Service Animals and Individuals with Disabilities under the Americans with Disabilities Act (ADA)

ADA Knowledge Translation Center Legal Brief No. 2.1

Sharan E. Brown

ADA Knowledge Translation Center

2019

Introduction

Although the use of assistance animals is not a new phenomenon, use has increased since the Americans with Disabilities Act (ADA) became law in 1990.[1] The ADA statute does not specifically address the rights of individuals with disabilities to bring their animals to programs or services covered by the ADA. However, several years after the ADA was adopted, regulations addressing assistance animals were issued by both the Department of Justice (DOJ) and Department of Transportation (DOT), including the definition of a service animal and the rights of individuals with disabilities.

This ADAKT Legal Brief provides an overview of the service animal guidelines under the ADA and then discusses issues that have been a focus in the federal courts. The first concerns an employer's duty to accommodate the request for an assistance animal in the workplace under Title I of the ADA. The second involves the rights of students with disabilities who also receive special education services under the Individuals with Disabilities Education Act (IDEA) to bring service animals to public schools, generally considered a right under Title II of the ADA. Finally, the litigation regarding the rights of individuals with service animals seeking to use Uber, Lyft, or other private transportation network company (TNC), an issue under Title III of the ADA, is reviewed.

It should be noted that the legal definition of a service animal under the federal ADA regulations may be different from the definition of an assistance animal or a service animal under a state law or other federal law. For more information on other federal laws that address the rights of individuals with disabilities and their assistance animals that often must be considered in tandem with the ADA obligations, a publication is available on the ADAKT website at https://adata.org/publication/assistance-animals-FHA-Section-504-ACAA. A practice matrix that summarizes how the ADA and other federal laws address assistance animals is also available at https://adata.org/publication/assistance-animals-and-individuals-disabilities-under-federal-laws-matrix-and-practice.

[1] Huss, R.J. *Why Context Matters: Defining Service Animals Under Federal Law.* 37 Pepp. L.Rev. 1163 (April 2010) and Rothstein, L. *Puppies, Ponies, Pigs, and Parrots*….24 Animal L. 14 (2018).

Service Animal Definition under ADA[2]

Not all animals that individuals with disabilities rely on to minimize limitations resulting from their impairments meet the definition of a service animal for purposes of ADA. ADA regulations by the Department of Justice (DOJ) and Department of Transportation (DOT) originally defined service animals as "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability."[3] This open-ended definition of the type of animal covered created some unintended consequences. For example, individuals made attempts to claim their parrot, snake, ferret or sugar glider was a service animal that worked or performed tasks for the individual and therefore was owed ADA protections.[4] These efforts were generally unsuccessful.

In response, DOJ clarified their definition in regulations effective March 2011. However, DOT maintains the original definition of service animals in its regulations which cover public (ADA Title II) and private (ADA Title III) transportation and continues to allow animals that meet the original definition of service animals.[5]

To complicate the matter, regulations that implement Title I of the ADA (employment related issues for individuals with disabilities), do not define service animals at all. The judicial decisions that have considered the rights of employees to bring their assistance or service animals to the workplace have not applied DOJ or DOT regulations but considered the issue under the reasonable accommodation analysis. Therefore, the DOJ

[2] A portion of this section is also published in a separate document available https://adata.org/publication/individuals-disabilities-and-their-assistance-animals-brief-history-and-definitions.

[3] 28 C.F.R. §36.104; the DOJ regulation was amended to reflect the current DOJ definition; 49 C.F.R. § 37.3.

[4] Floyd, W. and Vogan, S. *Feature: Wild Kingdom: ADA and Service Animals*. 29 S. Carolina Lawyer 47 (July 2017).

[5] https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/frequently-asked-questions#18; https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/doj-rule-service-animals-and-mobility-devices-note

service animal definition applies only to ADA Title II and Title III covered entities other than transportation services at this time.[6]

The current DOJ service animal definition under Titles II and III is:

> Any 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.[7]

The updated DOJ definition clearly states that other species of animals, whether wild or domestic, trained or untrained, are not service animals for purposes of this definition. Under these regulations, only dogs are service animal under ADA Titles II and III.

The regulations go into some detail regarding the various kinds of work that service animals (dogs) can perform for individuals. These tasks can include physical, sensory, psychiatric or intellectual tasks or those that will assist individuals with a mental disability.[8] According to DOJ guidance, service animals are "working animals" not household pets and "[d]ogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA."[9]

A service animal can be excluded from any ADA Title II or III public service or accommodation if any of the following situations exist:

1. The dog is out of control and the handler cannot get the animal under control; or
2. The dog is not housebroken.[10]

If one or both of these situations occur, the handler can be asked to remove the dog, but the individual with disability must still be welcome to participate in the service or accommodation without the dog.[11]

This DOJ definition of a service animal is clearly limited to dogs. However, Titles II and III regulations also include an additional requirement to make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual

---

[6] A review of the case law regarding animals in employment under Title I is found later in this brief.
[7] 28 C.F.R. §35.104; 28 C.F.R. §36.104.
[8] *Id*.
[9] https://www.ada.gov/service_animals_2010.htm
[10] 28 C.F.R. §35.136(1); 28 C.F.R. §36.302 (c)(1-2).
[11] *Id.* at (c)(3).

with disability in programs and services under those ADA titles.[12] To allow flexibility in situations where using a horse would not be appropriate, the final regulations do not include miniature horses in the definition of "service animal."[13]

Although the regulations themselves do not define miniature horses, DOJ guidance provides the following description:

> Miniature horses generally range in height from 24 inches to 34 inches measured to the shoulders and generally weigh between 70 and 100 pounds.[14]

As with service dogs under ADA, a miniature horse must be individually trained to perform a specific task or provide a service for the individual with disability.[15] Additional regulatory language includes four factors that should be considered in any determination regarding the reasonableness of allowing a miniature horse:

> (A) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
> (B) Whether the handler has sufficient control of the miniature horse;
> (C) Whether the miniature horse is housebroken; and
> (D) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.[16]

Assuming that the individualized training to perform a task or service for an individual with a disability has occurred, and none of the exceptions applies, service animals and miniature horses will generally be covered under ADA Titles II and III.

Comfort animals, search and rescue animals, therapy animals, and emotional support animals are not covered by DOJ Titles II and III regulations. Individuals with disabilities with these types of assistance animals do not have the same rights as do handlers of service animals to bring their animals in spaces covered by Title II and III, other than transportation services. Whether they are allowed under Title I of the ADA is still unsettled law as mentioned earlier.

