



## LET SLEEPING DOGS LIE – Furry Friends in Public Places may become Commonplace

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### **IT'S RAINING CATS & DOGS**

Pet owners would not be surprised by a 2011 Harris poll concluding that over 90% of dog and cat owners in the U.S. consider their pets to be family members. Consistent with this attitude, pet owners are increasingly bringing their furry family members to places that traditionally did not welcome pets, such as to dinner at a local restaurant, to grab a beer at the local pub, to shop at the local supermarket and to Starbucks for a Puppuccino (an item on Starbuck's secret menu).

The American Pet Products Association ("APPY") estimates that 65% of U.S. households own a pet. The growing population of pets coupled with Americans' attitudes towards their pets is great for businesses that cater to pets. However, this trend presents problems for businesses that desire to exclude pets or where pets are prohibited by law. Generally, state and/or local ordinances prohibit pets from entering many types of business entities, especially establishments that serve or handle food or alcohol. Some cities, such as Houston, allow dogs to accompany their owners in the outdoor patio sections of approved restaurants. (<https://www.houstonx.gov/health/Food/dogpatios.pdf>).

As the owners of an agility dog that competes in agility trials on a regular basis, we travel to other cities and states for competitions. Due to the large number of businesses that cater to pets, we were surprised to learn from fellow competitors and clients that there are a significant number of pet owners who represent that their pets are "service animals" or "emotional support animals" in an attempt to gain entry to businesses that prohibit pets or to take advantage of other benefits that businesses must provide to service animals.

### **DOGS RULE THE "SERVICE ANIMAL" KINGDOM**

Prompted by a client inquiry regarding "service animals", we decided to explore the scope of the American's With Disabilities Act ("ADA") in an attempt to clarify how a business must deal with a "service animal." Robin, the editor of the original symposium on the ADA published in the Temple Law Review, regularly advises clients on disability-related issues in the workplace and was aware that the ADA covered "service animals." Our investigation revealed that on September 10, 2010, the Civil Rights Division of the U.S. Department of Justice published revised final regulations in an attempt to provide guidance on the term "service animal" as used in the ADA. Although the new ADA regulations have provided some clarity, they have also created loopholes that are being exploited by pet owners and being used by numerous web-based businesses to sell fake "service animal" credentials.

The good news is that the new ADA regulations define the term "service animal" as **dogs that are individually trained to do work or perform tasks for people with disabilities**. This

limitation will not surprise dog trainers and owners who are aware of dogs' intelligence and loyalty. The most common example of a service dog is a guide dog that is trained to assist people who are blind. However, dogs that have been trained to perform the following work or tasks for people with disabilities also qualify as service dogs: dogs that are trained to alert people who are deaf; dogs trained to pull a wheelchair; dogs that alert and protect a person who is having a seizure; dogs that remind a person with a mental illness to take prescribed medications; and, dogs trained to calm a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack.

Service dogs are working dogs, not pets. These dogs have received thousands of hours of training that goes way beyond the basic training provided to most dogs or the training required by the AKC for a dog to be awarded a Canine Good Citizen certificate. The work or task that a service dog has been trained to provide must be directly related to a person's disability. *Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA*, and these dogs can be denied access to most business entities under the ADA. The ADA mandates that state and local governments, businesses and nonprofit organizations that serve the public generally must allow service dogs to accompany people with disabilities in all areas of the facility where the public is normally allowed to go. This would include patient rooms and cafeterias in hospitals and dining rooms in restaurants, but would probably not include operating rooms or kitchens where the animal's presence may compromise a sterile or sanitary environment. Service dogs must also be allowed access to public transportation, including buses, taxis and shuttles.

### **No DOCUMENTATION DOES NOT MEAN No SERVICE**

The ADA's "service animal" regulations do not contain any provisions related to training, certification or documentation of "service animals" nor do the regulations require that dogs wear specially marked vests. Identification problems related to service dogs are further complicated because a business owner's inquiry is limited to two (2) questions if it is not obvious what service the dog provides:

**(1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform.**

Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog or ask for a demonstration by the dog of the work or task the dog is trained to perform. It is also important to remember that:

- Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals.
- Establishments that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises.
- Disabled customers with service dogs cannot be isolated from other patrons, treated less favorably than other patrons, charged additional fees, and fees charged to patrons with pets must be waived. The owner of a service dog may be charged for damage caused by the dog.

### **SNIFFING OUT FAKE SERVICE DOGS**

Compliance with the ADA's service dog regulations does not mean that you must allow your business to go to the dogs. The ADA's regulations require that service dogs must be

harnessed, leashed or tethered, unless these devices interfere with the dog's work. In that case, the owner must maintain control of the dog by voice, signal or other means. Fake service dogs can often be sniffed out because they lack the intensive training required of true service dogs and will not be able to sit still, lie down or obey simple commands. Even a person with an observable disability can be asked to remove his service dog from the premises if: (1) the dog is out of control and the handler does not take effective action to control it, or (2) the dog is not housebroken. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.

### **PIGS CAN FLY AND A MINIATURE HORSES MIGHT BE A SERVICE ANIMAL**

The ADA's attempt to limit the definition of "service animals" to dogs applies to the vast majority of business entities. However, the regulations do not limit the broader definition of "assistance animal" under the Fair Housing Act or the broader definition of "service animal" under the Air Carrier Access Act. The broader definitions under these acts have lead to a number of bizarre situations where airline passengers have been allowed to travel with an assortment of exotic pets for emotional support, including monkeys, roosters, miniature horses and even a pot-bellied pig.

Thankfully, the ADA excludes the menagerie of animals that are now being used for "emotional support." However, ADA covered entities must modify their policies to permit miniature horses where reasonable. The assessment factors used to assist entities in determining whether miniature horses can be accommodated in their facility are fairly stringent and it is difficult to imagine many entities that could reasonably accommodate a miniature horse.

### **SERVICE ANIMALS AT WORK**

The Equal Employment Opportunity Commission ("EEOC"), which enforces the employment provisions of the ADA, does not have a specific regulation that addresses service animals in the workplace. Unless the disability is obvious, which means that the reason for the service animal is not obvious, an employer may request documentation to establish the disability and the manner in which the animal helps the employee perform his/her job. An employer can deny a request by an employee who requests an accommodation for a service or emotional support animal if (1) the animal poses an undue hardship; or (2) the animal poses a direct threat in the workplace.

### **MISTAKES CAN BITE YOU**

Violations of the ADA's service animal regulations can result in damages for governmental entities that violate the act and injunctive relief and attorney's fees can be awarded against private entities that violate the service animal provisions of the ADA. The task of determining whether an animal is a service animal is further complicated by the fact that some state and local laws define service animals more broadly than the ADA. Equally important, in some states, such as Texas, denying access to a person with a service dog or animal constitutes a violation of that person's civil rights, and may result in both civil and criminal penalties.

Contrary to popular belief, there is no federal crime that attaches to a person that misrepresents an animal as a service animal. Although many states, including Texas, classify

such a misrepresentation as a misdemeanor, enforcement of these laws is non-existent. Since a wrong assumption about a service animal can take a bite out of a business's revenue, the best option is to consult with an attorney that is familiar with the regulations.

*Please note that the information contained in this article is not designed to address specific situations, and does not include rules or regulations that apply to all states. If you have questions concerning this topic, you should consult with legal counsel of your choice to obtain advice on fact specific matters.*

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