Take Your Dog to Work Day—Everyday

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When the Americans with Disabilities Act was enacted, one of the “reasonable accommodations” that was contemplated was allowing seeing-eye dogs to accompany blind persons in places where animals were not otherwise allowed. This mandate has not proven especially problematic, as there is little doubt that persons using seeing-eye dogs are disabled, and as the dogs are highly trained not only to perform their function of guiding the blind person but to avoid being a nuisance. As with many well-intentioned provisions of the ADA, however, this concept has been twisted and stretched to absurd dimensions so as to cover situations not likely to have occurred to Congress when it enacted the ADA. Now, people with all sorts of conditions purporting to be disabilities are seeking to have their animals accompany them to stores, to restaurants, on airplanes and buses, even to the theater. It’s not just dogs any more, either. Cats, birds, horses, and even potbellied pigs are being characterized as “service animals” entitled to accompany their owners just about everywhere.

So too are employees more frequently wanting to bring their animals to work with them as a “reasonable accommodation” of some “disability.” Employees with depression, anxiety, and other psychiatric conditions are seeking to bring their animals to work, assertedly to alleviate their symptoms. But these animals are a far cry from highly trained seeing-eye dogs. Some are not trained at all, and in some instances the presence of the animal in the workplace can be highly disruptive. What is an employer to do when an employee with a vaguely described disability insists upon bringing a “service animal” to work that barks all day, threatens to bite other employees, and leaves a mess on the carpet?

Might Your Pet Qualify as a Reasonable Accommodation?

Whether for companionship, protection, or emotional support, millions of Americans own pets. Could your pet be characterized as a “service animal” so you could bring it to work with you? In many instances, it is not clear. The lack of a precise statutory definition of “service ani-
mal," coupled with murky regulations and little case law, makes it difficult to answer the question definitively. What does seem clear is that this issue is likely to be litigated with greater frequency in the future.

Title I of the ADA was designed to equalize employment opportunities for persons with disabilities who are otherwise qualified and can perform the essential functions of the job with reasonable accommodations. Although neither Title I of the ADA nor the EEOC’s regulations on the ADA directly addresses nor defines the role of service animals, the EEOC’s Interpretive Guidance states, as an example, that permitting an individual who is blind to use a guide dog at work would be a reasonable accommodation. The EEOC’s regulations do specify that an employer may turn down a request for accommodation where it would cause an undue hardship or present “a direct threat,” that is, a significant risk to the health or safety of others. Otherwise, the ADA and its accompanying regulations are silent on just how far an employer must go in allowing employees to bring service animals to work.

Under Title III of the ADA (which pertains to public accommodations), the Department of Justice (DOJ) has issued regulations stating that “generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” The DOJ’s regulations intend that “the broadest feasible access be provided to service animals in all places of public accommodation.” The DOJ’s regulations also include a broad definition of “service animal” as

[A]ny guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

According to the DOJ, businesses may ask if an animal is a service animal or what tasks the animal has been trained to perform but cannot require special ID cards for the animal or ask about the disability of the person whom the animal accompanies. In addition, persons with disabilities who use service animals cannot be charged extra fees, isolated from other patrons, or treated less favorably than other patrons. In addition to the ADA, other federal legislation, such as the Air Carrier Access Act and the Fair Housing Act, has addressed the issue of accommodating individuals with disabilities with service animals under a similar liberal approach.

In addressing how far places of public accommodation must go to accommodate a disabled patron under the ADA, the Supreme Court has maintained that the statute contemplates three inquiries: “whether the requested modification is ‘reasonable,’ whether it is ‘necessary’ for the disabled individual, and whether it would ‘fundamentally alter the
nature of the goods or services provided. As illustrated subsequently, however, establishing that allowing service animals would fundamentally alter the nature of a business is a formidable task to overcome.

