)

- An individual with MS and a spinal-chord injury was denied entry with his service animal Hannibal, who he alleged helped him walk and stand.
- Citing *Baughner*, Rent-A-Center filed a motion for summary judgment arguing that there was no evidence Hannibal was individually trained.
- **Court:** Motion denied as this case distinguishable from *Baughner*.
 - ❖ 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.



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Service Animal Cases: Animal Qualifications – Miller

Miller v. Ladd, 2010 WL 2867808 (N.D. Cal July 20, 2010)

- Service animal access denied by The Alibi Restaurant & Lounge
- Plaintiff researched service animals, identified a shelter dog suited for service animal work, trained Sati individually and with professional help, and trained Sati to alert her to panic, anxiety, and sleep attacks.
 - ❖ She also had a prescription for a service animal.
- **Court:** Sati was a service animal.
 - ❖ Noted that courts “recognize that federal regulations do not set forth any standards or requirements specifying the amount or type of training that an animal must receive to qualify as a service animal, nor the type or amount of work a service animal must provide for the disabled person.”
 - ❖ The relevant question is whether the animal helps the disabled person perform tasks to ameliorate the ADA disability.



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Service Animal Cases: Proper Inquiries – Costco



Grill v. Costco Wholesale Corp.,

312 F. Supp. 2d 1349 (W.D. Wash. 2004)

- Private membership club had a written policy requiring:
 - ❖ Employees told to look for ID of service animal status.
 - ❖ If no ID, employee's asked what task or function the animal performed that its owner could not.
 - ❖ Policy prohibited employees from asking about the disability.
- Court upheld policy - referenced *DOJ Brief & Guidance*.
 - ❖ **Note:** Portions of prior DOJ Guidance may no longer be valid under the new Regulations.

Thompson v. Dover Downs, Inc., 887 A.2d 458 (DE Super. Ct. 2005)

- Patrons should answer appropriate questions (training).



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Service Animal Cases: Proper Inquiries – Costco II

DiLorenzo v. Costco Wholesale Corp., 515 F.Supp.2d 1187 (W.D. Wash. 2007)

- Court again discussed the same policy upheld in *Grill v. Costco*.
- Puppy (Dilo) wore a vest that said "service animal in training."
- Store manager 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.
 - ❖ She was told that Dilo would be denied access in the future.
- Co. lawyer sent a letter asking for more info about training & tasks.



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Service Animal Cases: Proper Inquiries – Costco II

DiLorenzo v. Costco Wholesale Corp., 515 F.Supp.2d 1187 (W.D. Wash. 2007)

- Plaintiff was not asked to state her disability, or show proof of training.
 - ❖ Plaintiff argued that Costco's questioning constituted harassment.
- **Court:** It was "highly questionable whether [the dog in question] was a service animal."
 - ❖ However, the manner in which such questions may violate the law even if the animal is not a service animal.
 - ❖ In this case, no ADA violation as the inquiries were reasonable and not harassment.



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Service Animal Cases: Improper Denial & Inquiries – Stamm

Stamm v. New York City Transit Authority, 2006 WL 1027142 (E.D.N.Y. 2/7/06)

- Woman with PTSD and who was hard of hearing alleged the New York Transit Authority (NYTA) violated ADA Title II 43 times.
 - ❖ Alleged denial of access, improper inquiries, and other violations.
 - ❖ Due to prior problems, plaintiff had ID #001 issued by NYTA and NYTA printed a brochure about access for service animals.
 - ❖ Still problems - 35 occurrences after brochure printed.
- Bus driver did not recognize ID, "took the bus out of service and told the passengers that they would have to take the next bus..."
 - ❖ Plaintiff called police & showed them the NY State Law allowing access.
 - ❖ After a delay, the driver agreed to take plaintiff to her destination.



