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More Than Just Pets

Understanding the New Americans With Disabilities Act Service Animal Provisions

By Robert Lannan Esq.

The U.S. Department of Justice has issued new regulations under the Americans with Disabilities Act (ADA) to clarify the obligations of restaurants and other public accommodations to provide access to service animals that accompany people with disabilities. The new regulations, which became effective this past March, limit the species of animals that restaurants are required to admit to dogs and, in some instances, miniature horses. To have a protected status, these animals must also be trained to do work or perform tasks for people with disabilities, and not simply be present to provide emotional support. The new regulations also include other requirements, both for restaurants and their patrons who use service animals.

Last summer marked the 20th anniversary of the ADA, a comprehensive civil rights law that prohibits discrimination on the basis of disability. The ADA defines "disability" broadly, to include "a physical or mental impairment that substantially limits one or more major life activities" of an individual. Title III of the ADA provides people with disabilities a right to "the full and fair enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation," including any "restaurant, bar or other establishment serving food or drink." Restaurants are required to provide people with disabilities access that is "equal to that afforded to other individuals," and services that are not "different or separate" from those provided to other patrons. A restaurant must provide these services "in the most integrated setting appropriate to the needs" of people with disabilities. This requires a restaurant to make "reasonable modifications in [its] policies, practices or procedures, when such modifications are necessary" to provide services to people with disabilities.

Shortly after the ADA was enacted, the Justice Department issued regulations that required restaurants and other public accommodations to "modify policies, practices and procedures to permit the use of a service animal by an individual with a disability." The regulations defined the term "service animal" to include "any guide dog, signal dog, or other ani-

mal” that met certain other requirements. Over the following 20 years, this open-ended definition proved problematic for both public accommodations and people with disabilities. Because the regulation contained no limits on species, as *The New York Times* reported, people brought “a veritable Noah’s Ark of support animals” into businesses, claiming that they were service animals” (Skloot, 2009). According to published reports, animals brought into restaurants and other public accommodations — ostensibly under the protection of the ADA — included chimpanzees, capuchin monkeys, goats, cats, ferrets, pigs, hamsters, tortoises, and at least one parrot, iguana, duck and snake. (Adain, 2010).

Meanwhile, there was confusion between “service animals,” which are trained to perform specific tasks for people with disabilities, and “emotional support animals” (also called “comfort animals” and “therapy animals”), which do not perform specific tasks but provide emotional support for people simply by being present (Skloot, 2009). Although ADA regulations have never required access for the latter category of animals, people have often claimed that such access is required, either fraudulently or because of a misunderstanding of the distinction (Bourland, 2009-2010).

Confusion over service animals frustrated not only owners of restaurants and other public accommodations, but also people with disabilities. The Justice Department reported that individuals with disabilities who use trained dogs had expressed concern “that if untrained or unusual animals [were] termed ‘service animals,’ their own right to use guide or service dogs [might] become unnecessarily restricted or questioned. (U.S. Department of Justice, Americans with Disabilities Act Title III Regulations, Title III Regulations Supplementary Information, (2010), available at <http://www.ada.gov/regs2010/ADAREgs2010.htm>).

In 2004, the Justice Department began a process of updating its regulations under the ADA, including regulations on service animals. The rulemaking process took six years to complete, in part because of a change in administrations before it was completed. During this period, the department received extensive comments related to service animals, which led it to change some components of its regulations on this subject while retaining others. The new regulations were published September 15, 2010, and became effective March 15.

Dogs and Miniature Horses Only

The most significant change in the regulations on service animals is a limitation on the species that restaurants and other public accommodations are required to admit. Today, the only species that the Americans with Disabilities Act requires restaurants to admit to assist patrons with disabilities are dogs and miniature horses. The Justice Department determined that “limiting the number and types of species recognized as service animals will provide greater predictability for public accommodations as well as added assurance of access for individuals with disabilities who use ... service animals.” Therefore, “[o]ther species of animals, whether wild or

domestic, trained or untrained,” are no longer required by the ADA to be admitted into public accommodations.

Dogs are the best-established service animals and now have a preferred status under the ADA. In fact, the new ADA regulations limit the definition of the term “service animal” to dogs. A restaurant is required to “modify policies, practices, or procedures to permit the use of a [dog otherwise meeting the definition of a] service animal by an individual with a disability.” There are no limitations on the size or weight of dogs that may be used. The Justice Department noted that “many tasks performed by service animals require large, strong dogs.” Neither are there any limitations on breeds of dogs that may be used as service animals. The Justice Department stated that it did “not believe that it [was] either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks.” The department noted that breed restrictions vary from one jurisdiction to another and that certain breeds that might otherwise be restricted in some places (e.g., German Shepherds) have produced many successful service animals.

The new ADA regulations include a separate section with a more limited allowance for people with disabilities to use miniature horses instead of “service animals” (dogs). Restaurants and other public accommodations are allowed greater discretion to determine “whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility....” Specifically, a restaurant may consider “[t]he type, size, and weight of the miniature horse and whether the facility can accommodate these features,” as well as “[w]hether the miniature horse’s presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.” However, the presumption is that “[a] public accommodation shall make reasonable modifications in its policies, practices or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.”

