

Can I Bring My Dog With Me? How to Prevent Assistance Animal Fraud Without Violating Disability Laws

Consider a recent trip to the airport. Animals, especially dogs, seem omnipresent. Beyond service animals assisting passengers with disabilities, there has been a surge of emotional support animals (ESAs) making headlines. Additionally, an increasing number of airports now offer therapy animal programs. Do service animals, therapy animals,¹ and ESAs have equal access rights? In short, no. This article provides an overview of legislation concerning support animals to empower attorneys and proprietors to prevent service animal fraud while complying with anti-discrimination laws.

Right of Public Access & Commercial Entities

The Americans with Disabilities Act (ADA), as implemented by the Department of Justice (DOJ), requires government and commercial entities to “modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” American canine researcher Bonnie Bergin coined the term “service animal” when testifying before Congress in support of the Act; however, as originally enacted in 1990, the ADA contained no definition of the term.

The DOJ issued its first definition of service animals, with no species limitation, in its 1991 regulations. Nearly 20 years later, the DOJ revamped the regulations limiting service animals to one species; specifically, “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.”²

The Guide Horse Foundation, however, persuaded the DOJ to carve out a limited exception for miniature horses. An entity

may take into consideration the size, weight, and limited flexibility of the miniature equine when determining whether to accommodate a service horse, but entities are prohibited from imposing size, weight, or breed limitations—the ADA trumping any local breed restriction ordinances—for service dogs.

Whether horse or dog, the animal must be trained “to do work or perform tasks.” The DOJ regulation clarified “the provision of emotional support, well-being, comfort, or companionship [does] not constitute work or task for the purposes of this regulation.” Thus, ESAs and therapy animals *do not* qualify for right of access pursuant to the ADA. The key for public access is not whether the animal’s presence brings comfort but whether the animal is trained to respond. For example, psychiatric service animals can assist individuals with PTSD by grounding them in time and place by nudging or moving the individual to a safe location until the episode subsides.

Although service animals must be trained by definition, the ADA prohibits entities from requiring proof of training or certification since the animal may be trained by a professional or the handler. Because Tennessee’s law conditioned public access on the presentation of “credentials issued by an accredited school for training dog guides”, the legislature amended TCA § 62-7-112 in 2013, to comport with the ADA. (Tennessee’s statute authorizes access for service animals in training unlike the ADA.)

Verification of Service Animal & Basis for Exclusion

Service animals’ right of public access has limitations. When an individual presents her service animal, entities may ask two questions: (1) “Is this a service animal that is required because of

(continued on page 8)

a disability?” and (2) “What work or task has the animal been trained to perform?”

If a patron cannot provide a credible response to those questions, the animal may be barred entry. If the animal is denied access, the patron must be given the option to procure goods or services without the animal’s presence as the exclusion applies to the animal, not to the individual.

Animals also may be denied entry if their presence constitutes “a fundamental alteration as to the nature of the service, program, or activity” of the covered entity—the classic example being zoo areas where predators to dogs are housed.³ Barking may be deemed a fundamental alteration depending how the entity treats loud crowds or crying babies.

Additionally, the DOJ clarified in 2010, that entities may exclude service animals where the service animal fails to meet certain behavioral standards; specifically, if an animal is not housebroken or well-controlled. Service animals are to be kept on a leash or tether unless doing so interferes with the animals’ ability to perform its work or task; should that be the case, the animal still must be under control by voice, signals, or other effective means. An animal wandering away from its table at a restaurant encroaching on the space of other patrons, for example, is not under the control of the handler.

Housing & Reasonable Accommodations for Assistance Animals

Only service dogs (and sometimes mini equines) qualify for right of public access under the ADA; however, the DOJ recognizes other types of support animals may be appropriate to assist an individual inside her home. The Helping Hands “Monkey College,” for example,



Winnie Belle Wetzel-Haley
Owner: Eleanor (Ellie) Wetzel

has trained capuchin monkeys since 1979, to assist individuals with motor impairments.

The Department of Housing and Urban Development (HUD), therefore, employs a different standard for determining whether an animal may legally live in housing with a “no pets” policy,⁴ and uses the term “assistance animal”⁵ as an umbrella category for service animals and ESAs. Per HUD: “An assistance animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms of a person’s disability.”⁶ HUD provides no species limitation nor does it require assistance animals be trained or certified. Two inquiries may be made when an individual makes an accommodation request for an assistance animal: (1) “Does the person seeking to use and live with the animal have a disability—i.e., a physical or mental impairment that substantially limits one or more major life activities?” and (2) “Does the person making the request have a disability-related need for an assistance animal?”⁷

Only when the disability is not apparent may the entity ask for medical

documentation of the disability. Likewise, if the need for an animal is not readily apparent, the entity also may require documentation of how the disability necessitates an assistance animal. If none can be provided, the housing entity bears no obligation to provide an exception to its “no pets” policy.