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Service Animal Cases: Improper Denial & Inquiries – *Stamm*

- Another bus driver said she had to sit up front with her service animal.
 - ❖ When plaintiff refused, the driver parked the bus and told the other passengers that the bus “could be on its way if [plaintiff] would comply.”
 - As a result, other passengers became verbally abusive (happened 2+ times).
 - ❖ Driver took the bus out of service until ordered to continue by dispatcher.
- A subway conductor “deliberately and repeatedly” closed the door on her to deny access even after being informed that the dog was a service dog.
 - ❖ Fearing separation, plaintiff blocked the door open with her foot and boarded.
 - ❖ Conductor “demanded to know” plaintiff’s disability and “what the dog did for her.”
 - ❖ NYTA investigation took so long that union rules precluded disciplinary action.
- **Court:** Title II claim survives Motion to Dismiss although there is no 14th amendment violation (Sec. 1983) (substantive due process).
- **Note:** This case points out the need for ADA training to ensure compliance.



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ADA Regulations: Reasonable Modifications & Fundamental Alteration

The Fundamental Alteration Defense

Title II - 28 C.F.R. § 35.130(b)(7)

- A public entity shall make reasonable modifications in policies, practices, or procedures... to avoid discrimination..., unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.



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ADA Regulations: Reasonable Modifications & Fundamental Alteration

The Fundamental Alteration Defense

Title III – 28 C.F.R. § 36.302 Modifications in policies, practices, or procedures.

- (a) General. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.
- **Note:** It is the entity's burden to allege and prove the existence of a fundamental alteration - The outcome of this defense will depend on the distinct facts of each case.

Service Animal Cases: Fundamental Alteration – *Lentini*



Lentini v. California Center of the Arts, Escondido, 370 F.3d 837 (9th Cir. 2004)

- CA Center for the Arts refused access to a patron whose service dog previously yipped or barked at intermissions.
 - ❖ Dog did not disturb performances and barking was rare.
 - ❖ No patron ever complained & no significant disturbance.
- Center argued fundamental alteration of services – *i.e.*, the animal would deter other patrons from attending and artists from appearing.

Service Animal Cases: Fundamental Alteration – *Lentini*

- **Court:** Center to make a reasonable modification not “to exclude a service animal who has made a noise on a previous occasion, even if such behavior is disruptive, if the noise was intended to serve as a means of communication for the benefit of the disabled owner or if the behavior would otherwise be acceptable ... if engaged in by humans.”
- Fundamental alteration - “intensively fact-based inquiry”
- Mere speculation of potential future disturbances was undercut by evidence that demonstrated otherwise.

Service Animal Cases: Fundamental Alteration – *Proffer*

Proffer v. Columbia Tower, 1999 WL 33798637 (S.D. Cal. 1999)

- Tenant with paraplegia did not have a right to keep dogs in an apartment to train as service animals.
- Landlord did allow her to use her own service animal.
- **Court:** No ADA violation as the additional dogs were not trained to perform tasks for the tenant’s own benefit.
- **Note:** Animals in training raise two issues:
 - (1) Is the animal already trained to perform tasks?
 - (2) Is the animal performing tasks for the benefit of a person with a disability?
- **Note:** Animals in training are generally allowed under the FHA if being trained by a person with a disability.

Service Animal Cases: Fundamental Alteration – *Green*

Green v. Housing Authority of Clackamas County, 994 F. Supp. 1253
(D. Or. 1998)

- Tenant who was deaf sought exception to “no pets” rule for 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.
 - ❖ County Housing Authority threatened eviction claiming the tenant could not produce any verification or certification of training by a “highly skilled individual.”
- **Court:** County Housing Authority violated the Rehabilitation Act by threatening to evict the tenant.
 - ❖ 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.



