GPSOLO
SOLO, SMALL FIRM & GENERAL PRACTICE DIVISION A PUBLICATION OF THE AMERICAN BAR ASSOCIATION

Service Dogs and the Rights of the Disabled

Vol. 31 No. 2

By William D. Goren

William D. Goren, Esq., J.D., LL.M. (williamgoren.com/blog), is author of Understanding the Americans with Disabilities Act, 4th ed. (ABA, 2013), and founding member and president of the National Association of Attorneys with Disabilities. His practice focuses on making the ADA work successfully for clients. Parts of this article previously appeared on the author's blog.

The American with Disabilities Act (ADA), along with other federal legislation and many state laws, brought new protections regarding the use of service dogs by people with disabilities. But how does the law distinguish between a service dog and other kinds of dogs, and is the use of certain breeds of dog protected while the use of other breeds is not?

Sniffing Out the Differences: Service Dogs vs. Other Dogs

The sections of the federal regulations applying to service animals for public entities and for places of public accommodations (Title II and Title III of the ADA,

which can be found at 28 C.F.R. § 35.104 and 28 C.F.R. § 36.104, respectively) both define service animal in the same way: any dog 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. The work or task performed by the service animal has to be directly related to the handler's disability and may (the use of the term "may" strongly, if not conclusively, suggests that the list is not exclusive) include:

> 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 nonviolent protection or rescue work; pulling a wheelchair; assisting an individual during a seizure; alerting an individual 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.

Very importantly, deterring crime and providing emotional support, a sense of well-being, comfort, or companionship do not constitute work or tasks as defined in 28 C.F.R. § 35.104 and 28 C.F.R. § 36.104.

The inquiries that can be made when someone shows up with an alleged service animal at a public entity or at a place of public accommodation are limited by 28 C.F.R. § 35.136(f) (Title II) and 28 C.F.R. § 36.302(c)(6) (Title III). The only two permissible questions are whether the animal is required because of a disability and what work or task the animal has been trained to perform. Further, under these same regulations, those inquiries cannot be made if it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (for example, it is usually pretty obvious when an individual is using a seeing-eye dog).

Here's the problem: Under the ADA, a service animal must be allowed into the place of public accommodation or into the public entity. However, dogs that are either not working or not performing a task but are there simply to keep the person with a

About GPSolo magazine
Subscriptions
More Information
Contact Us

disability calm are not protected by these regulations; these animals are providing emotional support, well-being, comfort, or companionship rather than working or performing a task for the handler. That is, these animals are not engaged in what the U.S. Department of Justice would refer to as "recognition and response." Further, the ADA is not the only law in play. For example, the Fair Housing Act and its regulations do allow for emotional support animals. Also, the various states will have different approaches for dealing with service animals (portions of the Texas law, for example, are discussed below).

So, what happens if a person wants to enter a public entity or a place of public accommodation with a service animal, but it is not obvious whether the dog is performing work or a task for the handler? The personnel at the public entity or place of public accommodation can make the inquiries noted above, but because the inquiries are limited, this may not prove terribly helpful. For example, if the person with a disability is knowledgeable enough about the distinction between service and emotional support, this person may very well phrase the response in terms of the dog performing work or a task even though the dog is in fact providing emotional support and not functioning as a service animal. This places the personnel at the public entity or place of public accommodation in a very difficult position. Will they really pick up the phone and ask the appropriate person, preferably legal counsel, whether the response given by the person with a disability was in fact evidence of a dog performing work or a task? Maybe the personnel would make the call; it is certainly not practical. This scenario highlights the need for training of personnel to deal with such situations. On a preventive level, the better approach may be to allow the dog regardless and hope that the act of asking the questions itself serves as a deterrent to those trying to pass off their pet as a service animal.

What if the personnel at the public entity or place of public accommodation guess wrong, thereby denying rightful access to a person with a service animal? Because violations of Title II of the ADA are tied into the Rehabilitation Act, damages could be a possibility (42 U.S.C. § 12133) if a public entity is involved. If it is a place of public accommodation, injunctive relief and attorney fees are available (42 U.S.C. § 12188). The aggrieved individual may have remedies under state laws as well. In Texas, for example, wrongfully denying access to a person with a service animal is a misdemeanor punishable by a fine of not more than

$300 and 30 hours of community service. Guessing wrong in Texas also results in the personnel being deemed to have deprived a person with a disability of his or her civil liberties, possibly giving this person a cause of action for damages with a conclusive presumption of damages in the amount of at least $300.

