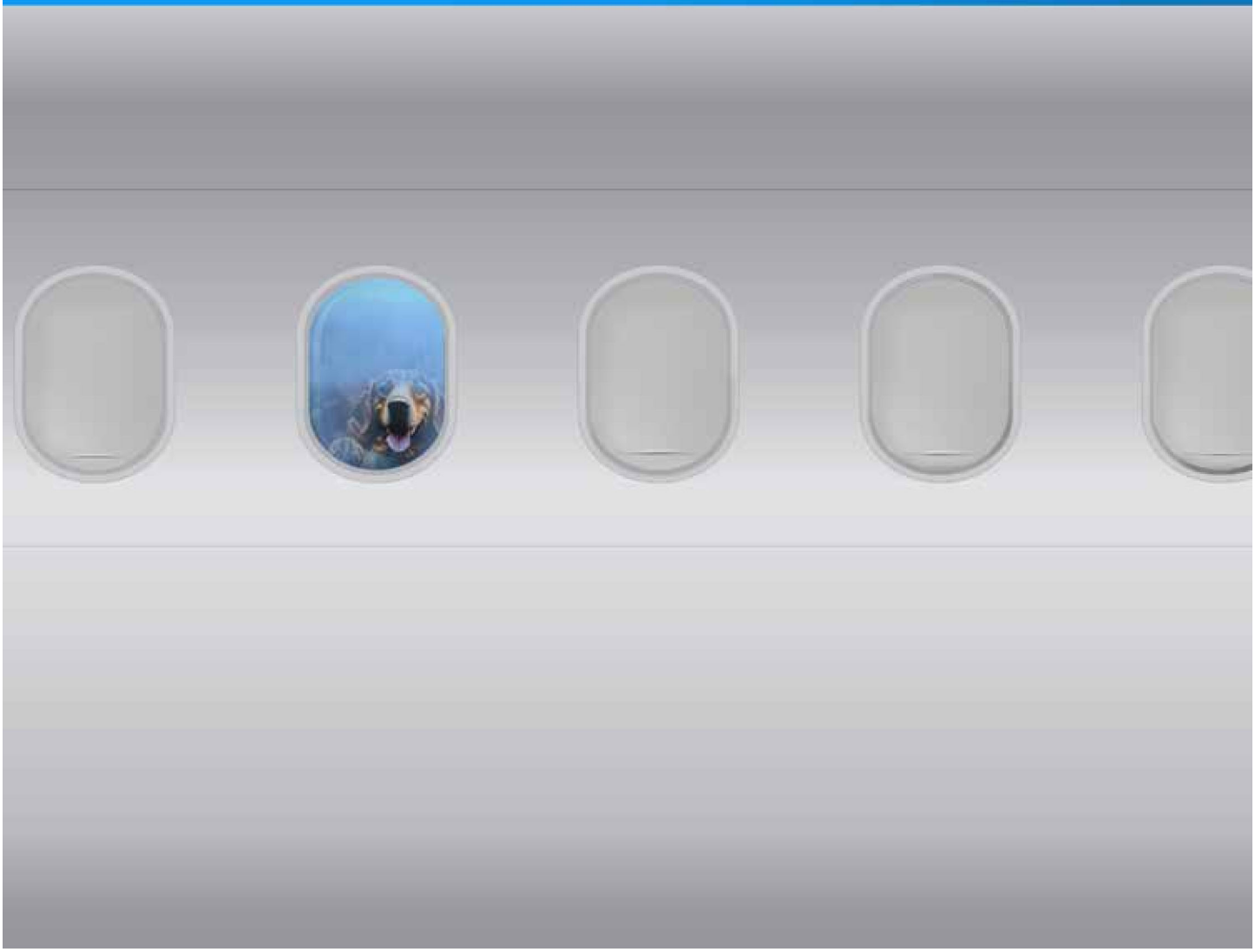
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Flying With Fido: A Brief Survey of Federal Service Animal Law



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Every year it seems that more of us are relying on the benefits of "emotional support" creatures, bringing them into previously animal-free environments. While these companions, four-legged or otherwise, undoubtedly provide great benefits, many are not "service animals" for purposes of federal law. Our author explains the regulations governing animals on airlines and related statutory nuances.