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Service Animal Cases: Fundamental Alteration – *Johnson*



Johnson v. Gambrinus Co./Spoetzel Brewery, 116 F.3d 1052 (5th Cir. 1997)

- A brewery refused to permit an individual who is blind to take a public brewery tour with his guide dog.
 - ❖ 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.
- **Court:** Brewery must modify its policies to ensure that individuals using service animals have the “broadest feasible access” to the brewery tour consistent with the brewery’s safe operation.
 - ❖ The Food, Drugs, and Cosmetics Act did not prevent the brewery from allowing guide dogs on at least part of the tour
 - ❖ Risk of contamination posed by the few foreseeable service animal visits was minimal, if not altogether unlikely or impossible in certain locations.
 - ❖ Money damages awarded under state service animal law.



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Service Animal Cases: Fundamental Alteration – *Lockett*

Lockett v. Catalina Channel Express, 496 F.3d 1061 (9th Cir. 2007)

- A ferry operator received a request from a frequent passenger who claimed to be allergic to animals for a dander-free zone.
 - ❖ Ferry designated the Commodore Lounge as the dander-free zone.
- The ferry operator refused to allow an individual who was blind and used a service animal access to the Commodore Lounge (were admitted to the ferry).
 - ❖ No advance notice - the ferry had to decide “on the spot.”
- Two weeks later, the ferry company changed its policy to allow service animals in that area.



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Service Animal Cases: Fundamental Alteration – *Lockett*

- **Court:** The ferry was allowed to make an individualized assessment as to the health and safety risks potentially posed by guide dog.
 - ❖ Its decision to exclude Plaintiff from lounge was a “reasonable judgment.”
- **Query:** Is it relevant if this was the only lounge on the ferry?
- **Query:** Should the ferry have been required to check if the allergic passenger was on board before denying access?
Please vote Yes or No.



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Service Animal Issues: Direct Threat Regulations



- Neither government entities nor public accommodations are required to permit access... 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, 35.104.

Service Animal Issues: Direct Threat Regulations

- 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)
- A person who poses a significant risk to others will not be "qualified," if reasonable modifications... will not eliminate that risk.
28 C.F.R. § 35.104 (Title II).

Service Animal Cases: Direct Threat – *Crowder*

Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996)

- Under Hawaii law, any person who entered Hawaii with a dog, cat, or other carnivorous animal had to have their animal quarantined for 120 days.
 - ❖ Policy intended to prevent rabies.
 - ❖ Upon written request, a person with a disability could stay in the State without cost in the quarantine station, a remote area within Hawaii.
- Class of plaintiffs with blindness & low vision alleged that this denied them meaningful use of Hawaii's services, programs, & activities.
 - ❖ Class also argued that separation rendered the animals susceptible to irretrievable loss of their training as service animals.
- **Court:** Policy violated Title II of the ADA absent reasonable modifications
 - ❖ Unless modifications caused a fundamental alteration.
 - ❖ Possible Modification: A vaccine-based system
 - ❖ Case remanded to the district court to determine whether plaintiffs' proposed alternatives were reasonable modifications or fundamental alterations.

Service Animal Cases: Direct Threat – *Brown*

Brown v. Cowlitz, 2009 WL 4824010 (W.D. Wash)

- State judge properly barred a dog that was not controlled properly and that had a significant odor causing individuals to leave the courtroom.
- Judge previously allowed Plaintiff to bring her dog to court, but later requested proof of disability and need for a service animal.
 - ❖ Court found these inquiries were permissible in light of "number of factors that led to legitimate suspicions" that the dog was not a service animal.
- **Note:** State Courts are covered by Title II of the ADA. Federal Courts are not covered by the ADA or Rehabilitation Act although their own Administrative Office has standards for accommodations for communication Access. See http://disabilityrightsca.org/pubs/502601.htm#_Toc504901173

Service Animal Cases: Direct Threat – *Roe*

Roe v. Providence Health System-Oregon, 655 F. Supp. 2d 1164 (D. Oregon 2009)

- **Court:** It was a direct threat for a hospital patient to use a service dog with a “putrid odor” that resulted in patient transfers.
- The dog’s size and growling response made it difficult for staff to treat patient and a handler was not always available.
 - ❖ Dog may have had an infection as well.
- Hospital offered a compromise by requesting that patient close her door when the dog was present and offered to provide a HEPA filter
 - ❖ Plaintiff refused this offer.
- Court dismissed Plaintiff’s case, and enjoined her from bringing any service animal to the hospital if she returned.
 - ❖ Court noted that the hospital had a history of accommodating service animals.



