Service Animals and the ADA

By Equip for Equality[1]

Service animals assist people with many different disabilities, as service animals can be trained to do everything from interrupt impulsive behaviors for someone with a mental health disability to carry items for someone with a mobility disability to detect an oncoming seizure for someone with epilepsy. Although there is a long history of people with disabilities using service animals, the laws about service animals remain unknown to many. Nearly every day, there is another news story about an individual with a disability denied access to a store or a restaurant due to a service animal. These stories are becoming even more prevalent as veterans returning from active military service use service animals as they transition back into civilian life.

The Americans with Disabilities Act ("ADA") protects the rights of individuals with disabilities who use service animals in certain settings, including state and local government services (Title II), places of public accommodation (Title III), and employment (Title I). This Legal Brief reviews the ADA's statutory language, implementing regulations, case law and important settlement agreements to provide all stakeholders information about service animals and the ADA.

The ADA does not apply to every setting where individuals with disabilities need access to a service animal, such as in private housing or on airplanes. There are other laws, such as the Fair Housing Act and the Air Carrier Access Act, that apply to these settings and which are outside the scope of this Legal Brief.[2]

I. Service Animals Under Titles II and III

The rules regarding service animals under Titles II[3] and III[4] are largely identical so will be addressed together in this Legal Brief. The U.S. Department of Justice ("DOJ") is the federal agency charged with enforcing and promulgating regulations about these two titles.

Titles II and III require covered entities to modify policies when necessary for people with disabilities.[5] This general provision has long been interpreted to require the modification of a "no pets" policy to permit the use of service animals. This requirement became explicit, however, when DOJ published updated regulations pertaining to Titles II and III, which became effective on March 15, 2011.[6] The DOJ regulations provide great detail about the right of people with disabilities to use service animals, including a

revised definition of service animals, strict restrictions on the questions covered entities are permitted to ask individuals about their service animals, and limitations on imposing surcharges. As analyzed below, these rules are among the most straightforward of any in the ADA.

The general rule is that people with disabilities who use service animals are "permitted to be accompanied by their service animals in all areas … where members of the public … are allowed to go."[7] For example, the National Federation of the Blind of California brought a class action lawsuit against Uber after a number of its members were refused service by UberX drivers due to their service animal. The plaintiffs presented stories where drivers shouted "no dogs" and left passengers without transportation. In 2015, the court denied Uber's motion to dismiss,[8] permitting this case to move forward and, in 2016, the court approved a class settlement.[9] As a result, Uber has implemented a more robust enforcement mechanism removing drivers who refuse to transport service animals, is requiring drivers to expressly confirm that they understand their legal obligations to transport rides with service animals, and has implemented an enhanced complaint response system to track data.

Moreover, unlike other aspects of the ADA where there is an analysis of whether an alternative accommodation would be effective, under Titles II and III of the ADA, this is not permitted when it comes to a service animal. In one recent case, *Alboniga v. School Board of Broward County, Florida*, a school denied a student's request to bring his service animal to school.[10] The student had multiple disabilities, but had a service animal who was trained to detect and respond to seizures. The school district denied the student's request and asserted, among other reasons, that specially-trained teachers could (and did) provide the same seizure detection and care as the student's service dog. After acknowledging the truth of this contention, the court rejected it, opining that if this outcome were permitted, it would be "akin to allowing a public entity dictate the type of services a disabled person needs in contravention of that person's own decisions regarding his life and care."[11]

A. Definition of Service Animal

Before 2010, there was debate about what type of animals could be service animals under the ADA. In 2010, DOJ redefined "service animal," and determined only *dogs* were service animals. The current definition of "service animal" under Titles II and III of the ADA 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."[12] Through this definition, DOJ confirmed that "*other species of animals*, whether wild or domestic, trained or untrained, *are not service animals* for the purpose of this definition."[13] *See Newberger v. Louisiana Dep't of Wildlife & Fisheries*, 2012 WL 3579843, at *4 (E.D. La. Aug. 17, 2012) (analyzing

whether the plaintiff's monkey qualified as a service animal under the pre-2011 definition, while noting that "[t]oday, the regulations specifically limit service animals to dogs"). While not called service animals, DOJ regulations carve out an exception for miniature horses, which is discussed below.

In addition to being a dog, a service animal must do work or perform tasks for a person with a disability. While the work or tasks performed must directly relate to the handler's disability, the ADA does not limit the kind of work or tasks that can be performed.[14] For instance, the DOJ recently reached a voluntary compliance agreement with Mercy College after a security officer restricted a student veteran from going to class with his service animal and stating that "service dogs are only allowed for blind people."[15]

Examples of work or tasks include, but are not limited to the following examples[16]:

- 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.

