

## **SERVICE ANIMALS, THERAPY DOGS & EMOTIONAL SUPPORT ANIMALS**

Dana R. Krajack (1/2019)

### **OVERVIEW**

While no animal has “standing” as an entity itself, or recognition beyond being considered as mere personalty, there are a special group of animals which are given special recognition in the law. This guide is meant to be a discussion about those animals, the requirements for the stature, and the legal import upon their recognition as such.

### **ISSUES**

This primer looks at the issues of not only what these animals are and are not, but also examines what special recognition and accommodation(s) are provided to these animals and their owners.

### **“Special” Animals**

#### **A. Service Animal(s)**

Service dogs have the greatest access to public places because they are allowed to go anywhere with their handlers. The definition of a service dog is “any dog 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).”<sup>1</sup>

The work or task performed by the service dog must be directly related to the handler’s disability and may include:

- Assisting the blind
- Assisting those hard of hearing
- Assisting the mobility impaired
- Providing non-violent protection
- Rescue work
- Retrieving items
- Providing physical support
- Assisting those with neurological or psychiatric disabilities by preventing or interrupting impulsive or destructive behaviors.

There is no federal certification process or requirement for hearing dogs, guide dogs or any type of service animal – the only requirement is that the animal be individually trained and work for the benefit of a disabled individual.<sup>2</sup>

Oftentimes, managers or owners of a business wish to know whether a dog accompanying a person is truly a service dog. The only questions a person may ask are:<sup>3</sup>

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<sup>1</sup> 28 C.F. R. §36.104.

<sup>2</sup> A.L.R. Fed. 2d 49 “What Constitutes “Service Animal” and Accommodation Thereof, Under the ADA.”

<sup>3</sup> 28 C.F.R. §35.136(f) (Title II) and 28 C.F.R. 302(c)(6)(Title III).

- 1) Is the animal required because of a disability? and
- 2) What work or task the animal has been trained to perform?

Injunctive relief and attorney fees can be awarded if rightful access to a service dog or service dog handler is denied.<sup>4</sup> Some states permit additional damages and make the denial of access criminal.<sup>5</sup>

Miniature horses are not included in the definition of service animal, which is limited to dogs. However, the new Americans with Disabilities Act (ADA) regulations contain a specific provision which covers miniature horses.<sup>6</sup>

Factors to assist in determining whether miniature horses must be accommodated are whether:

- the miniature horse is housebroken
- the miniature horse is under the owner's control
- the facility can accommodate the miniature horse's type, size, and weight
- the miniature horse's presence will not compromise legitimate safety requirements necessary for the safe operation of the facility.

No other animals are currently recognized by the ADA, though states may enact additional exceptions. Monkeys,<sup>7</sup> kangaroos, boa constrictors, and parrots do not qualify.<sup>8</sup> Sugar gliders do not qualify.<sup>9</sup>

Liability – there is no exception to the general rules of liability for service animals.

## **B. Therapy Animals**

Therapy animals are not service animals. Most therapy animals are dogs, but other animals such as horses, llamas, and cats have been registered as therapy animals. A therapy animal offers comfort, a sense of well-being, and companionship to people other than its handler; stated another way, a service animal helps its handler, a therapy animal helps other people. The goal in using a therapy animal is to improve a patient's social, emotional, or cognitive functioning and literature reviews state that animals can be useful for educational and motivational effectiveness for participants. There are various studies documenting the positive effects of therapy animals reported through subjective self-rating scales and objective physiological measures, such as blood pressure, hormone levels, etc.

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<sup>4</sup> Rehabilitation Act, 42 U.S.C. §12133 and 12188.

<sup>5</sup> See e.g. Texas Human Resource Code, §121.004.

<sup>6</sup> 28 C.F. R. §35.136(i).

<sup>7</sup> Not Reported in F.Supp.2d, 2012 WL 3579843 (E.D.La.); see also *Newberger v. Davidson*, 2013 WL 3804720, E.D.La., July 19, 2013 (NO. CIV.A. 12-2360).

<sup>8</sup> "Creature Comforts: When We Need Help, There Should Be a Menagerie of Options", Brian Sullivan, ABA Journal, *Id.*

<sup>9</sup> *Capell v. NC Div. of Vocational Rehabilitation Services*, 2011 WL 3501894 (W.D. N.C. 2011).