An emotional support animal has been defined as an animal that “works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a

---

[12] 28 C.F.R. §35.136(1); 28 C.F.R. §36.302(C)(9).
[13] https://www.ada.gov/regs2010/factsheets/title3_factsheet.html
[14] https://www.ada.gov/service_animals_2010.htm
[15] 28 C.F.R. §35.136(i).
[16] 28 C.F.R. §35.136(i); 28 C.F.R. §36.302(c)(9).

person's disability."[17] This definition comes from guidance issued by the Housing and Urban Development (HUD) and therefore arguably specific to that agency. The DOJ regulations implementing ADA Titles II and III described above make a clear distinction between this type of assistance animal and a service animal but acknowledge that emotional support animals may be permitted under other federal law and perhaps in Title I employment situations:

> There are situations, particularly in the context of residential settings and employment, where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.[18]

The primary difference between search and rescue dogs, therapy or comfort animals, emotional support animals, and service animals seems to be the specialized training that service animals receive to perform a specific task or tasks for an individual with a disability. Although every service animal under the ADA must have individualized training to meet the needs of the person with a disability, there is no requirement that a professional trainer or organization provide the training. The individual with a disability who will be handling the animal can provide the training. In addition, there is no approved training curriculum or certification requirement to be a bona fide service animal for ADA purposes, there is no approved vest or gear that is mandatory, and no central database of approved "service animals under the ADA." Nor is there regulatory oversight of service animal training programs by the federal government. When draft regulations addressing the definition of service animals were issued by DOJ in 2010, comments stressed the importance of requiring some form of certification or minimum training standards to ensure that the public could distinguish between untrained pets and service animals. DOJ declined to adopt such requirements.[19]

The ADA is a federal civil rights law with national reach. However, it is important to remember that states can adopt a different service animal definition for purposes of state enforcement. Many jurisdictions have passed such laws. When a state law provides a broader definition—or broader protections—the state law is applied in that jurisdiction. For example, some states have made it a criminal offense to present an animal as a service animal when in fact it is not; there is no such federal offense. How

---

[17] Trasvina, J. U.S. Dept. of Housing & Urban Dev., Service animals and Assistance Animals for people with Disabilities in Housing and HUD-Funded Programs 1, 2 (2013).
[18] Proposed DOJ regulations to ADA Title II and III at 73 Fed. Reg. 34516.
[19] *Id.* at 3524.

the service animal rule is enforced in any given situation will depend on whether the federal ADA rules are applied, or the situation occurs in a state with a different definition. For a review of state laws relevant to service animals in the United States, Michigan State University's Animal Legal and Historical Center provides a comprehensive review.[20]

Some of the confusion regarding which types of animals can accompany an individual with a disability results from additional federal laws that have different definitions of permissible animals than the definition of service animal under the ADA. These laws include the *Fair Housing Act* (FHA) and the *Air Carrier Access Act* (ACAA). The rights of individuals with disabilities to have assistance animals, including service animals, under these two federal laws are reviewed in a separate document available at https://adata.org/publication/assistance-animals-FHA-Section-504-ACAA.

Americans with Disabilities Act (ADA)

The Americans with Disabilities Act includes five major sections or titles. Service animals are relevant to Title I, II and III of the ADA. However, legal considerations under Title I (employment) are not the same as those under Title II (state and local government services) or under Title III (places of public accommodation). Considerations under each title are discussed below.

ADA Title I: Employment

Title I describes the duties of private employers with 15 or more employees and the rights of individuals with disabilities in their employment related interactions with those employers. The general prohibition is that no employer (covered by the ADA),

> [S]hall discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[21]

It is a violation of Title I to fail to hire an otherwise qualified individual with disability who can perform the essential functions of the job in question with or without reasonable accommodation. In other words, there is an affirmative duty to provide a reasonable accommodation if one exists to allow the individual to perform the job. There is no finite list of what constitutes a reasonable accommodation, but examples

[20] https://www.animallaw.info/topic/table-state-assistive-animal-laws
[21] 42 U.S.C. §12112(a).

include changes to the application process or to how job tasks are performed. The goal is to provide the accommodation that will allow the individual to have equal employment opportunities.

Title I employment regulations do not include the definition of a service animal that Title II and III use; in fact, the regulations include no definition. Without the specific definition relevant to the other substantive titles of the ADA, employers must consider requests to bring an animal to the workplace under the obligation to provide a reasonable accommodation. This may include allowing emotional support animals or other types of animals that do not meet the strict service animal definition under the Title II and III regulations. However, to reiterate, the federal courts have not definitely addressed this issue.

Title I requires that the employer and an individual with a disability engage in an interactive dialogue regarding the specifics of any accommodation request, including bringing an animal to work.[22] Questions can include how the animal will provide supports necessary to allow the individual to perform the essential functions of the job. As with other accommodation requests under Title I, the employer can ask for medical documentation that clarifies how the animal assists in minimizing existing barriers to performing the job. Confidentiality is required of the employer even though an animal is not generally something that will be "secret" in the workplace; information about why the service animal is necessary is confidential.[23]

As in all workplace accommodation considerations, the employer has a legal defense to employing an individual if the accommodation—including an animal—creates an undue hardship on the business or creates a safety issue. Any animal that disrupts the workplace or is a threat to others in the work place can be removed. It is a more difficult situation when there are other employees who are allergic to the animal and/or afraid of animals. These concerns may be sufficient to reject the request to bring an animal on the job, but discussions of ways to minimize the issues so all are comfortable would be part of the interactive dialogue between employer and the individual with a disability.

Related Court Cases

The reported judicial decisions related to animals in employment settings under Title I have concerned dogs. The two primary questions courts have considered include 1) whether the dog performs a specific task related to the ability of the individual with a disability to perform the essential functions of the job; and if so, 2) whether allowing the dog to be present at work is a "reasonable" accommodation. If a miniature horse is the

[22] 29 C.F.R. §1630.2(o)(3).

[23] EEOC guidance suggests telling employees: "We're emphasizing a policy of assisting any employee who encounters difficulties in the workplace." Small Employers and Reasonable Accommodation. www.eeoc.gov/facts/accommodation.html

proposed accommodation, these two questions would also be appropriate in the decision making as to the duty of the employer to allow the miniature horse. Several federal court cases that illustrate the questions considered are summarized below.

A case heard initially in the Western District of Michigan in 2001 and affirmed by the Sixth District Court of Appeals a year later, has been favorably cited by numerous federal courts.[24] In *Schultz v. Alticor/Amway Corp*., a hearing impaired designer asked to bring his service dog to the workplace as a reasonable accommodation. Although his supervisor did allow a trial period, there were complaints from other employees and ultimately his request was denied. The court ruled against the employee on the grounds that the employee himself acknowledged that there were no essential functions of his job that he could not perform independently and therefore there was no need for the assistance of the dog at work. A more recent case in 2015 from the Eastern District of New York, *Anderson v. National Grid PLC*,[25] involved a similar situation with an employee who was a senior field supervisor. The employee could perform his job satisfactorily without the assistance of his dog according to the employer and therefore the accommodation request was denied. The court agreed that the accommodation was not necessary.