For this reason, the ADA does not protect the rights of individuals who use untrained animals. For example, in *Davis v. Ma,* an individual with a back impairment was restricted from entering a Burger King restaurant with his 13-week old puppy, who was in training to be a service animal.[17] The court concluded that while the puppy was learning how to assist the individual with balance and mobility, at the time of his exclusion, the puppy was not a service animal as he had not been individually trained yet, other than basic obedience training. It is important to remember, however, that although not covered by the ADA, many state and local laws do protect the rights of individuals with service animals in training.[18]

There is often confusion about the difference between a "service animal" and an animal that provides other assistance, such as an emotional support, well-being, comfort, or companionship animal. The former is a service animal protected by the ADA, while the

latter is not. The difference is that emotional support (and similar) animals do not do work or perform a task.[19] 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." For similar reasons, DOJ regulations provide 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.[20] *See also Lerma v. California Exposition & State Fair Police*, 2014 WL 28810, at *3 (E.D. Cal. Jan. 2, 2014) ("A dog which provides the owner with a sense of security and comfort does not meet the statutory definition of a service animal."). Emotional support animals, under certain situations, are permitted in housing and on airplanes under the Fair Housing Act and Air Carrier Access Act, issues outside the scope of this brief.[21]

However, that does not mean that a dog with a propensity or pre-disposition to perform certain tasks is *not* a service animal; rather, with additional training, this type of animal might be the ideal service animal. In *Cordoves v. Miami-Dade County*, the plaintiff's service animal, Shiloh, was able to detect when she was about to have a panic attack, and would assist the plaintiff by jumping on or pawing her, nudging her chin, applying a pressurized licking massage, and calling the plaintiff's daughter over to assist.[22] In this case, after the plaintiff and her daughter testified that Shiloh possessed a natural ability to detect and respond to panic attacks, the defendants argued that Shiloh was not individually trained and instead, simply had the natural ability to do certain tasks. The court disagreed, finding that the plaintiff's daughter had trained Shiloh and that Shiloh's predisposition to perform certain tasks was not a disqualifying factor but rather just had bearing on what kind of individual training was required.

ADA regulations also make clear that the training requirement does not need to be met by a professional trainer. While this was clarified in the amended regulations, this principle is well-established in case law dating back at least twenty years. *See, e.g., Bronk v. Ineichen,* 54 F.3d 425, 430-31 (7th Cir.1995) (federal law does not require the service animal to be trained at an accredited training school); *Green v. Housing Auth. of Clackamas Co.,* 994 F.Supp. 1253, 1256 (D. Oregon 1998) ("there is no federal ... certification process or requirement for hearing dogs, guide dogs, companion animals, or any type of service animal."); *Vaughn v. Rent-A-Center*, 2009 WL 723166 (S.D. Ohio 2009) (finding individual with multiple sclerosis and spinal-cord injury sufficiently established that he trained his service animal to help him in and out of chairs, cars, beds, and showers); *Miller v. Ladd*, 2010 WL 2867808 (N.D. Cal. July 20, 2010) (finding dog to be sufficiently trained because individual with anxiety and PTSD researched service animals, identified a dog with the assistance of the shelter's staff that was most suited for service animal work, trained the dog individually as well as with professional help to alert her to panic, anxiety, and sleep attacks).

Notably, service animals can be any breed of dog. During DOJ's process of creating a revised definition of service animal, some commenters suggested that DOJ should defer to local laws restricting the breeds of dogs, but DOJ rejected this suggestion. Whether service animals are limited to specific breeds, and whether cities can restrict certain service animals through local ordinance, were issues examined by a court in *Sak v. City of Aurelia, Iowa*.[23] In *Sak*, following a stroke, a disabled police officer had his pit bull mixed, Snickers, trained to serve as a service animal. Snickers was trained to perform a number of physical tasks, including assisting the plaintiff with walking, balancing, retrieving items, and assisting when the plaintiff fell from his wheelchair. After working with Snickers for years, the plaintiff and his wife moved to a small city in Iowa. The city had a new ordinance restricting new pit bulls, and ordered the plaintiff to board Snickers outside of city limits. This caused significant problems for the plaintiff, as he regularly fell from his wheelchair and could not return and had great difficulty with his physical needs. The plaintiff filed a lawsuit and asked the court to enter a preliminary injunction permitting him to have Snickers. The court entered a preliminary injunction for the plaintiff and against the city. In so doing, the court deferred to the DOJ's position against restricting service animals to certain breeds, both because DOJ was the "authoritative response" and because "the reasons offered … are persuasive."[24] The court also rejected the City's claim that the plaintiff could substitute another service animal, as Snickers had been individually trained to address the plaintiff's needs for over two years.

