Service Animals

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TABLE OF CONTENTS

Introduction 1

Definitions 1
- A. Assistance or Service Animals 1
- B. Disabled Persons 2
- C. Discrimination 3
- D. Place of Public Accommodation 3

The Fair Housing Act Amendments 3

The Necessary Steps for Public Places to Accommodate Service Animals 4
- A. When are Modifications Not Required?
- B. The Removal of a Service Animal from a Public Place 6
- C. Hotels and Service Animals 6
- D. Proving the Service Dog's Authenticity 6
- E. Texas Law and the Blind 7

Conclusion 7

Sources 8

Introduction

The Texas Human Resources Code requires that "persons with disabilities have the same right as the able-bodied to the full use and enjoyment of any public facility in the state … including the right to use an assistance animal." Tex. Hum. Res. Code. Ann. § 121.003(a), (c), (d)(2); *see also Livingston v. Beeman*, 408 S.W.3d 566, 567–68. The following is an explanation of how the law protects the right of disabled persons to use an assistance animal in places of public accommodation.

Definitions

Assistance or Service Animals

"Assistance animals" and "service animals" are canines that are specifically trained or equipped to help a person with a disability that is used by a person with a disability. Tex. Hum. Res. Code. Ann. § 121.002 (1). This section of the Texas Human Resources Code, which narrowed the "service animal" definition to canines only, was added in 2013 by Texas House Bill 489 and became effective January 1, 2014. *See* 61 TEX. JUR. PUBLIC AID AND WELFARE § 98.

Animals used solely for emotional support or "comfort" are not considered service animals. *See* 28 C.F.R § 36.104 (stating that "emotional support, well-being, comfort, or companionship is not the type of "work tasks" considered in the ADA's definition of service animal). And service animals do not need formal training; they can be individually trained by their owner to help them in whatever ways needed, as long as they are under control and not interrupting the normal course of the public accommodation. 61 TEX. JUR. PUBLIC AID AND WELFARE § 98. Note that while assistance or" comfort animals" are most often dogs, other animals can qualify.

Title II of the Americans with Disabilities Act (ADA) requires state and local governments to make their programs and services accessible to persons with disabilities. 42 U.S.C.S § 12181-

12189. State and local governments must also adhere to Title III of the ADA to avoid discriminating against persons with the aforementioned disabilities. *See generally Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1055 (5th Cir. 1997); *see also* 42 U.S.C.S § 12181-12189. More specifically, "no individual shall be discriminated against on the basis of disability in the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C.S § 12182(a).

Disabled persons

Also amended with this section was the definition of a disabled person, which is now defined as "a person who has a mental or physical disability, an intellectual or developmental disability, a hearing impairment, deafness, a speech impairment, a visual impairment, post-traumatic stress disorder, or any health impairment that requires special ambulatory devices or services." Tex. Hum. Res. Code. Ann. § 121.002 (4); *see also* 61 TEX. JUR. PUBLIC AID AND WELFARE § 98.

These conditions count as a disability:

- Deafness or another hearing impairment;
- A visual impairment;
- A speech impairment;
- A mental disability;
- A physical disability;
- An intellectual or developmental disability;
- Post-traumatic stress disorder; or
- Any health impairment for which the person needs special ambulatory services or devices.

Title II of the Americans with Disabilities Act (ADA) requires state and local governments to make their programs and services accessible to persons with disabilities. 42 U.S.C.S § 12181-12189. State and local governments must also adhere to Title III of the ADA to avoid discriminating against persons with the aforementioned disabilities. *See generally Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1055 (5th Cir. 1997); *see also* 42 U.S.C.S § 12181-12189. More specifically, "no individual shall be discriminated against on the basis of disability in the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C.S § 12182(a).

Discrimination

Discrimination, according to the ADA, is defined as the failure of any place of public accommodation "to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C.S § 12182(b)(2)(A)(ii).