An important component of the reasonable accommodation determination by courts when service animals are involved has been the interactive dialogue obligation between employee and employer. In *Alonzo-Miranda v. Schlumberger Tech. Corp*.,[26] a veteran with Post Traumatic Stress Disorder (PTSD) worked as a mechanic at a maintenance facility in Texas. The plaintiff, Alonzo-Miranda, requested permission to bring Goldie, his trained service dog, to minimize the panic attacks he was experiencing. The employer and Alonzo-Miranda were discussing whether Goldie would be a reasonable accommodation but communication broke down when the employer claimed it did not receive information on how the employee's "condition affected his performance on the essential functions of his job and how having a dog at work would assist and enable him to perform the essential functions of his job."[27] The employee sued for discriminatory discharge and retaliation as well as failure to provide a reasonable accommodation. The employer filed a motion for summary judgment on all the charges.[28] The judge granted

---

[24] *Shultz v. Alticor/Amway Corp*., 177 F.Supp 2d 674 (W.D. Mich. 2001), aff'd 43 F. App'x 797 (6th Cir. 2002).

[25] 93 F.Supp. 3d 120 (E.D.N.Y. 2015).

[26] 2014 U.S. Dist. LEXIS 191082 (W.D. Tex).

[27] *Id*.

[28] Summary judgment is a motion brought by either party in a lawsuit (or both) asking for a court ruling that no factual issues remain to be tried and therefore one or all of the issues in a complaint can be decided without trial.

summary judgment for the discriminatory discharge and retaliation issues. However, he did deny summary judgment on the issue of whether Alonzo-Miranda had been denied a reasonable accommodation and confirmed that an employer's failure to engage in a good faith interactive process that leads to a failure to reasonably accommodate the employee is a violation of the ADA.[29]

Another case involving a returning veteran with PTSD and mild Traumatic Brain Injury (TBI) is worth mentioning.[30] Not long after Mr. Arndt was hired by the Ford Company, he began to "have issues" at work related to PTSD and requested permission to bring Cadence, his service dog, to work. Cadence was trained in three general areas related to PTSD and TBI including calming Arndt when he experienced panic attacks.[31] Apparently, the request was the first service animal request received by this Ford plant and the determination process went on for months. Eventually Mr. Arndt ran out of patience and filed a complaint with the Equal Employment Opportunity Commission (EEOC) and subsequently the court. The judge's opinion spelled out the "reasonable accommodation framework" required under ADA Title I including the analysis of the essential functions of the job, how the animal helps the individual complete those essential functions, and the importance of the interactive process.[32] The opinion discussed in some detail the importance of the service animal actually helping with the specific job tasks not only the general environment. It seemed important to the judge that although the dog was trained specifically to assist with PTSD and TBI symptoms, Cadence had not been trained in the actual work environment—i.e., the Ford factory floor. The analysis also focused on the specific tasks that the animal would perform in relation to the essential functions of Arndt's job. Ford won on summary judgment.

In *Clark v. Sch. Dist. Five of Lexington & Richland Counties,*[33] an elementary school teacher sued her school district for failure to provide a reasonable accommodation for her disability. The plaintiff, Ms. Clark, had asked the district to allow her dog Pearl to accompany her to work to help minimize her PTSD and panic disorder. The district ultimately denied the request. In the preliminary report from the Magistrate, the judge discussed the rights of an employee to a reasonable accommodation if it allows the person to "perform the essential functions of the job,"[34] and to "enjoy equal benefits and privileges of employment."[35] In addition, he reviewed the obligation for both parties

---

[29] *Id*.
[30] *Arndt v. Ford*, 247 F. Supp. 3rd 832 (E.D. Mich) 2017.
[31] *Id*. at 839.
[32] *Id.* at 848.
[33] 2017 U.S. Dist. LEXIS 46814 (January 6, 2017); 247 F.Supp. 3d 734 (D.S.C.2017).
[34] 42 U.S.C. §12111(8).
[35] 29 C.F.R. §1630.2(o)(iii).

to engage in an interactive process to identify the precise limitations resulting from the disability and possible reasonable accommodations to address those.[36] Ultimately, the Magistrate judge concluded that the plaintiff could perform her essential job tasks—instructing students—without the service animal. The additional tasks she was asked to do occasionally, such as attend fire drills or assemblies, were not essential functions to her job as a teacher. In addition, based on the evidence presented, having Pearl with her in school during a trial period did not seem to alleviate her anxiety and panic attacks and therefore it was not a successful accommodation. In response to Ms. Clark's argument that she was denied the opportunity to enjoy equal benefits and privileges, the judge found no evidence that she was denied any benefit or privilege that other employees enjoyed. A judicial footnote in the Magistrate's report on this case (prior to further action by the Federal District Court) is worth mentioning:

> Because Clark's claim arises under Title I of the ADA, the issue of whether Pearl falls within the definition of "service animal" applicable under Titles II and III is not pertinent to resolution of the defendant's motion.[37]

The Magistrate's report sent to the District Court judge identified the action the district court should take. Neither the Magistrate Judge nor the federal district court judge who reviewed the findings, were concerned about whether Pearl was covered as a service animal as defined by the regulations; instead, both judges analyzed whether Pearl helped Ms. Clark perform the essential functions of her job as a teacher and whether the interactive dialogue was genuine. However, the district court review of the facts was different than the Magistrate's report as to whether the ADA had been violated. Specifically, the district court held that there remained questions as to whether Ms. Clark could perform the essential functions of her teaching job without accommodation, whether Pearl was the only reasonable accommodation or whether those offered by the defendant were reasonable, and whether the teacher had obstructed the interactive dialogue process. The district court set a date for a jury trial in June 2017; however, there has been no further reported judicial action in the case.

The facts in a very recent case from the Eastern District of Virginia, *Maubach v. City of Fairfax,*[38] are similar in many ways to those described above. The plaintiff, Ms. Maubach, was an Emergency Operations Center (EOC or 911) dispatcher working the night shift in the city of Fairfax, Virginia. She brought a letter from her counselor recommending that Mr. B, the employee's emotional support animal (dog), be allowed to come to work with her. Although the issue was discussed with supervision, before there was final approval, the employee brought Mr. B to work. Several people in the contained space of the office had allergic reactions to the dog and there was evidence

---

[36] 29 C.F.R. §1630.2(o)(3).
[37] *Id*. at footnote 1.
[38] 2018 U.S.Dist. LEXIS 73815 (E.D. Va. 2018).

that the employee had taken the dog out for a walk leaving the office to an inexperienced dispatcher. Ultimately, the city determined that she would need to bring a "hypoallergenic" dog because it was not reasonable to have others exposed and thereby creating undue hardship for the employer. As an alternative the city offered Ms. Maubach the day shift to separate her dog from the other employees with allergies. The judge opined that allergies would not be a reason to exclude a service animal under Titles II and III but could be in an employment setting. The court also relied on the ADA to hold that an employee is owed a reasonable accommodation but not necessarily the preferred one.[39]

In this case, as in the *Clark* case above, the *Maubach* judge felt the need to add a detailed footnote regarding the question of whether Mr. B was a service animal under the ADA regulations as follows:

> The parties spill a significant amount of ink on the question whether Mr. B is a "service animal" under the ADA. There appears to be a difference in the law between service animals on the one hand and emotional support or comfort animals on the other. Titles II and III of the ADA, which address disability discrimination in the provision of public services and in public accommodations, respectively, have specific regulations addressing the distinction between service animals and emotional support animals. These regulations provide protections for use of service animals, and exclude emotional support animals from coverage under the ADA. Specifically, the Department of Justice regulations define a service animal as "any dog individually trained to do work or perform tasks for the benefit of an individual with a disability." 28 C.F.R. § 35.104. The work a service animal performs "must be directly related to the individual's disability" and incudes "helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors" but does not include "the provision of emotional support, well-being, comfort, or companionship." Id. Thus, an animal whose only purpose is emotional support is not a "service animal," and a disabled person has no entitlement to use the emotional support animal in public accommodations or in connection with public services.
>
> If this case were a Title II or III case under the ADA, the analysis would be simple. Plaintiff's dog, Mr. B, is not trained to perform any particular task related to plaintiff's disability, and so Mr. B does not qualify as a service animal. See 28 C.F.R. § 35.104. Furthermore, even if Mr. B were properly trained, the DOJ's regulations relating to service animals specifically exclude emotional support animals such as Mr. B. Id. Therefore, if plaintiff's case were analyzed within the framework either of Title II or III of the ADA, plaintiff would have no right to bring

[39] *Id*. at 8.

Mr. B to the workplace as an accommodation for her disability.

Plaintiff's case, however, is not a Title II or III case; it is governed by Title I of the ADA, which prohibits discrimination against the disabled in employment. Title I has no specific regulations or guidance related to service animals or emotional support animals, and there is very little case law addressing the question whether an emotional support animal can qualify as a reasonable accommodation for a disabled employee. Here, it is assumed without deciding that an emotional support animal qualifies as a reasonable accommodation under Title I of the ADA. Thus, the inquiry turns to the reasonableness of the particular accommodation in the particular employment context, namely whether Mr. B's presence in the EOC as an emotional support animal for plaintiff is a reasonable accommodation for her disability or whether Mr. B's presence imposes an undue hardship on defendant given the context in which plaintiff works.[40]

The cases summarized above suggest that when an employer receives a request to bring a service animal to the workplace, the initial step in determining if the request is a reasonable accommodation is whether the animal assists the employee to perform the essential functions of the job in question. If so, then the next question will be if it is reasonable to allow the dog on the premises. In none of these cases was the issue whether the dog is a service dog animal or not under ADA Titles II and III. Although in the *Maubach* and *Clark* cases the judge in each case wrote a footnote commenting on the lack of any Title I service animal regulation, a footnote is dicta and not of precedential value.[41]

A case which could help definitively answer this question for Title I cases was filed in March 2017. In the case, the Equal Employment Opportunity Commission (EEOC) sued a trucking company that had denied an applicant with PTSD and mood disorder his request to bring his dog with him to an out-of-town course for completion of a training program. The man's psychiatrist had prescribed an emotional support animal to help him control anxiety, cope with nightmares and "maintain appropriate social interactions." The judge ruled the case was filed in the wrong state and ordered the case moved to another jurisdiction. There has been no further legal action so it is unclear how the court would have analyzed the specific request for an emotional support animal under Title I.[42] Based

---

[40] *Id*. at footnote 6.

[41] Dicta is the plural for dictum which is Latin meaning "remark" or a comment by a judge in a decision or ruling which is not required to reach the decision, but may state a related legal principle as the judge understands it. While it may be cited in legal argument, it does not have the full force of a precedent (previous court decisions or interpretations) since the comment was not part of the legal basis for judgment. https://dictionary.law.com/Default.aspx?selected=514

[42] *EEOC v. CRST Int'l, Inc.*, 2017 U.S. Dist. LEXIS 180761 (M.D.Fla. November 1, 2017).

on earlier case law, it seems likely that the request for the animal would have been denied because it had not been individually trained to assist with an essential job task, not because of its status as an emotional support animal.

ADA Title II: Programs and Services of Local and State Governments

Title II of the ADA covers all local and state government programs and services. This title requires state and local governments to make reasonable modifications to their policies, practices and/or procedures if necessary to accommodate individuals with disabilities as long as they do not fundamentally alter the nature of the program. Modifications are not required if they cause an "undue financial or administrative burden or would require much difficulty or expense."[43] Allowing a service animal to accompany a person with a disability may meet that reasonable modification obligation. However, the rights of individuals with disabilities to bring their animal to any Title II program or service clearly requires that the animal meet the definition of service animal outlined in the DOJ regulations described earlier unless the service is public transportation.[44] As stated earlier, transportation services under both Title II and Title III are covered by DOT regulations that maintain the original definition of service animal under ADA. The judicial decisions related to service animals in transportation covered by Title II have applied this broader definition of service animal. However, some of the cases involving service dogs meet the more restrictive definition of service animal under DOJ regulations.[45]

If an animal meets the regulatory definition of a service animal and is under the control of the handler, housebroken, and not a threat to the health or safety of others in the setting, the animal is allowed in all areas covered by Title II including many community settings in which animals have historically not been allowed. The intent is that individuals with disabilities have the broadest access to the community with their service animals. DOJ has acknowledged there can be exceptions to this broad access. The examples given include surgical theaters or burn units where a sterile environment is necessary or locations that would be dangerous for an animal such as some construction sites or factories.

Unlike Title I in which the employer is allowed, as part of the interactive dialogue with the individual with a disability, to ask numerous questions related to the service animal, Title II allows only two questions regarding the animal if it is not obvious what service

---

[43] 42 U.S.C. §1218 (9).

[44] https://www.ada.gov/regs2010/factsheets/title2_factsheet.html

[45] See e.g., *Stamm v. NYC City Transit Authority*, 2011 WL 1315935 (E.D.N.Y., 2011)

the animal provides. These questions are 1) is this animal a service animal required because of a disability, and/or 2) what work or task has this animal been trained to perform. The individual with a disability cannot be asked to provide certification or other documentation that the animal has been trained and the program staff cannot ask about the individual's disability, request medical documentation or ask for a demonstration of what the animal can do.[46]

Although Title II covers many programs and services, two government programs that have recently been a focus in the courts related to the rights of individuals and their service animals are public education and emergency response services. The federal court cases concerning these Title II service systems are summarized below.

Public Education

Individuals with disabilities are protected from discrimination on the basis of disability in state and local government programs under Section 504 of the Rehabilitation Act and Title II of the ADA. Public education—primary through higher education—is covered under both statutes.[47] Although there are some differences between the two federal laws, for all intents and purposes, the protections are the same and they are analyzed similarly.

