

AMERICAN BAR ASSOCIATION
TORT TRIAL AND INSURANCE PRACTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges all federal, state, territorial, and local
2 legislative bodies to repeal or amend all laws or policies inconsistent with the regulations
3 implementing the Americans with Disabilities Act and to implement policies to ensure that
4 persons with disabilities utilizing service animals are provided access to services, programs and
5 activities of public entities and public accommodations in compliance with the regulations
6 implementing the Americans with Disabilities Act in a manner that:

- 7
- 8 1. Permits the use of a service animal for individuals with physical, sensory, psychiatric,
9 intellectual, or other mental impairments;
- 10
- 11 2. Provides an individualized determination of whether an animal meets the definition of
12 service animal, recognizing that service animals do a wide range of work or tasks for
13 individuals with disabilities;
- 14
- 15 3. Provides for a size, weight and breed neutral policy, utilizing a case by case analysis
16 to determine whether a particular animal can be excluded from a public entity or
17 public accommodation based on the particular's animal's actual behavior; and
18
- 19 4. Encourages the vigorous enforcement by the United States Department of Justice and
20 other governmental authorities with responsibility for implementing the Americans
21 with Disabilities Act, in situations where individuals with disabilities utilizing service
22 animals are denied access to services, programs and activities of public entities and
23 public accommodations.
24

REPORT

Introduction

There is a long history of humans utilizing service animals and although there is no formal census of the extent service animals are being utilized in the United States, the number appears to be growing.¹ Recent amendments to the regulations implementing Title II and Title III of the Americans with Disabilities Act of 1990² (ADA) set forth clear guidance on the obligation of public entities and public accommodation to allow persons with disabilities access to programs, services and activities accompanied by their service animal.³ Recent cases illustrate the need to continue to educate public entities and public accommodations as to their obligations under the ADA and to encourage enforcement of the law.⁴

Definition of Service Animal

The new definition of service animal restricts the species of animal to dogs, with a separate provision that would require entities and accommodations to make reasonable modifications in policies, practices and procedures to permit the use of a miniature horse.⁵

Wide Variety of Work and Tasks

A service animal must be “individually trained to do work or perform tasks”⁶ for the benefit of an individual with a disability. The regulations specifically state, consistent with prior

¹ See generally Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1166-67 (2010).

² 42 U.S.C. 12181 et. seq. (2006).

³ Americans with Disabilities Act Title II Regulations, Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.101 et. seq. (2011) [hereinafter Title II Regulations]; Americans with Disabilities Act Title III Regulations, Nondiscrimination on the Basis of Disabilities by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.101 (2011) et. seq. [hereinafter Title III Regulations].

⁴ E.g. *Lentini v. Cal. Ctr. For the Arts, Escondido*, 370 F.3d 837, 851 (9th Cir. 2004) (affirming district court’s judgment in favor of individual who was a quadriplegic and used a small Shih Tzu/Poodle mix as a service animal); *Miller v. Ladd*, 2010 WL 2867808 *5 (N.D. Cal. 2010) (denying motion for summary judgment in case where a restaurant patron with multiple disabilities alleged denial of access when she was accompanied by her service dog who was trained to alert her to anxiety attacks); *Pena v. Bexar County, Tx.*, 726 F.Supp. 675, 696 (W.D. Tex. 2010) (ordering mediation in Title II claim where an individual with a service dog was arrested after refusing to leave a courthouse); Huss, *supra* note 1, at 1189-93 (analyzing recent cases involving service animals and the ADA).

⁵ Title II Regulations, 28 C.F.R. §§ 35.104, 35.136 (2011); Title III Regulations, 28 C.F.R. §§ 36.104, 36.302 (2011). Access for a miniature horse is subject to a series of assessment factors. *Id.* See also Huss, *supra* note 1, at 1180-89 (discussing comments regarding the proposed species limitation in the rulemaking process).

Department of Justice guidance regarding service animals, that “the crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.”⁷ The guidance accompanying the regulations, reinforce that “emotional support” animals would not be covered by the ADA, however, highlight the coverage of other federal statutes, such as the federal Fair Housing Act, that would be applicable to emotional support animals.⁸

The work or tasks that a service animal performs must be directly related to an individual’s disability. The definition of service animal clearly allows that persons with disabilities other than physical disabilities that may traditionally be associated with the use of service animal (such as visual or auditory limitations) may qualify as an individual with a service animal. Specifically individuals with a “physical, sensory, psychiatric, intellectual, or other mental disability”⁹ may utilize a service animal. The DOJ provides examples of the type of work or tasks a service animal may provide including, but 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 to the presence of people or sounds, providing non-violent 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 disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.¹⁰

Given the wide range of work or tasks that a service animal may perform and the fact that individuals with disabilities that may not be apparent are covered,¹¹ it is important to continue to educate public entities and public accommodations as to their obligations under the ADA.¹²

⁶ Title II Regulations, 28 C.F.R. §35.104 (2011); Title III Regulations, 28 C.F.R. § 36.104 (2011).

⁷ *Id.*

⁸ Revised Final Title II Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability in State and Local Government Services, at 80-81 *available at* http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm (last accessed April 20, 2011) [hereinafter Title II Guidance]; Revised Final Title III Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, at 86-87 *available at* http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm (last accessed April 20, 2011) [hereinafter Title III Guidance].

⁹ Title II Regulations, 28 C.F.R. § 35.104 (2011); Title III Regulations, 28 C.F.R. § 36.104 (2011).