For example, in *Lentini v. California Center for the Arts*, a quadriplegic who used a wheelchair for mobility was accompanied by a small shih-tzu/poodle mix named Jazz. Jazz provided “minimal protection” and retrieved small dropped items for the plaintiff. The plaintiff was barred from bringing Jazz to any more performances at the defendant arts center after Jazz was barking while other patrons were seated nearby. Subsequently, the plaintiff filed suit alleging violations of Title III of the ADA and California’s Unruh Act. The district court held that the arts center could not exclude service animals that make noise “if the behavior would otherwise be acceptable to the Center if engaged by humans.” On appeal, the arts center contended that the dog’s “yipping or barking” at the same decibel level as a human noise such as coughing would nonetheless be more disruptive because it would be “an unexpected sound in a performance space.” The Ninth Circuit disagreed, reasoning that Jazz’s admittance was a reasonable accommodation because the behavior was not disruptive, reasoning that “no patron complained on the two occasions that Jazz made noise in the Center.” Furthermore, the appellate court held that a service animal could not be excluded from a place of public accommodation for making noise if the noise was intended as communication for the benefit of the disabled owner, such as to alert the owner of a potentially dangerous condition.

**Health and Safety Concerns**

Businesses have been largely unsuccessful in barring service animals from their premises based on health and safety concerns. For example, in *Branson v. West*, the plaintiff, a physician, was granted a permanent injunction permitting her to bring her service dog to work at a veterans hospital. In order to alleviate some of the negative side effects of using a manual wheelchair, the plaintiff used a service dog to assist her in various activities at work, including pulling her wheelchair, opening and closing doors, holding doors open, picking up dropped items, retrieving items, and bracing for her when she had to lean out of her wheelchair. The court rejected as mere speculation the hospital’s protest that the presence of a service animal was a “logistic nightmare” in the elevator and hallways. Similarly, the court dismissed the hospital’s health concerns about the service dog having “contact with patients having psychological or drug-induced fears of animals or patients with allergies, asthmas or immunodeficiencies to dogs.” In addressing the hospital safety concerns the court emphasized the hospital’s policy of permitting seeing-eye dogs into the facility and maintained that “no difference exists between a seeing-eye dog and a service dog.”
In Johnson v. Gambrinus Co./Spoetzel Brewery, a brewery would not allow the plaintiff, who is blind, to be accompanied by his guide dog on a tour because of a strict “no animals” policy. The brewery attempted to accommodate the plaintiff by providing him with a human guide, but he declined and brought suit under the ADA. The brewery defended by claiming that the blanket “no animals” policy was required under a Food and Drug Administration regulation which states that “guard or guide dogs may be allowed in some areas of a plant if the presence of the dogs is unlikely to result in the contamination of food, food-contact surfaces, or food-packaging materials.” The brewery contended that there was a risk of contamination because there was an open manufacturing system and the tour passed by places where the beer and beer packing were exposed to air. Furthermore, the brewery asserted that if guide dogs were allowed on the tour then beer production would have to be shut down while a dog was present to avoid exposure which, the brewery claimed, would fundamentally alter the nature of the tour since the purpose of the tour was to observe the manufacturing of beer. The Fifth Circuit nonetheless concluded that the brewery failed to show that there was a greater likelihood of contamination because of the presence of an animal as compared to the presence of the general public. The court therefore ordered the brewery to amend its blanket “no animals” policy in order to comply with the ADA.

In 2004 the EEOC and the FDA jointly issued How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers. The guide is designed to assist restaurants and other food service employers in complying with the employment provisions of the ADA. There is only one section pertaining to service animals which merely provides that employers may not automatically reject a request by an employee to use a service animal as a reasonable accommodation. The EEOC quoted the FDA’s rule that a food service employee may handle his service animal if he “washes his hands for at least 20 seconds using soap, water, and vigorous friction on surfaces of the hands, followed by rinsing and drying.” The EEOC’s guide goes on to give this example:

Adelio, who is blind and uses a service animal, applies to work as a cashier at a company’s snack bar. Adelio explains that the dog can sit near the cash register area while Adelio works. The company may not automatically reject Adelio because he uses a service animal. The company must allow Adelio to keep his dog near the cash register area unless it can prove that doing so would impose a significant difficulty or expense or a significant risk of substantial harm.