B. Verification by Covered Entity

Covered entities are able to confirm whether an individual's dog is a service animal by asking 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.[25] DOJ regulations also confirm that covered entities cannot ask any other questions about the nature or extent of an individual's disability and, may not even ask these two questions when it is "readily apparent that an animal is trained to do work or perform tasks for an individual with a disability."[26] For an example, it may be readily apparent if the covered entity witnesses a service animal picking up an item for an individual who uses a wheelchair or assisting with navigation for someone who is blind.

If the covered entity limits its inquiry to these two questions, and the individual refuses to answer these questions, the covered entity does not violate the ADA by refusing to accommodate the service animal. One example of this principle comes from *Lerma v. California Exposition*, where a police officer asked an individual who entered the state fair with a puppy to identify the tasks the dog had been trained to perform.[27] In response, the individual stated: "all I have to tell you is it's a service dog and I'm going to sue you."[28] The officer also asked the owner whether the dog was house broken, and

how it would relieve itself, to which the owner reiterated her threat of litigation. The court concluded that the officer's questioning was permissible and due to the individual's resistance, the office could not reasonably ascertain whether the puppy was a service animal so did not violate the law by excluding the animal. Notably, during the plaintiff's deposition, she admitted that her dog was not individually trained beyond basic obedience training, though she "needed the dog to be able to get through the day" and because her children wanted her to bring the dog.[29]

It is also clear that covered entities may not require an individual to provide documentation, such as proof of certification, training or licensure.[30] Unsurprisingly, policies and practices that require proof of certification or similar documentation have been found to violate the ADA, even before the amended regulations became effective. For example, in an older case, *Green v. Housing Authority of Clackamas County,* the court found a housing authority to violate Title II of the ADA, in addition to the Rehabilitation Act and the Fair Housing Act, by requiring verification or certification that the dog had been trained as a hearing assistance animal by a certified trainer or other "highly skilled individual," even though the tenant had provided information about the specific tasks that the dog did to assist him, such as alerting him to door knocks, the smoke detector, ringing telephone and cars arriving in the driveway.[31] Similarly, the DOJ entered into a settlement agreement with The Learning Clinic (TLC) after TLC required individuals who submit documentation about their child's service animal's training, in addition to other records such as certificate of liability insurance and signed indemnification form.[32] Per the settlement, TLC will implement a comprehensive service animal policy, and will no longer require documentation of the animal's training.

A related question is whether a plaintiff, when bringing an ADA lawsuit, must plead details about the type of training conducted. One recent case confirmed that a plaintiff need not provide specific details of a dog's training to bring an ADA claim in court. In *Riley v. Board of Commissioners of Tippecanoe County*, an individual with PTSD who used a service animal to assist him with balance support, mobility assistance, and calming during episodes of PTSD was barred from entering a local courthouse.[33] In his ADA complaint, the plaintiff pled that his dog was individually trained without providing additional detail. The defendants filed a motion to dismiss and argued that the plaintiff needed to provide information concerning the training methodology, but the court disagreed, finding plaintiff's complaint to sufficiently state a plausible claim. Plaintiffs must, however, plead enough facts to show what work or task the dog was trained to perform. *See also Beadle v. Postal*, 2017 WL 1731683 (D. Haw. May 2, 2017) (finding plaintiff failed to plead that his dog was a service animal because his complaint did not state the work or tasks his dog was trained to perform).

C. Prohibition on Surcharges

The ADA prohibits covered entities from asking or requiring individuals 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.[34] This rule was confirmed in the recent case *Johnson v. Yashoda Hospitality, Inc.*[35] In *Johnson*, a patron who is deaf wanted to stay at a Florida hotel with his service animal, but the hotel's employee advised the patron that he would have to pay a $20 pet fee per night. The patron explained that the service animal was not a pet, but the hotel still refused to waive the fee. The court confirmed that hotels may not charge pet fees for service animals under the ADA.

Similarly, because individuals are not required to provide medical documentation, hotels and other covered entities may not require a pet deposit if the individual refuses to provide medical documentation. The DOJ resolved a case on this issue after receiving a complaint from a hotel patron who was required to either provide medical support for his service animal or pay a $50 pet fee.[36] The DOJ reached an agreement with Budget Saver Motel prohibiting the company from imposing surcharges, as well as requiring medical documentation for patron's service animals.

D. Responsibility of Handler

The ADA provides that 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.[37] 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.[38]

There have been a number of recent cases analyzing what it means to handle a service animal, specifically in the school environment. The case law, thus far, suggests that a student can maintain control by tethering the dog to a wheelchair, but that a student must be able to issue commands without assistance, at least most of the time. A key case on this issue, *United States v. Gates-Chili Central School District*, was brought by the DOJ.[39] In this case, the student sought to attend school with her service animal without also providing a handler. She had control over the animal because it remained tethered to her wheelchair. Although she was unable to untether the dog, the parties disputed whether the student could issue commands independently. Said the court, if the only assistance the student needed was help untethering and occasional reminders to issue commands, then the student was in control. On the other hand, if school personnel were required to actually issue commands to the service dog, then the student was not in control, and the family would therefore need to supply a handler.