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THE PREROGATIVE TO UNSEAT: REMOVING COUNCILMEMBERS FROM COUNCIL COMMITTEES

By: Stephen K. Postema, City Attorney Ret., Ann Arbor, Michigan and Jennifer A. Richards, Assistant City Attorney, Ann Arbor, Michigan

Most city councilmembers comport themselves in a productive and cooperative manner. Occasionally, however, the city or county attorney will be called upon to evaluate the prospects for redressing unprofessional or unethical behavior by a councilmember. One such action may be to remove the member from a committee post. A thorough understanding of the rules and ramifications is required.

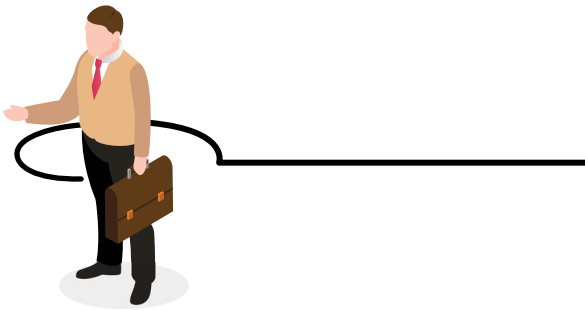
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"WE'RE HIRING, WE JUST NEED YOUR SOCIAL MEDIA LOGINS AND PASSWORDS"

By: Laura S. Burton, Police Attorney, Gastonia, North Carolina

Checking a job applicant's social media activity can provide a wealth of information, potentially revealing troublesome behavior and helping to avoid future problems. But such an inquiry triggers statutory and even constitutional issues, and many jurisdictions prohibit searching through a job seeker's non-public online activity.

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Flying with Fido: A Brief Survey of Federal Service Animal Law

By: MICHELLE VILLAREAL,
Deputy City Attorney, League City, Texas



Introduction

Service animals bring comfort and security to millions of Americans. As more of us rely on these creatures, they have increasingly become the subject of regulation. This article will explore how service animals are defined and regulated by the Americans with Disabilities Act,[1] the Fair Housing Act,[2] Section 504 of the Rehabilitation Act,[3] and the Air Carrier Access Act.[4] I analyze each law by determining how each defines "disability" and "service animal," how each applies in common situations and the general prohibitions addressed in each.

1. Service Animals under the ADA. Under the Americans with Disabilities Act ("ADA"), Congress granted protections to "qualified individuals with disabilities" so that they are not excluded from employment, public services, and/or public accommodations.[5] Under the ADA, a "disability" is defined a physical or mental impairment that substantially limits one or more major life activities of an individual, a record of such an impairment; or being regarded as having such an impairment.[6] The ADA's protections are divided into three sections: (1) Title I regulates employment activities;[7] (2) Title II regulates state and local governments (and their facilities);[8] and (3) Title III regulates private entities that provide public accommodations.[9]

Title II and Title III of the ADA define a "service animal" as a dog that is "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."[10] Other species of animals (except miniature horses), whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.[11] A service animal can be any breed and any size of dog regardless of whether a municipality bans certain dog breeds.[12] While not included in the definition of "service animal," the ADA also includes miniature horses in its regulations regarding service animals.[13] An animal in training, however, does not qualify as a service animal under the ADA.[14] In addition to the species limitation, a service animal must be under the control of its handler.[15] To be under "control," the service animal must be harnessed, leashed, or tethered, unless the individual's disability prevents using these devices or these devices interfere with the service animal's safe, effective performance of tasks.[16] In that case, the individual must maintain control of the animal through voice, signal, or other effective controls.[17]

Generally, ADA regulations related to service animals can be said to apply to places of public interactions and accommodations.[18] Under Title II specifically, individuals with disabilities may be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.[19] This applies to all public buildings of state and local governments; including administration buildings, meeting spaces, parks, schools, colleges, etc.