The snack bar cashier’s being accompanied by a service animal is perhaps less troubling than if the employee worked in the kitchen. It’s one thing for the government to carefully specify the type of hand-washing procedure deemed sufficient to render handling of a service animal
by food service employees safe. It’s another thing for those employees actually to follow that procedure.

“IT’S A ZOO IN THERE”

The days when almost all service animals were guide dogs are past. Today a Noah’s Ark of support animals such as cats, monkeys, and miniature horses, among others, are used in a variety of ways to assist disabled individuals. In an effort to help determine if an animal is in fact a service animal, rather than just a pet, the DOJ explains:

Some, but not all, service animals wear special collars and harnesses. Some, but not all, are licensed or certified and have identification papers. If you are not certain that an animal is a service animal, you may ask the person who has the animal if it is a service animal required because of a disability. However, an individual who is going to a restaurant or theater is not likely to be carrying documentation of his or her medical condition or disability. Therefore, such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, you may not insist on proof of state certification before permitting the service animal to accompany the person with a disability.17

While the DOJ’s guidance helps to recognize the ever expanding scope of the types of animals that may encompass the definition of “service animal,” it is not particularly helpful toward distinguishing between animals that are true service animals and those that are merely pets. Since the penalty for guessing wrong is usually a lawsuit, most public accommodations are likely to err on the side of allowing the animal, no matter how seemingly peculiar.

In Access Now, Inc. v. Kitchens,18 a dispute arose over a town ordinance which prevented a nine-year-old girl with spina bifida from utilizing a miniature horse that was purportedly a service animal. Allegedly, the miniature horse would assist the girl in standing, walking, maintaining her balance, and picking up unspecified objects off the floor or ground. In holding that the miniature horse was a pet and companion rather than a service animal, the court concluded that the girl was not disabled within the meaning of the ADA. It cited medical evidence that the girl was capable of standing and walking without assistance; in fact the girl’s own doctor admitted that the girl did not need a service animal.

Although the characterization of a horse as a service animal was unsuccessful in the Access Now case, the contention that a miniature horse may be used as a service animal is not far-fetched. According to the Guide Horse Foundation,19 miniature horses can provide exceptional help to the blind. Benefits of using a miniature horse as a guide for the
blind include, among other things, a life span of up to 50 years and an alternative for those individuals allergic to dogs.

In addition to the type of animals that may qualify as service animals, the range of tasks that such animals supposedly can perform is expanding as well. Aside from being guides for the blind, service animals are being employed to perform a variety of tasks including retrieving dropped items, opening doors, pushing buttons, picking up phones, and turning lights on and off. Service dogs, with their keen sense of smell, are even being used to help diabetic patients by detecting abnormalities in a person’s blood-sugar levels. While the benefits provided by some of these service animals are, in some cases, life saving, the expanding range of uses for service animals makes it more difficult for a business to determine whether an animal truly qualifies.

When Pigs Fly

Adding to the uncertainty over what constitutes a service animal are situations in which individuals claim that their companion animal is a service animal not because it provides assistance with physical tasks but because the presence of the animal in some way soothes or calms them. One notable incident occurred aboard a US Airways flight from Philadelphia to Seattle where a woman insisted upon bringing her 300-pound pet Vietnamese pot-bellied pig on board. The woman asserted that she was a qualified person with a disability (a heart condition) and that the presence of the animal helped her by relieving stress. The airline seated the passenger and the pig in the first class cabin, but not surprisingly, the pig ran squealing through the Boeing 757 on landing, soiling the cabin. While seeming to overlook the safety implications of a squealing 300-pound pig running through an aircraft cabin during landing, the Federal Aviation Administration commented in a most politically correct fashion: “US Airways acted in a reasonable and thoughtful manner based on a legitimate request to transport a qualified individual with a disability and her service animal.”