Place of Public Accommodation

A place of public accommodation, or a public facility, "includes a street, highway, sidewalk, walkway, common carrier, airplane, motor vehicle, railroad train, motor bus, streetcar, boat, or any other public conveyance or mode of transportation; a hotel, motel, or other place of lodging; a public building maintained by any unit or subdivision of government; a retail business, commercial establishment, or office building to which the general public is invited; a public accommodation, amusement, convenience, or resort to which the general public or any

classifications of person from the general public is regularly, normally, or customarily invited." Tex. Hum. Res. Code § 121.002 (5).

Under the ADA, the definition of public accommodations is also very broad. It includes:

- Hotels and other lodging establishments;
- Public transportation terminals, depots, and stations;
- Restaurants and other places that serve food and drink;
- Sales or rental establishments;
- Service establishments;
- Any place of public gathering, such as an auditorium or convention center;
- Places of entertainment and exhibit, like theaters or sports stadiums;
- Gyms, bowling alleys, and other places of exercise or recreation;
- Recreational facilities, such as zoos and parks;
- Libraries, museums, and other places where items are collected or displayed publicly;
- Educational institutions; and
- Social service centers.

The Fair Housing Act Amendments

The Fair Housing Act Amendments (FHAA) generally prohibits "discrimination in the sale or rental of housing" on the basis of being handicapped. Darcie Magnuson, *Note: Service Animals in Training and the Law: An Imperfect System*, 14 SCHOLAR 987. 1001 (2012). More specifically, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling" is prohibited by the FHAA. 42 U.S.C § 3604 (2006). For example, the FHAA states that a rental housing unit with a "no pets" policy must allow a disabled person with a service dog an opportunity to rent the unit, because without the dog, the disabled person would not have an equal opportunity to use and enjoy the dwelling. Darcie Magnuson, *Note: Service Animals in Training*

and the Law: An Imperfect System, 14 Scholar 987, 1004 (2012). Service and assistance animals are not 'pets' under the FHA.

Under the FHAA, emotional support animals are not limited to dogs and can be any species of animal. But the ADA defines service animals to exclude emotional support animals. *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, U.S. Department of Housing and Urban Development, FHEO Notice (2013).

However, this definition does not limit housing providers' obligations to make reasonable accommodations for assistance animals under the FHA or Section 504 of the Rehabilitation Act of 1973 (Section 504). *Id.* Persons with disabilities may request a reasonable accommodation for any assistance animal, including an emotional support animal, under both the FHA and Section 504. *Id.* In situations where the ADA and the FHA/Section 504 apply simultaneously, such as in public housing agency, sales or leasing offices, or housing associated with a university or other place of education, housing providers must meet their obligations under both the reasonable accommodation standard of the FHA/Section 504 and the service animal provisions of the ADA. *Id.*

The Necessary Steps for Public Places to Accommodate Service Animals

Therefore, according to the ADA and FHAA, state and local governments cannot discriminate against disabled people who need service dogs. "Generally, a public accommodation shall modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability." 28 C.F.R. § 36.302(c)(1). The Justice Department commented that this formulation reflects the general intent of Congress that places of public accommodation take the necessary steps to accommodate service animals and to ensure that service animals do not become physically separated from their disabled owners. *Johnson v. Gambrinus Company/Spoetzl*

Brewery, 116 F.3d 1052, 1055 (5th Cir. 1997). Local governments must ensure that the broadest feasible access be provided to service animals in all places of public accommodation. *Id.*

When are Modifications Not Required?

Note that modifications to accommodate service animals at a public place of accommodation may not be required if such modifications would either jeopardize the safety of the public accommodations or fundamentally alter the nature of the public accommodation. *Id* at 1064. The disallowance of modifications to accommodate service animals is a high standard and depends on the facts of each specific case. *Id*; *see also Lentini v. California Center of the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) (exemplifying the high standard of disallowance by rejecting the California Center of the Arts' appeal complaining that a service dog barked a few times during a concert performance).

If a place of public accommodation can prove that a person's use of a service dog is not directly related to the person's disability, then the place can disallow access of the service dog on its premises. *See* Tex. Health & Safety Code Ann § 437.023 (listing the following tasks that a service animal may perform in order to help a person with a disability: guiding a person who has a visual impairment; alerting a person who has a hearing impairment or who is deaf; pulling a wheelchair; alerting and protecting a person who has a seizure disorder; reminding a person who has a mental illness to take prescribed medication; and calming a person who has post-traumatic stress disorder).