Under Title III specifically, individuals with disabilities are permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.[20] This applies to stores, theaters, stadiums, groceries, shopping centers, museums, attorneys' and other professionals' offices, hospitals, bus and train depots, zoos, privately owned public transportation, recreational places, and similar locations that serve the public. People using a service animal may not be treated differently or charged a fee different from patrons without animals.[21] Regarding restaurants and bars, a service animal must generally be allowed in public areas even if state or local health codes prohibit animals on the premises.[22] That being said, seating, food, and drink are provided for customer use only and businesses are not required to allow an animal to sit or be fed at the table.[23] A

business is not also required to care for or supervise a service animal.[24]

Under the ADA, only two questions can be asked of an animal's handler by the public: (1) Is the animal required because of a disability; and (2) what specific work or task the animal has been trained to perform.[25] 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 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.[26] A public entity (under Title II) or a public accommodation (under Title III) may not require proof that the animal has been trained.[27]

While the ADA provides for the inclusion of service animals in most public areas, there are instances where service animals may be excluded. A service animal could be excluded if its presence would "fundamentally alter" the nature of the goods, services, programs, or activities provided to the public.[28] Examples of a fundamental alteration due to a service animal include the presence of an animal in a restricted area of a boarding school dormitory reserved specifically for students with allergies to dog dander or at a zoo, where the animals on display would be agitated by the presence of a dog. But a single person's dog allergies or someone's fear of dogs is probably not sufficient to fundamentally alter an environment in such a way as to warrant expulsion.[29]

A service animal could also be excluded if the dog is not under the control of its handler. Part of the definition of a service animal is that it remains under the control of the person with the disability.[30] To be "under control", the service animal must be harnessed, leashed, or tethered while in public places (and not roam freely) unless these devices interfere with the service animal's work or the person's disability prevents use of these devices.[31] "Under control" also means that a service animal should not be allowed to bark repeatedly in a lecture hall, theater, library, or other quiet place.[32]

While public entities may not require that service animals be certified as service animals, a public entity can still enforce local animal control or public health requirements.[33] So, if a public entity has dog registration and vaccine requirements and the service animal is not compliant with such requirements, the service animal may be excluded until such time as there is compliance.

Under Title III (public accommodations) of the ADA, private clubs and religious entities may exclude service animals if they so wish.[34]

As mentioned above, the ADA allows the inclusion of miniature horses in certain instances.[35] The regulations set out four assessment factors to assist entities in determining whether miniature horses can be accommodated in their facility.[36] The assessment factors are (1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner's control; (3) whether the facility can accommodate the miniature horse's type, size, and weight; and (4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.[37]

2. Service Animals under FHA.

On April 11, 1968, President Lyndon Johnson signed the Civil Rights Act of 1968, which expanded on previous acts and prohibited discrimination concerning the sale, rental, and financing of housing based on race, religion, national origin, sex, (and as amended) handicap and family status.[38] Title VIII of the Act is also known as the Fair Housing Act of 1968 (FHA).[39] The FHA covers most housing.[40] In very limited circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family houses sold or rented by the owner without the use of an agent, and housing operated by religious organizations and private clubs that limit occupancy to member.[41] The Fair Housing Act (FHA) makes it unlawful for a housing provider[42] to refuse to make a reasonable accommodation that a person with a handicap may need to enjoy and use a dwelling.[43] Under the FHA, we use the word "handicap" in place of "disability" but the terms have the same meaning.[44] A "handicap" is defined as a physical or mental impairment of a person which substantially limits one or more major life activities.[45] A reasonable accommodation under the FHA must include an assistance animal in certain circumstances.[46]