In *Alboniga v. School Bd. of Broward County, Florida*, a 2015 case, the mother of a student with multiple disabilities brought suit so that her son could use a service animal at school without having to provide a separate handler for the dog.[40] The student's service animal was trained to detect and respond to seizures. The student's mom asked the school to permit a staff member to accompany the student outside of the school premises when the animal needed to urinate. The school board objected to this request and argued that it did not need to provide this level of assistance and that the student could not act as handler due to his disabilities. The court disagreed and explained that the student could, in fact, act as a handler as the service dog was tethered to the student's wheelchair, was fully trained, and remained with him throughout the day. According to the court, this constituted control over the animal and the student acted as handler. The court also found it reasonable to have the school assist the student with respect to the dog's urination, given that all other elements of daily care, such as feeding, cleaning and exercise, were performed by the plaintiff outside of school hours. It also found the requested accommodation to be one to assist the student, not the animal.

In contrast, in *Riley v. School Administrative Unit #23*, the court denied a student's request for a preliminary injunction to force the school to accommodate the student's service animal without a separate handler.[41] Here, the court found that the student could not act as handler and could not exercise control. The student did not use a wheelchair, so the animal could not be tethered to him. He walked with assistance and required hand-under-hand guidance, making him unable to safely hold or grab the leash. Further, the student was unable to communicate verbally, so he also could not exercise control over the animal in that manner. In addition to the issues with respect to handling, the court found the accommodations requested by the student and his family were too broad. The student had requested that the school district provide someone to issue commands to the service dog and hold the dog's leash when it accompanied the student. The court concluded that the student's parents' request effectively to be asking for a handler, which was not required under the ADA.

E. Defenses

Although the general rule is that 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,[42] there are limited exceptions. Specific to service animals, covered entities need not permit a service animal who is "out of control and the animal's handler does not take effective action to control it" or who "is not housebroken."[43] However, 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.[44] Additionally, there are general defenses to the ADA and modifications need not be made if the entity can demonstrate that: (1) 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. Most of the case law about these defenses have been about fundamental alteration and direct threat.

1. Fundamental alteration

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. Because fundamental alteration is a defense, it is the covered entity's burden to allege and prove the existence of a fundamental alteration. The outcome of such defense will depend on the distinct facts of each case.

The bar to establish a fundamental alteration is a high one, as illustrated in a recent case about service animals in psychiatric facilities. In *Tamara v. El Camino Hospital*, an individual sued a hospital after it refused to allow her service dog to accompany her during stays in its psychiatric ward.[45] The hospital had a blanket ban on service animals, which was based on a memorandum concerning the Rehabilitation Act that was issued before the ADA. The memo provided that the presence of an animal would fundamentally alter the hospital because a psychiatric setting is "notoriously an area of risk for agitation and stress."[46] It also noted that the presence of an animal would negatively impact some of its therapies, and that patients may be sedated and would fixate on the animal. The court found that while a service animal might "affect" the psychiatric ward, it would not "fundamentally alter its nature."[47] The court was also persuaded by evidence presented by the patient that she had frequently observed an occupational therapist bringing a pet dog into the psychiatric ward, and that psychiatric wards in other hospitals allowed for the presence of service dogs. In light of all of these facts, the court found that the hospital failed to show that the presence of a service dog in a psychiatric ward was likely to fundamentally alter the nature of the facility.

Older cases have also analyzed whether a service animal's presence would cause a fundamental alteration in other settings, including musical performances or breweries. In *Lentini v. California Center for the Arts, Escondido,* the California Center for the Arts refused to allow a patron with quadriplegia to continue attending music performances with her service dog because the dog had previously yipped or barked during the intermission of two concerts.[48] The district court found for the patron and 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 made and 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."[49] The Center appealed and 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. The Ninth Circuit affirmed the decision, and 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.[50] The Center's speculation of potential future disturbances was undercut by evidence that demonstrated otherwise.

Further, in *Johnson v. Gambrinus Company/Spoetzel Brewery*, the issue was whether it would pose a fundamental alteration for a patron to bring his service animal on a public brewery tour.[51] The brewery argued that it would and that the Food, Drug, and Cosmetics Act prevented the brewery from modifying its blanket "no animals" policy. Both the district court and the Fifth Circuit Court of Appeals disagreed, and found the brewery violated the ADA by refusing access to the individual with a service animal. It stated that the Food, Drug, and Cosmetics Act did not prevent the brewery from allowing service animals 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.