The Removal of a Service Animal from a Public Place

A public accommodation can request the removal of a service animal if the animal is not house broken or is out of control and the owner does not take effective action to control it. 28

C.F.R. § 36.302(c)(2)(i)-(ii). The owner of the service animal will still be allowed to enter the premises if the service animal is removed or banned. 28 C.F.R. § 36.302(c)(3).

Hotels and Service Animals

"If a business such as a hotel normally charges guests for damage that they cause, a customer with a disability may also be charged for damage caused by himself or his service animal." Americans with Disabilities Act Requirements, *Service Animals*, U.S. DEPARTMENT OF JUSTICE, (May 29, 2015, 2:26 PM), http://www.ada.gov/service_animals_2010.htm

Proving the Service Dog's Authenticity

If a disabled person is seeking admittance to a food service establishment, retail food store, or physical space occupied by another entity regulated under the Chapter 437 of the Texas Health & Safety Code, a staff member of the establishment, store, or entity may question the person to establish proof that a person's use of a service dog is necessary. *See* Tex. Health & Safety Code Ann. § 437.023(b) (stating the staff member is only allowed to inquire about "whether the service animal is required because the person has a disability; and what type of work the service animal is trained to perform"). Although staff members are allowed to ask the aforementioned questions, they cannot require documentation (e.g. proof of certification, training, or licensure), a special identification card or training documentation for the dog, and they cannot ask the dog to demonstrate its ability to perform the work or task to prove that the animal is a service animal. 28 C.F.R. § 36.302(c)(6).

Texas Law and the Blind

Texas law goes even further to protect blind persons, specifically prohibiting a place of public accommodation from excluding a blind person because of their use of a service dog. *Id* at 1065; *see* Tex. Hum. Res. Code. Ann. § 121.003 (c) ("No person who is blind or physically

handicapped may be denied admittance to any public facility in the state because of the blind or handicapped person's use of a white cane, assistance dog, wheelchair, crutches, or other device of assistance in mobility, or because the person is blind or handicapped").

Conclusion

The rights of disabled persons to use service dogs are strongly protected. The law gives broad discretion to the admittance of service dogs in places of public accommodation, and establishes a high standard if attempting to take away this discretion. Generally, service dogs are allowed almost anywhere if the disabled person can prove that the dog is necessary to provide the disabled person the full use and enjoyment of any public facility in the state. *See* Tex. Hum. Res. Code. Ann. § 121.003(a),(c),(d)(2); *see also Livingston v. Beeman*, 408 S.W.3d 566, 567–68. (Although comfort animals do not have the same legal status, their accommodation under reasonable conditions is encouraged by enforcement agencies.)

Sources

- Tex. Hum. Res. Code. Ann. § 121.002 (1)
- Tex. Hum. Res. Code. Ann. § 121.002 (4)
- Tex. Hum. Res. Code § 121.002 (5)
- Tex. Hum. Res. Code. Ann. § 121.003(a),(c),(d)(2)
- Tex. Health & Safety Code Ann § 437.023
- 61 TEX. JUR. PUBLIC AID AND WELFARE § 98
- 28 C.F.R § 36.104
- 28 C.F.R. § 36.302(c)(1)(2)(3)(6)
- 42 U.S.C.S § 12181-12189
- 42 U.S.C § 3604 (2006)

- Section 504 of the Rehabilitation Act of 1973

- Americans with Disabilities Act Requirements, *Service Animals*, U.S. DEPARTMENT OF JUSTICE, (May 29, 2015, 2:26 PM); http://www.ada.gov/service_animals_2010.htm

- *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1055, 1064 (5th Cir. 1997)
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- *Livingston v. Beeman*, 408 S.W.3d 566, 567–68

- Texas House Bill 489

- Darcie Magnuson, *Note: Service Animals in Training and the Law: An Imperfect System*, 14 SCHOLAR 987. 1001 (2012)

- *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, U.S. Department of Housing and Urban Development, FHEO Notice (2013)