There are two types of assistance animals: (1) service animals; and (2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (sometimes referred to as a "support animal").[47] The definition of service animals under the FHA is the same as under the ADA and only includes trained dogs.[48] Support animals, however, have a broader definition and can include animals commonly kept in a household or unique animals.[49] Animals commonly kept in an household include dogs, cats, small birds, rabbits, hamsters, gerbils, other rodents, fishes, turtles, or other small, domesticated animals that are traditionally kept in the home for pleasure rather than for commercial purposes.[50] Reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals are not considered common household animals.[51] An individual requesting to keep a unique type of animal that is not commonly kept in households as described above, has the substantial burden of demonstrating a disability-related therapeutic need for the specific animal or the specific type of animal.[52]

Once an individual makes a request for a reasonable accommodation for an assistance animal, there are only certain questions that a housing provider is allowed to ask: (1) if the animal is required because of a disability; and (2) what work or task the animal has been trained to perform.[53] If the first question is ascertainable and answered in the affirmative and the requestor identifies a specific task, then the housing provider must allow

Continued on page 8

the reasonable accommodation. For support animals that are unique (not commonly kept in households), the requestor bears the substantial burden of demonstrating a disability-related therapeutic need for the animal.[54] If the requestor's disability is not readily observable or it is not clear that the animal does work to assist the requestor's disability, a housing provider is permitted to request information that supports that the requestor seeking the accommodation has a disability or that the animal does work with respect to the requestor's disability.[55] Such information could include a determination of disability from a government agency, receipt of disability benefits, a housing voucher received because of a disability, information from a licensed health care provider, etc.[56]

Once a requestor provides reasonable support of a disability and the need for the assistance animal relative to the disability, the housing provider must allow the reasonable accommodation. Once an assistance animal is allowed under the FHA, the housing provider must waive any pet deposit.[57] But while the pet deposit is waived, the requestor is still liable for any damage done by the assistance animal.[58] A housing provider may not limit the breed or size of the assistance animal, but it is not required to accommodate an animal that poses a threat to health or safety.[59] In addition, as this would be an assistance animal and not a pet, any pet rules would not apply to the animal.[60] As with the ADA, religious entities and private organizations are exempted from the requirements of the FHA.

3. Service Animals under the ACAA.
The Air Carrier Access Act (ACAA) prohibits discrimination by U.S. and foreign air carriers based on physical or mental disability.[61] The Department of Transportation, in interpreting and implementing the ACAA, has issued rules setting forth the standards of service which air carriers are expected to provide to disabled individuals, including rules related to service animals.[62]

Under the ACAA, a disability is defined as a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[63] An airline must allow a service animal to accompany a passenger with a disability.[64] A service animal is defined as a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.[65] Animal species other than dogs, emotional support animals, comfort animals, companionship animals, and service animals in training are not service animals under the ACAA.[66]

An airline may rely on three methods to determine if an animal qualifies as a service animal: (1) ask the passenger if the dog is accompanying the passenger due to a disability and what task the animal has been trained to perform; (2) observe the dog's behavior to see if it remains under the control of its handler like a typical trained dog; and (3) look for physical indicators, such as a harness or vest on the animal, to determine if the animal is identified as a service animal.[67]

Once an airline is aware that a passenger will bring a service animal, the AACA imposes various requirements on the airline. An airline may not require a passenger with a service dog to physically check in if there is an online check-in available to the public.[68] In certain circumstances, an airline may require 48 hours advance notice of the service animal and the completion of certain forms.[69] An airline must allow a service animal to sit on the disabled person's lap or foot space unless it would encroach on another passenger's space or would be inconsistent with FAA safety requirements.[70]