Enforcement of the rights of students with disabilities in public education is the responsibility of both the federal DOJ and the United States Department of Education (DOE), with the Office for Civil Rights (OCR) within DOE playing a primary role. OCR follows the Title II service animal regulations and DOJ guidance in interpreting the obligations under Section 504. The requirements that the animal meets the Title II definition of a service animal, the individual be responsible for controlling the dog, the animal be housebroken, and that it not be a threat to others, apply under Section 504. Although miniature horses are not considered service animals under the ADA definition, OCR policy is that schools should "permit [miniature horses] as a reasonable modification based on a case by case analysis considering the factors" outlined in the regulations.

OCR has stated in resolution agreements with school districts that allergies and fears of dogs is not a valid reason for denying access or refusing services to persons with service

---

[46] U.S. Department of Justice, Civil Rights Division, Disability Rights Section. ADA Requirements: Service animals. Available at https://www.ada.gov/service_animals_2010.htm

[47] Private schools are not covered by ADA Title II but are covered by ADA Title III. Most private and public schools are covered by Section 504 because they receive federal financial assistance.

animals. The guidance given is that if a student is allergic to the animal, both students should be accommodated by assigning them when possible to different locations within the room or different rooms in the same facility. Students with service animals cannot be isolated from others, treated less favorably than others or charged fees not charged to others without animals. In addition, the district may be responsible for training staff and students on appropriate behavior and/or conduct around a service animal if necessary.[48]

The general rule has been to allow the service animal in school if the criteria above are met with some exceptions. These depend somewhat on whether the setting is public primary and secondary education (K-12) or higher education.

Public Primary and Secondary Education

The general rule regarding service animals in public K-12—and the expectation of families whose children have service animals—is not as clear-cut following the 2017 United States Supreme Court decision, *Fry v. Napoleon County Schools*.[49] The expectation that a service animal can accompany a student if it meets the definition under the ADA regulations has become complicated because another federal law is also relevant for students with disabilities in public education, the *Individuals with Disabilities Education Act* (IDEA).[50] This federal statute mandates that states provide a free appropriate public education (FAPE) to all eligible students who require specialized instruction and related services in order to benefit from public education. Many, although not all, children with disabilities covered by ADA Title II and Section 504 also receive educational services under IDEA. Students who receive IDEA services are automatically covered as individuals with disabilities under ADA Title II and Section 504. It has been commonly understood that the rights articulated in the ADA or Section 504 are similar but different in some ways from those in IDEA and an individual student may have rights unique to one or the other federal statute or both. The right of a student to have a service animal in school has been considered an ADA right that, although not excluded from coverage under IDEA, is not specifically guaranteed in that statute. Before the *Fry* decision, students generally brought a complaint under the ADA for the failure of a school district to approve the request for a service animal and courts would routinely acknowledge the student's right to bring the animal if the regulatory requirements were met.

In *Fry v. Napoleon*, the Supreme Court reviewed a decision from the Sixth Circuit holding that the plaintiff had to exhaust the procedural remedies available in IDEA before she could sue under ADA or Section 504. IDEA has extensive due process protections for

---

[48] *See e.g.*, Resolution Agreement, XXX County School District, OCR Docket Number 04-13-1318. April 2, 2014.

[49] 137 S.Ct. 743 (2017).

[50] 20 U.S.C. §1400 *et seq*.

families and students and requires that complaints related to the provision of services under IDEA follow the administrative due process procedures prior to filing a court complaint. The intent behind this was to resolve disputes between schools and families in a nonadversarial manner and as quickly as possible. In their decision, the Supreme Court Justices gave guidance as to when exhaustion under IDEA was required before pursuing a civil rights claim under ADA and Section 504.

First the facts of the case. Ehlena Fry has cerebral palsy and received services under the IDEA as documented on her Individualized Education Program (IEP) in the Napoleon School District. A disagreement arose between the Frys and the school district over the parents' request that Ehlena have her service dog, Wonder, with her at school. Wonder had been trained to do tasks for Ehlena including retrieving dropped items, helping her balance when she used a walker, opening/closing doors, helping her take off her coat, and transfer to and from the toilet. Although the school did allow a 30-day trial with Wonder, they ultimately said the service dog could not continue. The family filed an OCR complaint and received a favorable ruling but the parents decided the environment would be too tense and they removed Ehlena from the school. In addition, they filed a judicial complaint under ADA and Section 504 requesting a declaration that the school violated Ehlena's rights by initially denying her the opportunity to have Wonder in school.

Both the federal district court and the circuit court dismissed the complaint due to Frys' failure to exhaust IDEA complaint procedures prior to suing in federal court under ADA and Section 504. The Frys appealed the Sixth Circuit decision to the Supreme Court.

In a unanimous decision, the Supreme Court clarified the test to use in determining whether IDEA exhaustion is required prior to bringing an ADA or Section 504 case. The test is "whether the gravamen of a complaint against a school concerns the denial of a FAPE or instead concerns disability-based discrimination."[51] Gravamen was defined by the Court to mean the "crux" or "essentials" of the complaint. Specifically, in this case, was the gravamen of the complaint about the educational services offered by the school district which is an IDEA issue or was it about disability discrimination under Section 504 and ADA. The Court provided guidance by suggesting hypothetical questions to guide the decision:

1. Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say a public theater or library?

[51] *Id*. at 756.

2. Could an adult at the school—say an employee or visitor—have pressed essentially the same grievance?[52]

In addition, the Justices suggested that to determine the gravamen of a complaint one should ask whether the plaintiffs had "ever sought to invoke the IDEA's procedures before switching to the Section 504/ADA remedies." If so, that may suggest that the issue was really a denial of FAPE and if that is the case, IDEA exhaustion would be required. The *Fry* case was remanded to the lower court for a determination of whether the complaint was about FAPE or disability discrimination.

Although there has been no further legal action in the *Fry* case, several cases have applied the Supreme Court's test to determine when IDEA exhaustion procedures must be followed if a Section 504/ADA Title II complaint is filed. One from New Hampshire, *A.R. v. Sch. Admin. Unit #23*,[53] involved an elementary student who received IDEA services and had been accompanied to his school by his service dog, Carina. However, because the student A.R. was unable to handle the dog—as required under ADA Title II—the school asked his parents to "provide and pay for a handler to supervise Carina during the school day."[54] The parents refused arguing that the reasonable modification obligation under Section 504 and ADA Tile II required that the school do so. The federal district court in the case applied the *Fry* standard to determine whether the request that the school district pay for a service dog handler went to the gravamen of an educational right under IDEA or was it "reasonable accommodation mandated by the ADA."[55] Because the ADA requires that a service animal be under the control of the handler, it would not be a reasonable accommodation to mandate that the handler be the responsibility of the school district according to the judge. To this court, the handler was akin to a "related service" that is part of the definition of an "appropriate education" under IDEA and therefore something that needed to be determined under that statute. Since the handler was an IDEA issue, exhaustion of IDEA procedures was required before a decision could be made under the ADA or Section 504. The family's option is to begin IDEA due process procedures to determine whether the district would be responsible for providing the handler as a related service. If that is unsuccessful, then they can file a complaint under Section 504 and/or ADA.