Miniature horses can be trained to perform many of the same functions that dogs perform for people with disabilities, including guiding the blind and visually impaired, pulling wheelchairs, and providing stability and balance. They range in height from 24 to 34 inches and usually weigh between 70 and 100 pounds. Like dogs, they can be housebroken. Their chief advantage over dogs is in longevity. While an average guide dog provides service for about seven years, a miniature horse can provide service for more than 25. For an individual with a disability, this reduces both cost and time spent training and adjusting to new animals.

‘Psychiatric Service Animals’ Covered; ‘Emotional Support Animals’ Not

The new regulations also specify that a service animal must be “individually trained to do work or perform tasks

SOME INQUIRIES ALLOWED; OTHERS PROHIBITED

The new ADA regulations include specific instructions on questions that a restaurant or other public accommodation may ask a person with a service dog or miniature horse, and questions that are prohibited.

The following questions are prohibited:

- **Don't ask a question if the answer is obvious.** "Generally, a public accommodation may not make ... inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., [a] dog is observed guiding an individual who is blind...)."
- **Don't ask about the disability.** "A public accommodation may not ask about the nature or extent of a person's disability...."
- **Don't 'card' the animal.** "A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal." (Although service animals must be "individually trained to do work or perform tasks," the ADA does not regulate the training or require any form of license.)

ADA regulations expressly allow only "two inquiries to determine whether an animal qualifies as a service animal" (again, unless the answers are obvious):

1. "A public accommodation may ask **if the animal is required because of a disability....**"
2. "A public accommodation may ask ... **what work or task the animal has been trained to perform.**"

ability." The definition of "service animal" continues:

"Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing of the presence of people or sounds, providing nonviolent 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 devices, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors."

As the last of these examples suggest, service animals recognized under the ADA include "psychiatric service animals." In comments issued with the new rule, the Justice Department said, "Psy-

to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the individual to take medicine, providing safety checks or room searches for individuals with PTSD, interrupting self-mutilation and removing disoriented individuals from dangerous situations."

However, if an animal has not been trained to "do work or perform tasks," the ADA does not require a restaurant or other public accommodation to admit it. The definition of "service animal" states that "the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition." In its comments on the new regulations, the Justice Department explained the distinction between "psychiatric service" animals and "emotional support" animals:

"It is the Department's view that an animal that is trained to 'ground' a person

with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with a disability...."

Guard Dogs Not Service Animals

The new ADA regulations also state that "[t]he crime deterrent effects of an animal's presence" are not sufficient to make it a "service animal" that a restaurant or other public accommodation must admit. The "work or tasks" that a service animal performs may include only "nonviolent protection." The earlier regulation had used the phrase "minimal protection." The Justice Department changed this language to recognize "that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal."

Nevertheless, a restaurant may not exclude a service animal simply because its breed has a reputation for aggressive behavior. As noted earlier, ADA regulations do not restrict the breeds of dogs that may be used as service animals. If a dog's handler has it under control and the dog does not engage in aggressive behavior, the restaurant may not remove the dog.

Distinctions From Other Laws

Restaurant operators should be aware that the ADA regulations on service animals are different from regulations of the U.S. Department of Housing and Urban

✓ Checklist:

OTHER IMPORTANT PROVISIONS

The new ADA regulations contain a few more provisions on service animals that are particularly relevant to restaurant operators:

- ✓ Service dogs and miniature horses must be under the control of their handlers. For dogs, it is presumed that control requires "a harness, leash, or other tether." However, exceptions allow control by "voice control, signals, or other effective means" if a physical restraint is not practicable. Animals of both types must be housebroken.
- ✓ A restaurant may exclude an animal that is out of control or not housebroken. If it does so, it must offer the person with a disability the opportunity to obtain services without having the animal on the premises.
- ✓ A restaurant is not responsible for the care or supervision of either type of animal. (For example, if the animal needs to go outside, the restaurant is not responsible for taking it outside.)
- ✓ A person with a disability must be permitted to be accompanied by a service animal in all areas of the restaurant where other patrons are allowed.
- ✓ The restaurant may not ask nor require an individual with a disability to pay a surcharge for a service animal, even if other patrons accompanied by pets are required to pay fees. Neither may the restaurant ask or require the individual with a disability to comply with any other requirements that are generally not applicable to patrons without pets. However, if a restaurant normally charges individuals for damage they cause, then it may charge an individual with a disability for damage caused by his or her service animal.

Restaurant operators should consult with their attorneys, or state or local restaurant associations, on any state and municipal laws that may apply to them regarding service animals and emotional support animals.

Development under the Fair Housing Act, and of the U.S. Department of Transportation under the Air Carrier Access Act. The latter two sets of regulations require housing facilities and airlines to accommodate more species of animals, including "emotional support" animals, than restaurants and other public accommodations are required to accommodate under the ADA. A restaurant patron may believe that because he has a right under federal laws to live and travel with, for example, a cat as an emotional support animal, he must have the same right to bring his cat into a restaurant. This is not accurate under current federal law.

Finally, it should be noted that all 50 states and the District of Columbia have their own laws to protect the rights of people with disabilities. The

ADA expressly reserves the right of states and municipalities to "provide[] greater or equal protection for the rights of individuals with disabilities than are afforded by" the ADA itself. Therefore, even though federal law does not require a restaurant to admit an animal other than a dog or miniature horse accompanying a person with a disability, or any "emotional support animal" that does not otherwise qualify as a service animal, either requirement may exist under applicable state or municipal law. Restaurant operators should consult with their attorneys, or state or local restaurant associations, on any state and municipal laws that may apply to them with respect to service animals and emotional support animals. **RS&G**

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