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Service Animal Hospital Cases

Pool v. Riverside Health Services, Inc., 1995 WL 519129 (D. Kan. Aug. 25, 1995)

- **Court:** Hospital policy permitting the presence of service animals in public areas, but excluding them from non-public areas such as the emergency room was reasonable.

Smith v. Moorman, 2002 WL 31182451, (6th Cir. Sept. 20, 2002)

- **Court:** VA Medical Center did not discriminate by refusing the veteran’s request to keep his dog with him during the veteran’s hospitalization.
 - ❖ Without much elaboration, the court found that Smith received medical treatment and his disability played no part in the Medical Center’s decision to prohibit the dog from staying.
- **Query:** Does it matter if the disability was not part of the decision?



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Service Animal Cases: Direct Threat – *Branson*

Branson v. West, 1999 WL 1129598 (N. D. Ill. 1999)

- VA hospital violated the federal Rehab Act when it refused its employee-physician with a spinal chord injury use of service dog while at work.
- The physician used the service dog primarily to pull her manual wheelchair so the physician would not overuse her upper extremities.
- Hospital was unable to demonstrate any threat to health or safety
 - ❖ Already permitted seeing-eye dogs except where a significant health risk existed or the animal's behavior became disruptive.
- **Court:** Ordered the hospital to allow the physician use of her service dog.
 - ❖ Also 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.



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Service Animal Hospital Cases



Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (7th Cir. 2007)

- Medical facility violated the ADA by preventing an individual with blindness from bringing her service dog into the MRI suite during her son's appt.
- MRI facility modified its no-animal policy soon afterwards.
- The court held that plaintiff's suit was not made moot by the new policy.
- **Note:** Demonstrates the association provision of the ADA.



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Service Animals in Hospitals: Recent DOJ Guidance

- DOJ commentary from the recent ADA Regulations indicate that DOJ follows the guidance of the Centers for Disease Control and Prevention (CDC).
- "...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."
 - ❖ Access should be allowed in: areas as admissions & discharge offices, E/R, inpatient & outpatient rooms, examining & diagnostic rooms, clinics, rehabilitation therapy areas, cafeteria & vending areas, pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without taking added precautions.

See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 CFR Part 36 at page 56272.



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Service Animals in Hospitals: Recent DOJ Guidance



- ❖ There are some exceptions, e.g., Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.
- ❖ Per CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, e.g., operating rooms & and burn units.

See, CDC Guidelines for Environmental Infection Control in Health-Care Facilities, available at:

http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf.



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Service Animal Cases: Possible Title I Issue – *McDonald*

McDonald v. Dept. of Envir. Quality, 2009 WL 1680784 (Mont. Sup. Ct. 6/17/09)

- Case under the Montana Human Rights Act
- Employer claimed it was not responsible for providing non-skid floors for an employee's service animal that slipped and fell on the employer's tile floors.
 - ❖ Employer argued that providing this accommodation was akin to providing care for the animal, which the ADA did not require.
- 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.
- **Query:** Must an animal meet the definition of a "service animal" to serve as a reasonable accommodation under Title I of the ADA?
Please vote Yes or No.



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Service Animals and Title I Issues

- See <http://www.eeoc.gov/policy/docs/accommodation.html>, indicating that leave may be a reasonable accommodation for training a service animal.
 - ❖ Does this imply that animals that don't meet the service animal definition might be permitted in the workplace?
- What should an employer do if one employee needs a service animal, but another employee is allergic to it or has asthma?
 - A. Permit the service animal anyway.
 - B. Deny access for the service animal.
 - C. Try to separate the workers even if one worker may need to be relocated.
 - D. Try to find an alternative effective reasonable accommodation.