Generally speaking, therapy animals must complete a testing or training process required by a registering or certifying organization.<sup>10</sup> Therapy animals must be obedient, of good health and temperament, friendly, adaptable, and empathetic. Therapy animals are insured by the certifying organization against third-party claims of liability while serving as a therapy animal.

They are used in a number of settings but may only be in a facility by invitation of the facility. Some settings include:

- Hospitals
- Nursing homes
- Schools
- Disaster relief areas
- Airports
- Mental health facilities
- Courtrooms<sup>11</sup> – victim & children advocates
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Therapy animals (and their owners) do not have the same access rights as service animals or emotional support animals (more on them below). However, it should be noted that therapy dogs are recognized under the Fair Housing Act (FHA) and the Air Carrier Access Act (ACAA).

Liability – there is no exception to general rules of liability for therapy dogs.

### **C. Emotional Support Animals (ESAs)**

Emotional support and service animals are not considered "pets" by law but rather are considered more like assistive aids. By definition, an Emotional Support Animal (ESA) is an untrained companion of any species that provides solace to someone with a disability.

An emotional support animal is a companion animal that provides therapeutic benefit to an individual with a mental or psychiatric disability. The person seeking to use an emotional support animal must have a verifiable disability (the reason cannot just be a need for companionship).<sup>12</sup> Interestingly, there is no special training or recognition for an ESA, and there is no particular requirements as to what an individual must satisfy to be considered to have the requisite mental or psychiatric disability. To become an ESA, the animal's owner need only pick an online registry and pay a fee between \$70 to \$200.<sup>13</sup> As a result, obtaining

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<sup>10</sup> See e.g. Alliance of Therapy Dogs, Therapy Dogs International, and Pet Partners.

<sup>11</sup> Various programs exist in Texas, Mississippi, Florida, Maryland. See "Canines in the Courtroom", American Bar Assoc., GPSOLO Magazine, by Debra S. Hart-Cohen, July/August 2009.

<sup>12</sup> Animal Legal & Historical Center, FAQs on Emotional Support Animals, Michigan State University College of Law, Rebecca F. Wisch, 2013.

<https://www.animallaw.info/article/faqs-emotional-support-animals>.

<sup>13</sup> *The New Yorker Magazine*, "Pets Allowed – Why are so many Animals now in Places where they Shouldn't Be?", Patricia Marx, Oct. 20, 2014.

an ESA designation for an animal is often abused and is becoming the subject of frequent criticism. Examples of animals that have been classified as an ESA include turtles, snakes, rodents, alpaca, turkey, and pigs (as well as dogs).

### **Special Persons and Places**

Fair Housing Act (FHA); 42 U.S. C. §§ 3601, et seq.

A service animal (as defined above) for a person with a qualified disability is, in a sense, *prima facie* viewed as a "reasonable accommodation" under the FHA and federal law generally overrides a landlord's "no pets" rule. In most housing complexes the tenant will need a letter or prescription from an appropriate professional and must meet the definition of a person with a disability.<sup>14</sup> So long as the requested accommodation does not constitute an undue financial or administrative burden for the landlord, or fundamentally alter the nature of the housing, the landlord must provide the accommodation.<sup>15</sup> A landlord is, however, entitled to consider the administrative, financial, or programmatic repercussions of allowing an animal onto the premises, including the potential disturbance to other tenants. Even if a service animal is allowed under the FHA, if the animal is particularly disruptive or should the tenant fail to take proper measures to ensure the animal does not bother the other tenants, the landlord may be justified in denying the accommodation or ultimately filing for an eviction.<sup>16</sup>

The question of whether an ESA would be considered a reasonable accommodation under the FHA is a bit more unsettled. Not all courts are in agreement or consistent in their rulings when making this determination.<sup>17</sup> Another conflict handlers and landlords find themselves in is when a landlord or municipality has a breed ban (such as a ban on any pit bull-type dogs) and the person with a disability has a service or emotional support dog which is a banned breed.

### **Americans with Disability Act (ADA)**

While the liability associated with owning a service dog is the same as any private citizen's liability, additional liability issues arise under Title II and III of the American Disabilities Act<sup>18</sup> when a public entity or place of accommodation denies access to a person with a service

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<http://www.newyorker.com/magazine/2014/10/20/pets-allowed?intcid=mod-most-popular>

<sup>14</sup> The statutes recognize three broad categories of disabilities: (1) a physical or mental impairment that substantially limits one or more major life activities (such as walking, seeing, working, learning, washing, dressing, etc.); (2) a record of having such an impairment; or (3) being regarded as having such an impairment. 28 C.F. R. §35.108.