A request also may be declined where the *specific* animal either poses a safety threat or would cause substantial property damage that cannot be reduced or eliminated by another reasonable accommodation. HUD emphasizes the determination must be based on “the specific animal’s actual conduct,” “not mere speculation” based on the species or breed.

Housing law does not apply to hotels, which have no legal obligation to host ESAs.

Air Carrier Access Act (ACAA) & Rise of the Emotional Support Animal

The ADA applies to all forms of transportation—bus, railway, private taxis or Uber, etc.—except flight; accordingly, only service dogs (and sometimes horses) are permitted on ground transit. The Department of Transportation (DOT) oversees airlines by implementing regulations for the Air Carrier Access Act of 1986. The DOT’s first regulations addressing service animals did not issue until 1996, and ESAs were not addressed until 2003.

In the context of airlines, the DOT uses the term “service animal” to encompass service animals (as defined for the ADA) and ESAs. Although no law outlines species limitations for ESAs on domestic flights, the DOT authorizes airlines to decline carriage to rodents, ferrets, and snakes—or any other “unusual service

(continued on page 14)

animals” (defined in the airlines’ discretion).

As initial evidence an animal is a service animal, airlines may accept identifying cards or vests or “the credible verbal assurances” of the passenger. The DOT has outlined steps for airline personnel to determine credibility by first inquiring, “Is this your pet?,” and following up with questions about the animal’s tasks/functions, training, and task execution.⁸ If a passenger cannot give credible assurances to these questions, then the airline may demand documentation for the animal to fly in cabin.

The DOT authorizes airlines to demand a higher level of proof for *psychiatric service animals and ESAs* by requiring specific medical documentation. This documentation consists of a recent letter written by a mental health professional (on letterhead) stating: (1) the individual has a mental health-related illness recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM IV); (2) the ESA is necessary for the mental disability; and (3) that the undersigned is a mental health professional, specifying license type and date of issue. Per current DOT regulations,

airlines may require passengers to supply notice of their intent to fly with psychiatric service animals or ESAs up to 48 hours prior to the flight and check in early.⁹

In light of highly publicized incidents involving animals on aircraft, many airlines revised their policies in early 2018—some of these changes arguably violate the ACAA. The DOT is reviewing its regulations and published an advance notice of public rulemaking on May 16, 2018,¹⁰ along with an “Interim Statement of Enforcement Priorities Regarding Service Animals” to provide guidance until final regulations issue.

Conclusion

Animals bring joy and offer numerous documented health benefits for their human companions, but pets—and even assistance animals—are not granted unfettered access to public places. Many businesses are concerned about high financial penalties for violating anti-discrimination laws. At the same time, access laws have been abused, knowingly and unknowingly. By educating clients about the categories

of support animals and access laws, attorneys can assist entities in ensuring access rights for individuals with disabilities. ■

Endnotes

¹ Therapy animals have no right of access. For a discussion on therapy animals in courtrooms, see the forthcoming July Online Article of the Month at NashvilleBar.org/NashvilleBarJournal.

² 28 C.F.R. § 35.104 (title II); 28 C.F.R. § 36.104 (title III).

³ DOJ, *Frequently Asked Questions about Service Animals and the ADA* (July 2015).

⁴ Applicable housing legislation includes Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act (FHA), FHA Amendments, Section 227 of the Housing and Urban-Recovery Act of 1983, and Section 504 of the Rehabilitation Act of 1973.

⁵ Commenters encouraged the DOJ to employ the term “assistance animal” instead of “service animal” to align with the industry-preferred term used internationally. The DOJ elected to retain “service animal” in its final regulations since other administrative agencies like HUD use the term “assistance animal” to denote a broader category of animals.

⁶ Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, FHEO-2013-01 (Apr. 25, 2013).

⁷ *Id.* at 3; see also Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 17, 2004).

⁸ Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24874, 24877 (May 9, 2003).

⁹ 14 C.F.R. § 382.27(c)(8).

¹⁰ DOT, *Traveling by Air with Service Animals Advance Notice of Proposed Rulemaking*, DOT-OST-2018-0068 (May 16, 2018), available at transportation.gov/briefing-room/dot3618.

WE UNCOVER INFORMATION THAT WOULD OTHERWISE GO UNDETECTED

Liberty Digital Forensics uncovers hidden or deleted data in an ever-dependent and rapidly changing digital world. Our team of Certified Examiners has the experience, expertise and equipment to discover digital evidence that can *turn the tide of a legal proceeding*



COMPUTER
FORENSICS



MOBILE
FORENSICS



TRAINING &
CONSULTING



(615) 229-2932

LibertyBA.com



ELEANOR (ELLIE) WETZEL is a registered therapy dog handler through Pet Partners. She and her dog, Winnie, volunteer at the Children’s Hospital at Vanderbilt, the Davidson County Juvenile Court Foster Care Review Board, and special events. Ellie is an NBA member and serves as co-chair on the Editorial Committee, as well as on the Board of Directors for MusicCityPetPartners.org. She is a Fellow of the Nashville Bar Foundation, and is licensed to practice law in Indiana and Tennessee.