4. Service Animals under Section 504.
Section 504 of the Rehabilitation Act of 1973 (Section 504) is the federal law that protects the rights of people with disabilities to participate in Federal programs and services.[71] Federal agencies, such as the U.S. Department of Veterans Affairs, Social Security Administration and the IRS do not have to comply with the ADA but must comply with Section 504.[72] Section 504 also applies to certain housing providers that receive federal funding. Although Section 504 does not specifically address services animals, it, like the ADA, requires reasonable accommodations for qualified people with a disability.[73] HUD has indicated that a service animal is a reasonable accommodation.[74]

Ending Considerations.
When advising municipal clients, its important to understand the applicability and interplay of the ADA, FHA, AACA and Section 504 regarding service animals. Each set of laws has its own applicability and its own definition of disability and service animal. It is important to understand how to apply each set of rules in order to ensure compliance.

Notes

1. 42 U.S.C. § 12102.
2. 42 U.S.C. § 3601 *et seq*.
3. 29 U.S.C. § 794.
4. *See* 49 U.S.C. § 41705(a).
5. 42 U.S.C. § 12102.
6. 42 U.S.C. § 12102.
7. *Id.* § 12111 *et seq*; The regulations applying Title I are in 29 C.F.R Part 1630.
8. *Id.* § 12131 *et seq*; The regulations applying Title II are in 28 C.F.R Part 35.
9. *Id.* § 12181 *et seq*; The regulations applying Title III are in 28 C.F.R Part 3.
10. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.
11. *Id.*
12. See https://www.ada.gov/resources/service-animals-faqs/.
13. 28 C.F.R. § 35.136(i); 28 C.F.R. § 36.302(c)(4).
14. Q6 at https://www.ada.gov/regs2010/service_animal_qa.html.
15. 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c)(9).
16. *Id.*
17. *Id.*
18. While we focus on Titles II and III of the ADA for service animals, a service animal might qualify as a reasonable accommodation under Title I of the ADA.
19. 28 C.F.R. § 35.136(g).

20. 28 C.F.R. § 36.302(c)(7).
21. 28 C.F.R. § 35.136(h); 28 C.R.F. § 36.302(c)(8).
22. *See* https://www.ada.gov/service_animals_2010.htm.
23. Q32 at https://www.ada.gov/resources/service-animals-faqs/.
24. 28 C.F.R. § 35.136(e); 28 C.R.F. § 36.302(c)(5).
25. 28 C.F.R. § 35.136(f); 28 C.R.F. § 36.302(6).
26. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.
27. *Id*.
28. Q25 at https://www.ada.gov/resources/service-animals-faqs/.
29. See https://www.ada.gov/resources/service-animals-2010-requirements/.
30. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.
31. Q27 at https://www.ada.gov/resources/service-animals-faqs/.
32. *Id*.
33. Q18 at https://www.ada.gov/resources/service-animals-faqs/.
34. 28 C.F.R. § 36.102(e).
35. 28 C.F.R. § 35.136(i); 28 C.R.F. §. 36.302(c)(9).
36. *Id*.
37. *Id*.
38. *Id*.
39. 42 U.S.C. § 3601 *et seq*.
40. 42 U.S.C. § 3603(a); https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf.
41. 42 U.S.C. § 3603(b).
42. *See* https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf (footnote 3).
43. 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204.
44. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988").
45. 24 C.F.R. § 100.201.
46. *See* https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf .
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*.
61. 49 U.S.C. § 41705.
62. 14 CFR Part 382.
63. 14 C.F.R. § 382.3.
64. *Id* at § 382.72.
65. *Id*.
66. *Id*.
67. *Id* at § 382.73.
68. *Id* at § 382.76.
69. *Id* at § 382.75.
70. *Id* at § 382.77.
71. 29 U.S.C. § 794; 24 C.F.R. part 8.
72. Q36 at http://fclawlib.libguides.com/ld.php?content_id=22722486.
73. *See* 24 C.F.R. § 8.11.
74. *See* https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq.