<sup>15</sup> *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *Fulciniti v. Village of Shadyside Condominium Ass'n.*, No. 96-1825 (W.D. Pa. Nov. 20, 1998)

<sup>16</sup> *Woodside Village v. Hertzmark*, 1993 WL 268293 (Conn. June 22, 1993).

<sup>17</sup> See, e.g., *Fair Hous. Of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028 (D. N. D. 2011) – the FHA encompasses all types of animals regardless of training); *Prindable v. Ass'n. of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245 (D. Haw. 2003) – a dog not specially trained is not a "service animal" within the meaning of the FHA.

<sup>18</sup> 42 U.S. C. A. §§ 12101, et seq.; see also 28 C.F.R. §§35.104 and 36.104, respectively.

animal.<sup>19</sup> The ADA and associated regulations give persons with disabilities equal access and include the right to be accompanied by a service animal. While the ADA no longer specifically covers ESAs,<sup>20</sup> a number of courts have found that ESAs within the context of other claims, under the FHA, are a reasonable accommodation.

The ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities:

Title I – applies to employment

Title II – applies to public entities

Title III – applies to public accommodations

Title IV- applies to telecommunications

Title V – miscellaneous provisions

#### Rehabilitation Act of 1973 §504 (RA)

Section 504 of the Rehabilitation Act of 1973<sup>21</sup> – extended protection under the ADA to any program or activity that receives federal funding.

#### Air Carrier Access Act (ACAA)

A service animal and an ESA are also recognized under the Air Carrier Access Act (the ACAA) of 1986.<sup>22</sup> To qualify, a person must meet the federal definition of having a disability and must also have a note from a physician or other medical professional stating that the person has a disability, and the reasonable accommodation (the service animal or ESA) provides benefit for the individual with the disability. The emotional support animal must alleviate or mitigate some of the symptoms of the disability. No specific training of the animal is required. While perhaps our society is more willing now than ever to recognize and assist those who suffer from a mental or physical impairment, there remain those who abuse the accommodations. In recent years, due to the abuses that have occurred as well as the pragmatic concerns that have arisen due to the myriad animals that were certified as ESAs (such as turtles, snakes, peacocks, alligators, rodents, alpacas, turkeys, and pigs) tighter restrictions are starting to redefine the landscape. Many airline carriers now request proof of the disability and limit the number of ESAs able to be brought on board, the conditions upon which an ESA may be brought on board. They may also limit the flights on which someone may bring an ESA aboard.

#### Liability for Misrepresentation

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<sup>19</sup> 42 U.S.C.A §§12101 et seq.; .

<sup>20</sup> See HUD/FHEO Notice FHEO-2013-01, which provides that the “ ...Dept. of Justice’s (DOJ) amendments to its regulations for Titles II and III of the ADA limit the definition of ‘service animal’ under the ADA to include only dogs, and further define ‘service animal’ to exclude emotional support animals...[t]his definition, however, does not limit housing providers’ obligations to make reasonable accommodations for assistance animals under the FHA or Section 504.”

<sup>21</sup> 29 U.S. C. §§701 et seq.

<sup>22</sup> 49 U.S. C.. 41705; see also 14 C.F. R. §382.55.

Due to increased abuses in service and emotional support animal misrepresentation, states including South Carolina are proposing and passing laws that criminalize the misrepresentation of an animal as a service or emotional support animal. Federal law already makes such a misrepresentation a crime, but there is little to no enforcement of the laws. Unfortunately, the hurdles for disabled individuals legitimately needing animals to mitigate their disabilities are growing due to systemic abuses of those who simply wish to take their animals more places than they are permitted.

### CONCLUSION

In short: service animals have *a right* to go anywhere with their handlers; emotional support animals have *a right* to live in housing and to travel on planes with their handlers; and therapy animals may only go where they have been invited.

State and federal law as well as business and industry policy continue to adapt to the changing landscape of animals who mitigate disabilities for their humans to meet the needs of the disabled while closing loopholes exploited by the disingenuous. There may be legal recourse for those denied rightful access with their service or emotional support animal. In addition, there may be more penalties on the horizon for those abusing the system and misrepresenting their animals.