Legal advocates have recommended a strategy to protect a student's right to bring a service animal to public school with the goal to avoid any debate about exhaustion under IDEA. The strategy is to clarify that the service animal is not related to a FAPE

---

[52] *Id*. at 756.
[53] 2017 U.S. Dist. LEXIS 169466 (2017).
[54] *Id.* at 3.
[55] *Id*. at 20.

educational request but instead a separate right under Section 504 and ADA Title II. This can be achieved by developing a Section 504 written plan that recognizes the right of the student to have a service animal as defined under the ADA in school that is separate from the services provided by the IEP.[56] Whether this is a successful approach remains to be seen. Many public K-12 schools have welcomed service animals as a Section 504/ADA right and the *Fry* decision may have minimal impact nationally on the issue. However, if additional families request that school districts cover the cost of a service animal "handler" for some students with disabilities, the *Fry* decision may well limit their options to bring a civil rights complaint regardless of whether the animal is on a Section 504 plan.

Post-Secondary Education

Although IDEA is not relevant to students enrolled in post-secondary education, service animals on college and university campuses involve Section 504 and ADA Title II considerations as well as Fair Housing Act (FHA) regulations. As in primary and secondary education, several federal laws must be considered to understand the rights of students to have their animals on campus.

Public higher education institutions are clearly covered by Title II of the ADA and Section 504 as they are programs of the state. Private institutions are not covered by ADA Title II in every case but will be covered under Title III; as described earlier, service animal obligations of Title II and Title III entities are in essentially the same. Because most private institutions are also covered by Section 504 due to the receipt of federal funding, the discussion below does not discuss potential differences in the obligations owed students who bring service animals to private versus public campuses. As in public primary and secondary education, enforcement of the rights of students with disabilities in higher education is the responsibility of both the DOJ and OCR in the Department of Education. In addition, higher education cases are typically analyzed similarly under the ADA and Section 504.

The primary obligation of postsecondary education institutions is the same as for K-12 institutions under Title II—i.e., to ensure that an otherwise qualified individual with a disability is not excluded from participation in any program or service offered by the school. In order to achieve this, institutions are required to make reasonable modifications to policies, practices, or procedures as long as they do not fundamentally alter the nature of the program.[57] These obligations will be applied in any situation in which a student with a disability requests a service animal on campus. ADA regulations related to service animals are also relevant to any request. Therefore, the animal must

[56] See Colker, R. 46 J.L. & Educ. 443 *Endrew F. and Fry Symposium: Did the Fry Decision Under the IDEA Overturn Rowley?* Fall 2017.
[57] 42 U.S.C. §1218 (9).

meet the definition of a "service animal," be individually trained to perform a task or service for the individual, within the control of the handler and be housebroken.

The amended Title II regulations and the limitations on questions that a school can ask an individual with a disability did create a change from earlier guidance from the DOE. Prior to 2012, the definition of a "service animal" was broader and school administrators could require a student with a service animal to furnish documentation to support the use of the service animal.[58] In addition, post-secondary institutions were allowed to require and ask for verification of necessary vaccinations per the local laws.[59] Higher education institutions can no longer ask for this documentation. As in the K-12 setting, Title II regulations define a service animal as a dog; however, the reasonable modification obligation can include allowing a miniature horse on campus on a case-by-case basis.

If the regulatory criteria are met, colleges and universities must allow a service animal to accompany the student to classes and other campus events and services. The service animal issue that has been at times problematic for higher education administration involves student housing. Titles II and III do not cover all housing options for students with disabilities. However, Title II does cover state or local housing that a college or university owns, and Tile III will cover campus housing at private institutions. There seems to be little debate about the general obligation of a school to "reasonably modify" the common "no pet" rule in dorms or campus housing to allow a service animal to live with the student with a disability. ADA regulations include a definition of "housing at a place of education" as "housing operated by or on behalf of an. . . undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence."[60] The regulations state that housing is part of the "program" operated by the institution and access is essential for students with disabilities. Finally, the regulations clarify that the federal Housing and Urban Development (HUD) agency also has enforcement authority over campus housing under ADA Title II.[61]

Legal complaints related to service animals on campus since the new regulations have focused in large part on how to handle requests for assistance animals other than service animals as defined by ADA in dorms or other campus housing. The complaints are the result of the fact that on-campus housing is covered by the Fair Housing Act (FHA)

---

[58] Memorandum from OCR entitled "Service Animal Guidance" (October 25, 2006).
[59] University May Require Proper Vaccination of Service Animals, *Disability Compliance for Higher Educ.*, Oct. 1, 2008.
[60] 28 C.F.R. §35.104, §36.104.
[61] 75 Fed. Reg. 56.215 ADA Title II Final Rule.

regulations and enforced by the Housing and Urban Development (HUD), as well as the ADA. Although there has been a fair amount of debate regarding whether FHA even applies to post-secondary education, HUD, DOJ, and the courts agree that it does.[62]

If the FHA and ADA Title II required post-secondary institutions to handle requests similarly, these disputes may not have arisen. However, they differ and in the most fundamental way—i.e., what animals must be allowed in university housing. The FHA regulations do not define "service animal." They do require that "reasonable accommodation must be made in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[63] A reasonable accommodation may be an exception to "no pets allowed" rules. HUD guidance on what and when animals must be accommodated includes the following definition of assistance animals:

> Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person's disability . . . . Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves, and in, some cases, no special training is required. The question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.[64]

Although there may be future litigation and/or regulatory changes, at this time it appears that a post-secondary institution is obligated to follow the ADA regulations for campus wide programs and services and FHA regulations specifically in campus housing. Campus housing decisions will require consideration of a wider range of assistance animals than the narrowly defined service animal under ADA. FHA regulations do permit a university to ask for documentation of disability and for the need for an emotional support animal, if not readily apparent, but there are currently no limits on the breed of animal.[65] Nonetheless, because the obligation is to provide a reasonable accommodation to the individual, there may be types of animals that would be

---

[62] Huss, R.J. Canines on Campus: Companion Animals at Post Secondary Educational Institutions, 77 Mo.L. Rev. 417 (2012) at 430 fn 68.
[63] 42 U.S.C. §3604(f)(3)(B).
[64] U.S. Dept of Hous.& Urban Dev. HUD Handbook 4350.3 http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4350.3/index.cfm.
[65] HUD Handbook 3-29.

unreasonable to allow in housing. FHA regulations concerning assistance animals in housing are reviewed in more detail later in this brief.