NY Times article about an EEOC filing on this issue at:
http://www.nytimes.com/2010/05/11/us/11spice.html?_r=1



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DOJ Lawsuit – Consent Decree

U.S. v. Lehouillier & Assoc., P.C., 1:09-cv-02582-MSK-MEH

- DOJ Complaint alleges Title III discrimination when a couple and their attorney were denied access to a law office for a deposition due to using a service animal.
- Defendant was informed one month before the incident about the service animal, and plaintiff offered to hold the deposition at a nearby location rather than Defendant's law office.
- **Consent Decree:**
 - ❖ Prohibits association discrimination, utilizing eligibility criteria that screen out people with disabilities, failing to make reasonable modifications, and retaliation or intimidation.
 - ❖ Contained specific info about proper inquiries.
 - ❖ Must allow access to all public areas.

Consent Decree found at: <http://www.ada.gov/lehouillier.htm>



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DOJ Lawsuit & a Consent Decree

U.S. v. Lehouillier & Assoc., P.C., 1:09-cv-02582-MSK-MEH

- **Consent Decree:**
 - ❖ Attend a two hour program of educational training regarding ADA.
 - ❖ Pay a total \$30,000 in monetary damages to the person with a disability and \$10,000 to her husband.
 - ❖ Post notice about service animal access.
 - ❖ Adopt and distribute a policy allowing access
 - ❖ Only a manager can deny access - can be based on direct threat, BUT:
 - Barking alone is not a direct threat.
 - Direct threat does not exist if the service animal's owner takes prompt, effective action to control the animal.
 - Must be based on current, not past experience and an individualized assessment.



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Service Animals – DOJ Settlements



- A Wal-Mart Store denied access to service animals.
 - ❖ Modify policy to allow access.
 - ❖ Post prominent notice that service animals are welcome
 - ❖ Train and certify each employee about the service animal policy
 - ❖ Pay \$150,000 into a fund to settle claims
 - ❖ Implement a grievance policy.
 - **Note:** Most settlements contain similar requirements.
 - Log Cabin Restaurant Case (mobility assistance animal).
 - ❖ Owner apologized & agreed to educate his staff about ADA.
 - ❖ Agreed to contact other professionals in his field & trade org.
 - ❖ Make a donation to a charitable organization for service animals.
- 20 service animal settlements listed at <http://www.ada.gov/settlemt.htm>



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Service Animals – DOJ Settlements

- Shoney's Restaurant Case
 - ❖ Must modify policy to allow access.
 - ❖ If unsure if an animal is a service animal, may discreetly inquire if the animal is a service animal, needed for a disability.
 - ❖ May not ask a customer to identify his or her disability.
 - ❖ May not ask for or demand proof of service animal certification.
- Arizona Shuttle Service Case
 - ❖ Must transport all service animals, not just "seeing eye dogs."
- Travel Inn Case
 - ❖ Cannot charge a \$10 fee for a service animal.
- Budget Rent-A-Car Case
 - ❖ Cannot put animals in kennels for shuttle service – policy must avoid separation.



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Service Animals in Other Contexts

Fair Housing Act, Schools (IDEA and § 504), & Airlines (ACAA)



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Service Animals in Fair Housing Context

- Fair Housing Act, 42 U.S.C. 3601
- Problems typically arise with denial of housing and failing to make reasonable accommodations.
 - ❖ Landlords insisting on "no pet" rule despite being told the animal serves needs of disabled
 - ❖ Landlords refusing to modify "no pet" the rule upon request
 - ❖ Asks for additional fees or deposits
 - ❖ Usually HUD has not otherwise considered "no dog" or "no animal" statements to be discriminatory.
 - ❖ Unlawful to inquire into the nature and severity of the disability.
 - ❖ May verify the nexus between disability and the service animal.
 - HUD has permitted landlords to ask for a doctor's note to show nexus.