The Department of Transportation (DOT) has implemented the Air Carrier Access Act by publishing guidelines which generally require carriers to permit service animals to accompany individuals with disabilities on flights. The guidelines provide that airline personnel should engage in a two-step process. First, the airline must attempt to determine whether the animal is a service animal and whether the individual is a qualified individual with a disability. Second, the airline must determine whether the animal presents a direct threat to the health of others or would cause a fundamental alteration in passenger service. The DOT seems ready to permit emotional support animals aboard flights by specifically expanding the definition of “service animal” to include “any animal shown by documentation to be necessary for the emotional well being of a passenger.” In order to determine that the service animal is
not just a pet, the guidance states that the carrier should seek “credible verbal assurances” that the animal is more than just a pet.

To test the credibility of an initial verbal assurance, according to the guidelines, a carrier may ask the individual to identify tasks or functions that the animal performs. The guidelines further provide that the carrier may ask what the animal has been trained to do, and it can ask for a specific description of how tasks or functions are performed. Interestingly, the guidelines list only “snakes, other reptiles, ferrets, rodents and spiders” as animals that pose “unavoidable safety and/or public health concerns” and can categorically be denied transport. However, according to the guidelines, the suitability of miniature horses, pigs, monkeys, and other animals should be evaluated on a case-by-case basis. Thus, the DOT may be ready to classify emotional support animals as service animals, potentially opening the cabin door to just about every one of God’s creatures except rodents, reptiles, and spiders.

**Circumventing the “No Pets” Rule at Home**

Incorporating emotional support animals, or companion animals, into the scope of “service animals” has not been exclusive to the airline industry. For decades, under the Fair Housing Act, housing providers have been required to accommodate physically disabled residents who require guide dogs or other types of service animals. But recently, housing providers with no-pets policies have begun receiving more and more requests from individuals who claim to need “companion” or “emotional support” animals. Similar to the ADA, the FHA does not specifically mention guide dogs or service animals as a type of accommodation; rather, the DOJ has issued regulations which require that disabled individuals with service animals must be reasonably accommodated. The question remains, however, as to whether the owners of emotional support animals are entitled to be reasonably accommodated.

One of the earliest companion animal cases on point, predating the ADA and FHA, arose under the Rehabilitation Act, *Majors v. Housing Authority of the County of Dekalb Georgia.* On summary judgment, the court ruled that a reasonable accommodation could include an exception to a “no pets” rule to permit a companion dog for a psychologically disabled tenant.

More recently, in *Auburn Woods I Homeowners Ass’n v. Fair Employment and Housing Commission,* problems arose when a husband and wife attempted to keep a small terrier named “Pooky” in violation of their condominium’s restriction prohibiting dogs anywhere in the development. Both spouses suffered from severe depression and found that taking care of a dog alleviated their symptoms and enabled them to function more productively. In holding that the homeowners should have been allowed to keep their dog as a reasonable accommodation, the California Court of Appeal emphasized that the homeowners’ disabilities interfered with
the use and enjoyment of their home, and having a dog improved their situation. According to the court, “Pooky did not need special skills to help ameliorate the effects of the [homeowners’] disabilities.” The court continued that “it was the innate qualities of a dog, in particular a dog’s friendliness and ability to interact with humans that made it therapeutic here.” The *Auburn Woods* decision might be read as decreeing that only *unfriendly* dogs may be barred via no-pets rules in California.