2. Direct Threat

As a general matter, covered entities need not engage in an action that amounts to a direct threat, and this defense applies to service animals as well.[52] "Direct threat" is defined as a significant risk to the health or safety of others that cannot be reduced or eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.[53] 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."[54]

Like all situations where a covered entity attempt to show direct threat, covered entities asserting that a service animal would pose a direct threat must base their conclusion on actual risks rather than speculation, stereotypes, or generalizations about individuals with disabilities.[55] 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.

Before the ADA clarified that only dogs could be service animals, courts analyzed whether various species of animals posed a direct threat. For example, in *Rose v. Springfield Greene County Health Department,* a Missouri federal district court assessed whether the monkey of the plaintiff caused a direct threat to public health.[56] The court found that the defendant had engaged in an extensive, 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. *See also Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006) (finding public housing authority did not violate Title II by refusing to permit a tenant to keep snakes and was unable to assess the potential safety risk without additional information that the tenant refused to provide).

Now that service animals are limited to dogs, most cases about direct threat are about service animals in the hospital setting. In its commentary to the 2010 revised ADA regulations, the DOJ stated:

> "…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 (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.[57]

Consistent with direct threat principles, determinations of direct threat cannot be made on generalized speculation. In *Tamara v. El Canino Hospital*, discussed above, the Hospital also argued that the patient's service animal posed a direct threat defense in a psychiatric ward, an assertion rejected by the court for a number of reasons.[58] First, the court noted that the Hospital did not conduct an individualized assessment. Second, although the Hospital argued that having a dog in the psychiatric unit would be unsafe because its harness could be used as a weapon and the dog might dangerously upset patients, the court noted that all of these arguments were based on generalized speculation as opposed to the individual circumstances of the case. Finally, the court noted that the patient had provided individualized facts relating to her service dog's training, harness, and layout of the psychiatric ward that challenged the generalizations made by the Hospital.

However, when there is viable information about the safety of a dog, the direct threat defense can be established. In *Roe v. Providence Health System-Oregon*, a patient with a neurological illness filed suit against a hospital.[59] An Oregon federal district court found that the hospital did not violate the ADA, but rather that the 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 the plaintiff was bedridden. The court also noted that the 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 she refused. In addition to dismissing the plaintiff's case, the court further enjoined her from bringing any service animal to the hospital if she planned to return there.

F. Miniature Horses

Although the definition of service animal under Titles II and III of the ADA includes only dogs, the ADA also requires covered entities under Titles II and III to make reasonable modifications to their no-pets policy 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."[60] The regulations also provide covered entities a list of four factors to consider when determining whether such a modification is reasonable.[61]

Such factors are:

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.

The most comprehensive analysis about the right to use miniature horses comes from a Sixth Circuit opinion, *Anderson v. City of Blue Ash*.[62] In this case, the family's horse was trained to assist the daughter, who had multiple disabilities, in the backyard, by steadying her while walking and helping her stand after a fall. The city had ordinance banning farm animals and the plaintiff was convicted of violating that ordinance. The plaintiff defended her conviction by arguing that the miniature horse was permitted under the ADA and Fair Housing Act, and also brought an affirmative lawsuit against the City for failing to modify its policies to permit the miniature horse.

The Sixth Circuit Court of Appeals issued a positive decision for the family. One issue analyzed was the sufficiency of the horse's training. The court confirmed that the plaintiff did not need to hold a training certification to demonstrate that the horse was individually trained; here, the plaintiff testified that she trained the horse to assist her daughter in overcoming her mobility limitations by steadying her as she walked and helping her to stand after she fell. The City also argued that the horse does not assist with the individual's activities of daily living, but the court rejected this argument as well, explaining that there is nothing in the law that requires an animal to be needed in all aspects of daily life or outside the house to qualify for a reasonable modification under the ADA.

The Sixth Circuit also reviewed the four factors set forth in the ADA regulations. The lower court had construed these factors against the plaintiff, noting that her house was located on a lot smaller than that typically required for a miniature horse; the horse was not housebroken; and there had been health complaints lodged against the plaintiff, suggesting that the horse would compromise a legitimate threat to public safety concerns. This was reversed on appeal, as the plaintiff raised factual dispute about her house's ability to accommodate her horse by asserting that her horse was uniquely suited for a smaller yard and that her yard included a shed which would comfortably accommodate her horse. The court questioned the relevance of whether the horse was house broken given that the horse would always be outside. Finally, the court found that the plaintiff demonstrated that previous complaints about the health and cleanliness of the horse did not accurately reflect the current condition of her residence. In particular, earlier complaints were largely related to other animal waste which was no longer present, and not only were there no longer active complaints against the plaintiff, but the plaintiff's current neighbors had signed letters of support.