Alternatively, what happens if the person with a disability misrepresents the dog as a service animal when it is not? There have been several reports in the media that such a misrepresentation is a federal crime under the ADA. The ADA contains no such provisions. Nor is that surprising, given that the ADA is a civil statute. Further, this author was unable to find any federal criminal statute that would make it a crime to misrepresent a dog as a service animal. That said, some states make misrepresentation of being a person with a disability a misdemeanor. Statutes in Tennessee (T.C.A. § 39-16-301(a)(4)) and Arkansas (A.C.A. § 5-37-208(b)(1)(E))), for example, label such misrepresentation "criminal impersonation." Texas, per § 121.006(a) of the Human Resources Code, makes misrepresentation of an animal as a service animal a misdemeanor punishable by a fine of not more than $300 and, added by H.B. No. 489, 30 hours of community service. The wording of such statutes differs from state to state and may be confusing. Per an introductory clause in the Texas version, for example, the statute making it a misdemeanor to misrepresent a dog as a service animal arguably applies only in cases where the person making the misrepresentation uses a harness or leash of the type commonly used by persons with disabilities who have service dogs.

Of course, making a misdemeanor of such misrepresentation is problematic on another level because it is a long-standing ethical rule that an attorney can't threaten criminal prosecution solely for the purpose of gaining a civil advantage. That said, it is hard to see what other leverage a defendant may have to a frivolous service dog claim that winds up in litigation.

Keeping a Tight Leash on Breed Restrictions

Another issue related to service dogs is the legality of breed restrictions. Some local ordinances restrict which breeds of dog can reside in a town and which cannot. Oftentimes, the breed restricted is a pit bull. Will such restrictions withstand scrutiny if the dog is a service dog?

Nothing in the federal regulations governing service dogs restricts the breed of dog that qualifies. (Although the term "service animal" refers only to dogs, it does bear noting that in a separate section of the regulations, miniature horses get the same kind of protection as dogs: 28 C.F.R. § 35.136(i) (Title II) and 28 C.F.R. § 36.302(c)(9) (Title III)). Rather, as mentioned above, the question is whether the dog is engaged in "recognition and response." Further, there isn't any certification requirement associated with being a service dog. It is entirely possible—and it does happen—that a person could train a dog to work (engage in recognition and response) without a formal training program.

Towns that enact breed restrictions may want to think twice before taking adverse action against a resident owning such a dog as a service animal. Although a town is free to make laws in the interest of its citizens, the town still must comply with the ADA and state laws (which may track or go further than the ADA). Towns should have in place a system whereby, before the dog is removed, the resident can appeal in order to demonstrate that the animal performs work (recognition and response) for that individual in assisting with his or her disabilities.

This is not an academic discussion. In *Grider v. City of Aurora*, 2013 WL 6633404 (D.Colo. December 16, 2013), the plaintiff brought suit against the city, alleging that the ordinances restricting certain dog breeds violated Title II of the ADA. This resulted in two years of litigation whereupon the defendant moved to dismiss and also moved for summary judgment. Owing to the way the case was pleaded and the nature of the facts, the court granted both motions. The city then brought suit seeking reimbursement for attorney fees of $132,447.33 (gives you an idea of how expensive defending this kind of litigation can be). The court found that an award of attorney fees was not warranted because the claims and theories as presented were not flawed from the inception of the case and the record was not completely devoid of evidence so as to find that the plaintiff's action to be frivolous, unreasonable, or without foundation. (The court also indicated that plaintiff's counsel probably could have put forth a better effort in analyzing the jurisdictional requirements, the elements of the claims, and the facts necessary to support the claims.)

Something to Chew On

There are several points to take away here. Regarding the

differentiation between dogs used as service animals and other dogs, the personnel of public entities and places of public accommodations need to be familiar with service animal regulations—not only those under the ADA but also the Fair Housing Act and various state laws (the Texas law is much more comprehensive than the portions discussed above). Such personnel need training so that the proper questions are asked and impermissible questions are not. This training should focus on determining with the information obtained from the two permissible questions whether the dog, or conceivably a miniature horse, is engaged in recognition and response. Finally, not all states have penalties, criminal or otherwise, for misrepresenting being a person with a disability or for misrepresenting an animal —dog or miniature horse—as a service animal; this may be a situation that public entities and places of public accommodations may want to address.

Similar caution should be urged when representing a town that has enacted breed restrictions. Unless there is a system in place to ensure that residents have a way to show their dog meets the definition of a service animal as defined in the Department of Justice regulations prior to removal of the dog, the town is asking for a very expensive litigation fight involving the ADA and/or possibly state laws as well.

Finally, nothing in this article is meant to constitute legal advice. For that, a lawyer knowledgeable in this field should be consulted.