The West Virginia Supreme Court took the opposite approach, however, in *In re Kenna Homes Co-op. Corp.*. That case involved an occupancy rule that prohibited all animals except for those “properly trained and certified.” Two residents who suffered from depression sought to keep pet Yorkshire Terriers to help alleviate some of their symptoms. The court held that both federal and state law required that a service animal “be individually trained and work for the benefit of a disabled person in order to be considered a reasonable accommodation of that person’s disability.” Specifically, the court held that animals which provide nothing more than “the ordinary comfort of a pet” are insufficient to be classified as service animals. Thus, under the reasoning of the *Kenna Homes* decision, a reasonable accommodation need not be made for companion animals.

In 2004, however, the DOJ sued Kenna Homes in federal court for its refusal to allow an emotional support dog for a mentally disabled resident. Despite the West Virginia Supreme Court’s ruling in 2001, Kenna Homes elected to enter into a consent decree, which provided that residents were permitted to keep “service animals and emotional support animals” as long as a medical provider certified that the specific animal in question “helps to ameliorate the effects” of the resident’s disability.

Such a loose standard as “ameliorating the effects of a disability” is likely to produce some bizarre results. For example, in *Assenberg v. Anacortes Housing Authority*, the plaintiff asserted that his pet snakes were service animals because they provided a “great therapeutic benefit … in the treatment of his depression.” The plaintiff attempted to allege that his housing provider denied him of a reasonable accommodation because they required that the snakes be “professionally trained, and certified.” The court concluded that the housing provider terminated the plaintiff’s tenancy for using illegal drugs on the premises, rather than for his possession of the snakes, thus sidestepping the issues of whether the housing provider would have had to make a reasonable accommodation for the snakes, and whether it would be permissible for a housing provider to require that snakes be “professionally trained and certified” in order to qualify as service animals.

Similarly, in *DelCore v. Fire Island National Seashore*, the plaintiff sued to overturn a policy at a national seashore prohibiting dogs except for seeing-eye dogs. The plaintiff claimed to have posttraumatic stress disorder and a skin condition caused by 9/11 that required him to frequent “clothing-optional” beaches, and he sought to take his dog
“Cheekies” along for emotional support and comfort. When park rangers refused to consider “Cheekies” as a service animal so as to qualify for an exemption to the no-dogs rule, the lawsuit resulted.

**Workplaces Gone to the Dogs**

Although most of the litigation to date regarding service animals has occurred in the context of public accommodations, air travel, and housing, it is likely just a matter of time before the battle shifts to the workplace. Unless a court or the EEOC draws a firm distinction between service animals and companion animals (and holding that the latter need not be permitted as a reasonable accommodation in the workplace), more employees are likely to insist upon bringing their animals to work. Unfortunately many employers, fearful of lawsuits, may be willing to allow these animals, which will only make it more difficult when some employer attempts to draw the line by attempting to prove that the presence of these animals at work presents an undue hardship. Soon it may be doggone difficult to distinguish veterinarians’ offices from other workplaces, with the latter becoming virtual petting zoos crammed with dogs, cats, monkeys, horses, and other creatures whose asserted purpose is to provide emotional support and comfort to their owners while at work.

**Notes**

2. 42 U.S.C. § 12111(8).
3. 29 C.F.R. Part 1630 Appendix.
4. 29 C.F.R. § 1630.15(b)(2).
5. 28 C.F.R. § 36.302(c)(1).
6. 28 C.F.R. Part 36 Appendix B.
7. 28 C.F.R. § 36.104.
11. 370 F.3d 837 (9th Cir. 2004).
14. 116 F.3d 1052 (5th Cir. 1997).
15. 21 C.F.R. § 110.35(c).
21. The guidelines may be found at http://airconsumer.ost.dot.gov.
22. 652 F.2d 454 (5th Cir. 1981). See also Whittier Terrace Associates v. Hampshire, 532 N.E.2d 712 (1989) (holding a mentally disabled resident living in subsidized housing should be able to keep a cat as a companion where a relationship between the resident’s ability to function and the companionship of her cat was “undeniable”).
23. 18 Cal. Rptr. 3d 669 (Cal. App. 2004).
27. No. CV-06-3407 (E.D.N.Y., filed July 12, 2006).