II. Service Animals Under Title I

Applicants and employees with disabilities also have rights under the ADA. However, because Title I—not Titles II and III—applies to applicants and employees, questions about service animals in the workplace must be analyzed under a different legal framework. The applicable regulations for applicant and employees, Title I's regulations, however, come from the Equal Employment Opportunity Commission ("EEOC") instead of the DOJ. This is a point that causes much confusion among employees and employers alike.

Under Title I, an employee's need for a service animal is considered a reasonable accommodation.[63] As a result, whether the service animal is required in any specific situation depends on standard reasonable accommodation principles, including whether the request is reasonable, whether there is an alternate, effective accommodation that would address the employee's needs, and whether the request would pose a fundamental alteration or undue hardship.

Under the ADA, reasonable accommodations are modifications or adjustments to (1) a job application process to enable a qualified applicant to be considered for employment; (2) the work environment, or manner or circumstances a job is customarily done that enables the individual to perform the essential functions of the job; or (3) enable an individual to enjoy equal benefits and privileges of employment.[64]

There has been only a small number of Title I cases about an employee's need for a service animal in the workplace. Many of these cases address whether the employee is entitled to a service animal as a reasonable accommodation if she can perform the essential functions of her job without her service animal. In an older but important service animal case, *Branson v. West,* a physician who used a wheelchair requested permission to use her service animal at work.[65] She explained that her manual wheelchair caused her to experience fatigue and stress on her body, and her service animal could help by pulling her wheelchair, opening doors and retrieving items. The hospital refused, calling the animal a "lifestyle choice and not a necessity." In defense of the physician's lawsuit, the hospital asserted that the physician was able to perform her essential functions without a service animal so it was not required to grant her request. The court disagreed. It found for the physician and said that reasonable accommodations also permit people with disabilities to work in "reasonable comfort."[66] The hospital also presented no evidence that the physician's service animal created an undue financial or administrative hardship.

This very issue was also discussed in a 2017 case, *Clark v. School District Give of Lexington and Richland Counties.*[67] In *Clark*, a school district refused to permit a

teacher with mental health disabilities to bring her service animal to school. The district also argued that reasonable accommodation was not required because the teacher was able to perform the essential functions of her job without the service animal. The court questioned whether the teacher truly could perform her job duties without the dog in light of past performance concerns, it also noted that the teacher could prevail "if a reasonable accommodation would allow her to enjoy 'equal benefits and privileges' of employment as are enjoyed by other similarly situated employees without disabilities." It then quoted the following from another case: "[D]efendant argues that it is not required to provide plaintiff reasonable accommodation because she can perform her essential job duties without any accommodation. The court concludes that defendant perceives its obligations too narrowly. To be sure, an employer has a duty to provide reasonable accommodations that enable a disabled employee to perform essential job functions. But, that is not the employer's only duty. If the employee needs reasonable accommodation to enable her 'to enjoy equal benefits and privileges of employment,' the employer is obligated to provide it as well."[68] *See also Equal Employment Opportunity Com'n v. AutoZone, Inc*., 2008 WL 4418160 (D. Ariz. 2008) (rejecting employer's defense that it had no duty to accommodate customer service representative who requested to bring his guide dog to work based on the fact that the employee could perform the essential functions of his job without any accommodation).

Issues about service animals in the workplace are likely to become more prevalent as veterans return from active duty. In one recent case, *Alonzo-Miranda v. Schlumberger Technology Corp.*, a veteran with a service animal to help with his PTSD requested to bring his service animal to work.[69] This request was delayed for six months. This case went before a jury, who found for the veteran and awarded him nearly $30,000 in compensatory damages and lost overtime wages.

Unlike Titles II and III, employers may seek reasonable medical documentation when making this determination, so long as the employee's disability and need for a service animal is not obvious. For instance, in *Edwards v. EPA*, the employee wanted to bring a puppy to work as a reasonable accommodation, but was not permitted to do so.[70] During the interactive process, the employee provided a note from his doctor that disclaimed ability to predict whether dog would be effective and said: "go for it! It certainly cannot hurt."[71] As a result, the court concluded that the employer's refusal did not violate the ADA because the plaintiff failed to present objective evidence that bringing his untrained dog to work would have been an effective means of resolving his stress.

Unlike Titles II and III, it is possible that an untrained puppy could be a reasonable accommodation as the law its currently unsettled as to whether the DOJ's definition of service animal extends to Title I as well. The definition discussed above comes from the

DOJ and not the EEOC. The EEOC has not defined "service animal" so it could be possible for an employee may request to bring an emotional support or assistance animal to the workplace as a reasonable accommodation.

In addition to permitting a service animal in the workplace in the first instance, it may be a reasonable accommodation to make changes to the workplace to ensure a safe and appropriate environment for a service animal. For instance, in *McDonald v. Department of Environmental Quality*, a case under state law that is substantially similar to the ADA, the 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.[72] 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.