Related Court Case

Entine v. Lissner,[66] a case filed in late 2017 in Ohio, illustrates the still unclear legal landscape related to the duties of post-secondary education institutions to accommodate students with disabilities. Ms. Entine was an undergraduate student at the Ohio State University. She had depression, anxiety, obsessive-compulsive disorder, and post-traumatic stress disorder, and trained her dog—Cory—to disrupt her panic attacks. Ms. Entine and Cory lived in the Chi Omega sorority on the Ohio State campus. Another Chi Omega student claimed to be severely allergic to the dog; specifically that her dog allergy exacerbates her Crohn's disease causing her "significant pain and distress." When Ohio State asked Ms. Entine to remove the dog because she had "signed the lease" after the other student and there was apparently no way to accommodate the student with allergies, Ms. Entine sued. The court was asked to decide how the university "should reconcile the needs of two disabled students whose reasonable accommodations are (allegedly) fundamentally at odds."[67]

The court did not see this as a complicated legal question as it involved a "straightforward application of ADA regulations." Specifically, the court determined that the university had not engaged in the interactive discussion required under the ADA, the other student's allergy was not well documented, and there was no evidence that the dog was the cause. As a result, the judge granted Ms. Entine's request for a preliminary injunction allowing her to continue living in the sorority until the court could formally hear the case. The court did not specifically address the issue of whether Cory was an emotional support animal or met the ADA service animal definition. ADA Title II would not cover Cory if the dog was ultimately determined to be an emotional support animal, but it would be covered under FHA regulations.[68] There has been no further judicial activity to date on this case.

Emergency Response Services

In addition to public education, local and state governments also provide emergency response services and are obligated to accommodate service animals under Title II of the ADA as well as Section 504. The rights of individuals with assistance animals and the responsibilities of emergency response services provided by local and state government are reviewed below.

---

[66] *Entine v. Lissner*, 2017 U.S. Dist. LEXIS 190289, 2017 WL 5507619 (S.D. Ohio November 17, 2017)

[67] *Id.*

[68] *Id.*

ADA Title II regulations apply to all programs and services of local and state government and includes those programs and services directly provided by governments as well as third parties that the governments may have contracts with, such as nonprofit organizations. Therefore, services must be available and accessible to all, eligibility criteria that screen individuals with disabilities out cannot be used, reasonable modifications to policies, practices and procedures are required if necessary in order to avoid discrimination, and effective communication must be provided. Modifications that fundamentally alter the nature of the program or would cause undue financial burden, are not required.

There has been a great deal of attention from DOJ to the responsibility of local and state governments to adequately plan for the needs of individuals with disabilities in case of an emergency. Checklists for planning purposes, guidance in the form of FAQs and procedural manuals have all been developed and published. Although some of these resources were completed a decade or more ago and may not reflect the most recent regulatory changes related to service animals under ADA, recently released guidance does reflect those changes.[69]

State and Local Emergency and Homeless Shelters

One technical assistance manual addressing service animals in relation to shelters offers the following recommendation that recognizes the need to balance the rights of individuals with their service animals as well as the general population:

> Adopt procedures to ensure that people with disabilities who use service animals are not separated from their service animals when sheltering during an emergency, even if pets are normally prohibited in shelters. While you cannot unnecessarily segregate persons who use service animals from others, you may consider the potential presence of persons who, for safety or health reasons, should not be with certain types of animals.[70]

Additional guidance in the "ADA Best Practices Tool Kit for State and Local Governments Chapter 7: Emergency Management under Title II of the ADA" provides detailed recommendations on ways to ensure access for individuals with disabilities using service animals and the limitations on the questions emergency providers can ask.[71] The document states that the service animal should go and stay with the person, no

---

[69] https://www.ada.gov/emerg_prep.html

[70] Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities. Available at https://www.ada.gov/emergencyprep.htm

[71] ADA Best Practices Tool Kit for State and Local Governments Chapter 7: Emergency Management under Title II of the ADA.

registration or certification is required, and that service animals may include psychiatric or emotional support animals. However, for the purposes of ADA Title II, the animals would still need to meet the definition under the new regulations. In addition, the Best Practices Toolkit states that shelter "operators need to make food and water available so individuals can feed and care for their service animals." Further, they should make "reasonable modifications to security screening procedures so that people with disabilities are not repeatedly subjected to long waits at security checkpoints simply because they have taken their . . . [service] animals outside for relief."[72]

After Hurricane Katrina, Congress passed the *Pets Evacuation and Transportation Standards (PETS) Act.*[73] This law addresses the responsibility of local and state governments to make plans for both household pets and service animals in all aspects of emergency planning and service delivery. However, the requirements are somewhat different depending on whether the animals are service animals or household pets. Service animals must not be separated from their handlers during evacuation and must remain with them in emergency shelters. The PETS Act also requires that service animals and their handlers must be comingled in the same living space with the general population.[74] Household pets can be collocated with their owners—i.e., located next to or near their owners but not in the same living space.[75]

Homeless shelters are another emergency response service for those without stable housing.[76] If the shelter is a service of state or local government, it is covered under Title II. Homeless shelters present different types of challenges when individuals want to bring their animals. Because most homeless shelters do not allow animals as a general rule, many of their owners do not utilize the shelters as they will not abandon their animal. However, a homeless shelter with a blanket "no pets" rule may violate the ADA Title II rights of individuals with disabilities. As with all Title II covered services and programs, the individual with a disability has a right to their service animal—although perhaps not an emotional support animal and/or pet—if the shelter can reasonably modify their policies.

---

[72] *Id*

[73] 42 U.S.C. §§5121, 5196, 5170(b), 5170(a)(3).

[74] *Id.*

[75] *Id.*

[76] Although there are compelling arguments that can be made about the rights of homeless individuals to have their pets for companionship or safety, this brief focuses on the rights of individuals with disabilities to their assistance animals in homeless shelters.

Related Court Case

There have been numerous complaints made throughout the country concerning the rights of individuals to bring animals to homeless shelters.[77] Many of these cases settle before a trial or after a judge has issued a preliminary injunction. *Lopez v. New York City*[78] is a recent example. The city had contracted with a nonprofit to open Marsha's House, a shelter designed for young people who self-identify as LGBTQ. Ms. Lopez, the plaintiff, sued New York City because the shelter required her to prove that her animal was a service dog. She was unable to do so, and the shelter subsequently denied the dog admittance. There was no legal debate about the responsibility of the shelter to consider a modification to the no pet rule under ADA Title II and the judge granted a preliminary injunction allowing the dog to accompany Lopez until the court could hear the full case. Although there were other issues left unsettled, the shelter did inform Ms. Lopez she could bring the dog and that no proof that the animal was a service animal was required.[79]

Generally, homeless shelters are covered by ADA Title II as a state or local government service. However, some courts have questioned whether a nonprofit such as Marsha's House, which has a contract with a local or state government to perform a service, is in fact covered under ADA Title II. The ADA defines a "public entity" that must comply with ADA Title II as 1) any state or local government, 2) any department, agency special purpose district, or other instrumentality of a State or States or local government and 3) any commuter authority. The judge in the *Lopez* case ultimately decided that Marsha's House was not covered under Title II, and therefore was not obligated to follow the regulations, because it did not meet any of these options to make it a covered entity. Therefore, whether a homeless shelter will be covered under ADA Title II will depend on who is the actual provider of services and whether it meets the definition of covered entity under Title II.

Federal Government Emergency Response Services

The federal government is also involved in emergency response services through the work of the Federal Emergency Management Agency (FEMA). FEMA is not covered by the ADA. However, it is covered by Section 504 and must provide equal access to its programs and activities, which may include allowing service animals. The federal role in emergency response is described below.