¹⁰ *Id.*

¹¹ *See e.g.* HR 1154 (112th Cong., 1st Session, Mar. 17, 2011). This bill references the ADA and mandates that the Department of Veterans Affairs allow service dogs in its facilities. *Id.* at Sec. 3. The Congressional findings include the statement that the usage of medical service dogs among veterans is increasing. *Id.* at Sec. 2(1). Janie Lorber, *For the Battle-Scarred, Comfort at*

No Limit on Size, Weight or Breed of Dog

The DOJ's guidance articulated its reasoning for not providing a limit on the size, weight or breed of dog that may qualify as a service animal. It responded to commentators that suggested that the DOJ should defer to local laws restricting the breeds of dogs that individuals in a community may own by stating:

The Department does not believe that it is 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. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, *e.g.*, German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual's home jurisdiction but is nonetheless banned by other jurisdictions.¹³

the End of the Leash, NEW YORK TIMES, Apr. 4, 2010, at A17 (reporting on the use of service dogs by veterans with post-traumatic stress disorder).

¹² *E.g.* United States v. LeHouillier, Consent Order, Civil Action No. 1:09-cv-02582-MSK-ME, (D.Co. Mar. 29, 2010) (providing that a law firm will adopt an ADA compliant service animal policy and take other action after the Department of Justice alleged that LeHouillier and the firm violated the ADA when they barred a complianant with a service dog from the office); Julie Murphy, Guide Dogs Lead in Daytona Beach: City has High Number of Service Animals, DAYTONA NEWS J. (Daytona Beach, Fl.), Mar. 16, 2010 at 1C (reporting on an advocacy group for individuals with service animals and discussing the continuing issues with such individuals being denied access to public accommodations)

¹³ Title II Guidance at 81; Title III Guidance at 87. *See* Grider v. City and County of Denver, 2011 WL 721279 (D. Colo. 2011) (discussing a case where individuals with disabilities using trained service animals subject to breed bans alleged violations of Title II of the ADA). The court in this case specifically did not rule on the validity of the jurisdictions' ordinances but only considered whether the Plaintiffs in the case alleged facts sufficient to support the elements of the ADA claim. *Id.* at *2. The jurisdictions named in this lawsuit have reacted to the new regulations by, in the case of the City of Denver, announcing a new animal control policy and in the case of the City of Aurora, revising the breed discriminatory ordinance to provide some exceptions for service animals. Grider v. City and County of Denver, Civil Action No. 10-cv-00722-MSK-MJW, Aff. of Doug Kelly (Apr. 15, 2011) (stating that a new written policy relating to service animals had been adopted by Animal Control and attaching that policy); Sara

The DOJ reiterated that a public entity or public accommodation retained

the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal’s actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.¹⁴

If a purported service animal is “out of control and the animal’s handler does not take effective action to control”¹⁵ the animal a public entity or public accommodation may ask an individual with a disability to remove a service animal from the premises.¹⁶ Given the regulations and guidance, legislative bodies and governmental agencies should take steps to ensure that their laws and policies provide that individuals with disabilities accompanied by a service animal, regardless of size, weight or breed are accommodated in public entities and public accommodations.

Conclusion

The Tort Trial and Insurance Practice Section urges adoption of this recommendation calling for all federal, state, territorial, and local legislative bodies and governmental agencies to adopt laws and policies to ensure that individuals with disabilities utilizing service animals are provided access to services, programs and activities of public entities and public accommodations pursuant to the regulations implementing the Americans with Disabilities Act.

Respectfully submitted,

Castellanos, *Aurora City Council Changes Course on Service Animals*, THE AURORA SENTINEL (Aurora, Colo.), Feb. 6, 2011, Pg. Num. Unavail. (announcing decision by the Aurora City Council to amend the ordinance to provide for some exceptions for service animals).

¹⁴ Title II Guidance at 81; Title III Guidance at 87.

¹⁵ Title II Regulations, 28 C.F.R. § 35.136; Title III Regulations, 28 C.F.R. § 36.302(c) (2011).

¹⁶ *Id.*

GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice Section

Submitted By: Ginger M. Busby, Chair

1. Summary of Recommendation.

This Recommendation is intended to address issues with individuals with disabilities continuing to be denied access to public entities or public accommodations when they are accompanied by service animals.

2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial and Insurance Practice Section on _____, 2011.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies are Relevant to This Recommendation and How Would They Be Affected By Its Adoption?

Not applicable.

5. What Urgency Exists Which Requires Action at This Meeting of the House?

Individuals with disabilities deal with issues of access every day. This recommendation calls attention to regulations that became effective on March 15, 2011 that ensure that persons with individuals utilizing service animals are able to have access to public entities and public accommodations, while allowing for the exclusion of service animals that are not under control of the handler.

6. Status of Legislation. (If applicable.) Not applicable.

7. Cost to the Association. (Both Direct and Indirect Costs)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referral.

This Report and Recommendation is referred to the Chairs and Staff Directors of all ABA Sections and Divisions.

10. Contact Persons. (Prior to the Meeting)

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11. Contact Person. (Who Will Present the Report to the House.)

TBD

EXECUTIVE SUMMARY

1. Summary of the Recommendation

This Recommendation calls for all federal, state, territorial, and local legislative bodies and governmental agencies to enact laws and implement policies to ensure that persons with disabilities utilizing service animals are provided access to services, programs and activities of public entities and public accommodations pursuant to the regulations implementing the Americans with Disabilities Act.

2. Summary of the Issue that the Recommendation Addresses

The Recommendation is intended to address the issue of individuals with disabilities accompanied by service animals being denied access to services, programs and activities of public entities and public accommodations.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This recommendation sets forth the regulation and guidance for legislative bodies and governmental agencies are required to follow to ensure that their laws and policies are consistent with the Americans with Disabilities Act.

4. Summary of Minority Views or Opposition Which Have been Identified

No minority or opposing view has been identified.