Conclusion

The ADA has clear and specific protections about the use of service animals in certain circumstances. Despite the clear requirements, many businesses fail to modify their policies to permit service animals. Perhaps one reason for the confusion is the number of different laws that apply to the rights of people with disabilities who use service or other assistance animals, and even the differences between Title I and Titles II and III of the ADA. However, given the increasing prevalence of service animals in our country, it is critical for all ADA stakeholders to understand their rights and responsibilities about including service animals in their establishments, programs/activities, and workplace.

---

[1] This Legal Brief was updated in 2017 by Barry C. Taylor, Vice President of Civil Rights and Systemic Litigation, Rachel M. Weisberg, Staff Attorney and Manager, Employment Rights Helpline, and Jordan Silver, Contract Attorney, Equip for Equality. This Brief was originally written in 2010 by Sarah Price, Staff Attorney, with assistance from Barry C. Taylor and Alan Goldstein, Senior Attorney, Equip for Equality. Equip for Equality is the protection and advocacy system for the State of Illinois, and is providing this information under a subcontract with Great Lakes ADA Center funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant number 90DP0091-02-00).

[2] To learn more about the right to service animals under the Fair Housing Act and the Air Carrier Access Act, see the following resources: (1) U.S. Department of Transportation, Service Animal Matrix, https://www.transportation.gov/sites/dot.gov/files/docs/P3.SA_.HUD%20Matrix.6-28-6.pdf; (2) U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF; (3) Service Animals and Emotional Support Animals, ADA National Network, https://adata.org/publication/service-animals-booklet

[3] Title II governs public entities, including any state and local government, any department, agency, special purpose district, or other instrumentality of a State or State and local government, the National Railroad Passenger Corporation, and any commuter authority. 28 C.F.R. § 35.101 *et seq*.

[4] Title III governs public accommodations, including businesses that serve the public such as restaurants, retail establishments, service providers, and hotels. 28 C.F.R. § 36.101 *et seq*.

[5] 28 C.F.R. § 35.130(b)(7)(i)(Title II); 28 C.F.R. § 36.302(a)(Title III).

[6] 28 C.F.R. § 35.101 *et seq*. (Title II); 28 C.F.R. § 36.101 *et seq*. (Title III).

[7] 28 C.F.R. § 35.136(g)(Title II); 28 C.F.R. § 36.302(c)(7)(Title III).

[8] *National Federation of the Blind of California v. Uber Technologies, Inc.*, 103 F.Supp.3d 1073 (N.D. Cal. 2015).

[9] *National Federation of the Blind of California v. Uber Technologies, Inc.*, Settlement agreement available at: http://dralegal.org/case/national-federation-of-the-blind-of-california-et-al-v-uber-technologies-inc-et-al/

[10] *Alboniga v. School Bd. Of Broward County, Fla.*, 87 F.Supp.3d 1319 (S.D. Fla. 2015).

[11] *Id*. at 1341.

[12] 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III).

[13] *Id*.

[14] *See*, *e.g*., Consent Decree, United States v. Days Inn and Conference Center Tulsa, 14-cv-148 (N.D.Okla. Feb. 6, 2015), available at www.ada.gov/days_inn_cd.htm (Company agreed to adopt a new written policy providing examples of broad range of tasks service animals provide).

[15] Voluntary Compliance Agreement between the United States and Mercy College, available at www.ada.gov/mercy_college_sa.html (April 29, 2016).

[16] 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III).

[17] *Davis v. Ma,* 848 F.Supp.2d 1105, 1115 (C.D.Cal. 2012).

[18] *See, e.g*., Service Animal Access Act, (720 ILCS 5/48-8)(Illinois state law ensuring protections for both individuals with disabilities who use service animals and trainers who are training service animals).

[19] 28 C.F.R. § 35.104 (Title II); 28 C.F.R. § 36.104 (Title III).

[20] *Id*.

[21] To learn more about the right to service animals under the Fair Housing Act and the Air Carrier Access Act, see the following resources: (1) U.S. Department of Transportation, Service Animal Matrix, https://www.transportation.gov/sites/dot.gov/files/docs/P3.SA_.HUD%20Matrix.6-28-6.pdf; (2) U.S. Department of Housing and Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF; (3) Service Animals and Emotional Support Animals, ADA National Network, https://adata.org/publication/service-animals-booklet

[22] *Cordoves v. Miami-Dade County*, 92 F.Supp.3d 1221 (S.D. Fla. 2015).

[23] *Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026 (N.D. Iowa 2011).

[24] *Id*. at 1043-44.

[25] 28 C.F.R. §35.136(f) (Title II); 28 C.F.R. §36.302(6) (Title III).