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Service Animals in Fair Housing Context: Grounds for Rejecting Service Animals

- Disability-neutral reasons
 - Threat to the health and safety.
 - ❖ Cannot be based on speculation or bias but must be based on objectively reasonable grounds.
 - Damage to property
 - Undue economic burden
 - Fundamental alteration
- Other Recent Issues**
- Emotional support animals
 - Other tenants suffer from allergy or asthma

Service Animals in Public School Education



- IDEA, ADA, and Rehabilitation Act may apply.
- IDEA - Free Appropriate Public Education (FAPE) - Does student need the animal to benefit from education?
- ADA/Rehab Act
 1. Evidence of individual training
 2. Animal must be suited to ameliorate the unique problems of the student with a disability.

34 CFR §104.4(b)

Service Animals in Public School Education: State Law

- May also be state law, e.g., IL law
 - ❖ Service animals. Service animals such as guide dogs, signal dogs or any other animal individually trained to perform tasks for the benefit of a student with a disability shall be permitted to accompany that student at all school functions, whether in or outside the classroom. (105 ILCS 5/14-6.02) (from Ch. 122, par. 14-6.02). (Source: P.A. 87-228.)
 - ❖ See recent court decision interpreting this law broadly in *K.D. ex rel. Nichelle D. v. Villa Grove Community Unit School Dist. No. 302 Bd. of Education*, 2010 WL 3450075 (Ill. App. Ct. 4th Dist., August 24, 2010).

Service Animals in Public School Education: DOE/OCR Process

DOE/OCR Process

- Determine if an animal is a service animal
 - ❖ If so, service animal attends school unless the animal poses an unacceptable risk to the health and safety of others.
- If animal is not a service animal
 - ❖ District must hold an IEP/504 meeting to determine if the animal should attend school as an element of the student's free appropriate public education (FAPE) and/or as a necessary related aid or service.

51 IDELR 142 (California 2008), Bakersfield (CA) City School District, Office for Civil Rights, Western Division, San Francisco (California) 09-07-1220 January 25, 2008.

Service Animals in the Air (Air Carrier Access Act)



14 C.F.R. § 382.55 - Miscellaneous provisions

- Service animals may accompany someone with a disability and sit in any seat absent obstructions.
- Possible verification: Identification cards, other written documentation, harnesses or markings on harnesses, tags, or credible verbal assurances.
- Carriers shall not restrict the movements of people with disabilities in terminals or require them to remain in a holding area or other location.

14 C.F.R. § 382.37(c) - Seat assignments

- If a service animal cannot be accommodated at the seat location of the qualified individual with a disability whom the animal is accompanying, the carrier shall offer the passenger the opportunity to move with the animal to another seat location as an alternative to requiring that the animal travel with checked baggage.

Service Animals in the Air (Air Carrier Access Act)



14 C.F.R. § 382.117

- For emotional support or psychiatric service animals: Passenger must provide you current documentation (i.e., no older than one year) on the letterhead of a licensed mental health professional specifically treating the passenger's mental or emotional disability (e.g., psychiatrist, psychologist, licensed clinical social worker) stating the following:
 - (1) The passenger has a mental or emotional disability listed in the DSM IV;
 - (2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the destination;
 - (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and
 - (4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.

General ADA Resources

- **National Network of ADA Centers:** www.adata.org;
800/949 –4232(V/TTY)
- **Equip For Equality:** www.equipforequality.org;
800/537-2632 (Voice); 800/610-2779 (TTY)
- **U.S. Department of Justice, ADA Info:** www.ada.gov
- **U.S. Department of Education:** www.ed.gov
- **U.S. Department of Transportation:**
<http://www.dotcr.ost.dot.gov/asp/airacc.asp>



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January 19, 2011
Top 10 ADA Cases of 2010



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<http://www.surveygizmo.com/s/404240/service-animals-november-10-2010>



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Service Animals and the ADAAA

The End

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