[26] *Id.*

[27] *Lerma v. California Exposition*, 2014 WL 28810 (E.D. Ca. Jan. 2, 2014).

[28] *Id*. at *4.

[29] *Id*. at *5.

[30] 28 C.F.R. §35.136(f) (Title II); 28 C.F.R. §36.302(c)(6) (Title III).

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

[32] Settlement Agreement, United States and The Learning Clinic. Available at: www.ada.gov/tlc.htm (March 25, 2013).

[33] *Riley v. Board of Commissioners of Tippecanoe County*, 2016 WL 90770 (N.D. Ind. Jan. 06, 2016).

[34] 28 C.F.R. §35.136(h) (Title II); 28 C.F.R. § 36.302(c)(8) (Title III).

[35] *Johnson v. Yashoda Hosp., Inc.*, 2016 WL 6681023, at *2 (M.D. Fla. Nov. 14, 2016).

[36] Settlement Agreement between the United States and Budget Saver Corp., D.J. No. 202-22-36 (Jan. 27, 2012), available at: www.ada.gov/budget_motel_settle.htm

[37] 28 C.F.R. §35.136(d) (Title II); 28 C.F.R. §36.302(4) (Title III).

[38] 28 C.F.R. §35.136(e) (Title II); 28 C.F.R. §36.302(5) (Title III).

[39] *United States v. Gates-Chili Central School District*, 198 F.Supp.3d 228 (W.D.N.Y. 2016).

[40] *Alboniga v. School Bd. Of Broward County, Fla.*, 87 F.Supp.3d 1319 (S.D. Fla. 2015).

[41] *Riley v. School Administrative Unit #23*, 2015 WL 9806795 (D.N.H. Dec. 22, 2015).

[42] 28 C.F.R. § 35.136(a) (Title II); 28 C.F.R. § 36.302(c)(1) (Title III).

[43] 28 C.F.R. § 35.136(b)(2) (Title II); 28 C.F.R. § 36.302(c)(2) (Title III).

[44] 28 C.F.R. §35.136(c) (Title II); 28 C.F.R. §36.302(c)(3) (Title III).

[45] *Tamara v. El Camino Hospital*, 964 F.Supp.2d 1077 (N.D. Cal. 2013).

[46] *Id*. at 1084.

[47] *Id*.

[48] *Lentini v. California Center or the Arts, Escondido,* 370 F.3d 837 (9th Cir. 2004).

[49] *Id*. at 842.

[50] *Id*. at 845.

[51] *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.3d 1052 (5th Cir. 1997).

[52] 28 C.F.R. §35.139(a) (Title II); 28 C.F.R §36.208(a) (Title III).

[53] 28 C.F.R. §35.104 (Title II); 28 C.F.R. §36.104 (Title III).

[54] 28 C.F.R. §35.139(b) (Title II); 28 C.F.R §36.208(b) (Title III).

[55] 28 C.F.R. §35.130(h) (Title II); 28 C.F.R §36.301(b) (Title III).

[56] *Rose v. Springfield Greene County Health Dept.*, 668 F. Supp. 2d 1206 (W.D. Mo. 2009).

[57] 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.

[58] *Tamara v. El Canino Hospital*, 964 F.Supp.2d 1077 (N.D. Cal. 2013).

[59] *Roe v. Providence Health System-Oregon*, 655 F. Supp. 2d 1164 (D. Or. 2009).

[60] 28 C.F.R. § 35.136(i)(1)(Title II); 28 CFR § 36.302(c)(9)(i)(Title III).

[61] 28 C.F.R. § 35.136(i)(2)(Title II); 28 CFR § 36.302(c)(9)(ii) (Title III).

[62] *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015).

[63] 29 C.F.R. Pt. 1630, App., §1630.2(j)(1)(vi) (reasonable accommodations "certainly" includes the use of a service animal).

[64] 29 C.F.R. § 1630.2(o)(1).

[65] *Branson v. West,* 1999 WL 1129598 (N. D. Ill. May 11, 1999).

[66] *Id*. at FN 10.

[67] *Clark v. School District Give of Lexington and Richland Counties*, 247 F. Supp. 3d 734 (D.S.C. 2017).

[68] *Id*. (quoting *Merrill v. McCarthy*, 184 F. Supp. 3d 221, 238 (E.D.N.C. 2016)).

[69] *Alonzo-Miranda v. Schlumberger Tech. Corp*., 2015 WL 3651830, at *1 (W.D. Tex. June 11, 2015).

[70] *Edwards v. EPA*, 456 F. Supp. 2d 72 (D.D.C. 2006).

[71] *Id*. at 79, 101.

[72] *McDonald v. Department of Environmental Quality*, 2009 MT 209, 351 Mont. 243, 214 P.3d 749 (2009).