---

[77] See e.g., http://latimesblogs.latimes.com/unleashed/2009/07/lawsuit-alleges-discrimination-against-homeless-people-with-service-dogs.html

[78] *Lopez v. City of New York*, 2017 US Dist LEXIS 160989.

[79] *Id*.

FEMA was created in 1979 to bring a federally coordinated focus to state and local emergency response to natural disasters. Almost ten years later Congress passed the *Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)*[80] that amended earlier federal law to allow for streamlined financial and physical assistance by FEMA. The *Stafford Act* gives FEMA authority to "coordinate[s] the federal government's role in preparing for, preventing, mitigating the effects of, responding to, and recovering from all domestic disasters, whether natural or man-made, including acts of terror."[81] Specifically, federal assistance is available to develop comprehensive responses to aid all citizens under this statute. FEMA became part of the United States Department of Homeland Security in 2003 and reorganized three years later by the *Post-Katrina Emergency Reform Act*. This Act created additional responsibilities for FEMA in response to natural disasters such as Hurricane Katrina.

The FEMA Strategic Plan for Fiscal Years 2014-18 states, "[the agency] will work with the whole community to ensure equal access to disaster services and to meet the functional needs of all individuals without discrimination."[82] The Office of Disability Integration and Coordination is the program within the agency that "lead[s] FEMA's commitment to achieve whole community emergency management, inclusive of individuals with disabilities."[83] Regional offices across the country are the focal point for state and local governments in developing disability inclusive disaster preparedness. The compliance obligations issued from FEMA to state and local governments are documented in a variety of sources, including laws, guidelines, fact sheets, and FAQs.[84]

As a federal agency, FEMA is covered by Section 504.[85] Section 504 covers recipients of federal assistance or any program or activity conducted by any Executive agency. Under Section 504, FEMA is obligated to ensure that "no qualified individual with [a disability] . . . be excluded from participation in, or denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency."[86] This mandate includes the rights of individuals with service animals to have those animals with them during times of national disaster or an emergency such as a hurricane or

---

[80] 42 U.S.C. §5121 *et.seq*.
[81] https://www.fema.gov/about-agency
[82] https://www.fema.gov/media-library/assets/documents/96981
[83] https://www.fema.gov/office-disability-integration-and-coordination
[84] https://www.fema.gov/providing-equal-access-programs-and-services-fema-priority
[85] FEMA is also obligated to follow Section 501 of the Rehabilitation Act. Section 501 prohibits federal executive branch agencies from discriminating against qualified individuals with disabilities. It requires these agencies to take affirmative action in the hiring, placing and advancing of individuals with disabilities.
[86] 44 C.F.R. §16.130(a).

earthquake. Because FEMA is coordinating local and state governments' implementation of emergency plans, the guidelines and expectations reflect the standards articulated in ADA Title II.

ADA Title III: Public Accommodations

Public accommodations, as defined under ADA Title III, are privately owned businesses that provide goods and services to the public. There are 12 categories of public accommodations under Title III, including among others, restaurants, hotels, retail stores, theaters, concert halls, and sports facilities.[87] These businesses must modify policies, practices or procedures to allow a service animal in any area open to the public. Like Title II, the intent is to ensure the broadest access possible for people with disabilities and their service animals in places of public accommodation. In addition to the specific categories covered under Title III, the statute also defines and addresses the obligations of fixed route systems, demand responsive systems, and over-the-road buses to ensure that individuals with disabilities have "equivalent access" to these transportation services.[88] Another section of Title III prohibits discrimination in specific public transportation services provide by private entitles defined as those "primarily engaged in the business of transporting people.[89] Although taxicab services are not specifically mentioned in the statute, the DOT regulations issued to implement Title III do include providers of taxi services.[90]

The definition of service animal under DOJ regulations is the same in both Titles II and III with the exception that private transportation systems (such as taxicabs) must follow DOT regulations. Like Title II, Title III limits the questions that can be asked of individuals with service animals, and there is no right to bring emotional support dogs to places of public accommodation. A defense under Title III to the obligation to modify the program is that allowing the service animal would "fundamentally alter" the nature of the goods or would result in an undue burden.[91] DOJ regulations state that in "rare circumstances," the accommodation of service animals may not be required—i.e., it would require a fundamental alteration of the goods, services, facilities or benefits offered or would jeopardize the safe operation of the public accommodation.

Further guidance from DOJ covering both ADA Title II and III entities includes:

1. Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog

[87] 42 U.S.C. §12181(7)(A)-(L).
[88] 42 U.S.C. §12182(b)(2)(B),(C).
[89] 42 U.S.C. §12184.
[90] 49 C.F.R. §37.29. See Appendix D of Part 37 of the regulations for additional information regarding duties of private providers of taxi services.
[91] 42 U.S.C. §12182(b)(2)(A)(ii) (iii).

dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.

2. A person with a disability cannot be asked to remove his service animal from the premises unless: (1) the dog is out of control and the handler does not take effective action to control it or (2) the dog is not housebroken. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.
3. Establishments that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises.
4. People with disabilities who use service animals cannot be isolated from other patrons, treated less favorably than other patrons, or charged fees that are not charged to other patrons without animals. In addition, if a business requires a deposit or fee to be paid by patrons with pets, it must waive the charge for service animals.
5. 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.
6. Staff are not required to provide care or food for a service animal.[92]

There has been a fair amount of litigation regarding service animals in places of public accommodation and the courts have consistently ruled in favor of the individual with a disability unless the regulatory requirements are not met. For example, hotels have been found in violation of Title III when they have a strict "no pet" policy and refuse to allow service animals, including horses if the animal is individually trained.[93] UPS Stores, grocery stores, and multiple other Title III entities have settled with DOJ or lost court cases for a similar "no pet" rule or requiring documentation that the animal in question was a service animal.

A federal district case involving a Costco Warehouse was decided prior to the revised regulations regarding service animals under Title III but is summarized here because of the extensive discussion related to the scope of the questions that could be asked of an individual with a service animal.[94] In this case, a returning veteran brought her pug to Costco on several occasions. The first time, the pug was not wearing any identifying hardware and she was asked about the animal and the work it performed. She informed

---

[92] https://www.ada.gov/service_animals_2010.htm

[93] *See e.g.,* DOJ v. Sairam Enterprises, Inc. Days Inn and Conference Center Tulsa https://www.justice.gov/usao-ndok/pr/justice-department-resolves-lawsuit-against-sairam-enterprises-inc-discriminating

[94] *DiLorenzo v. Costco Wholesale Corp*., 515 F. Supp.2d 1187 (W.D.Wash.) (2007).

the staff that the dog was "in training" to help her with her issues. The second time, she came with her husband and the dog was wearing a vest with an "in training" logo. The woman was questioned again about the tasks that the animal performs and whose animal it was because the Costco staff had seen the animal with her husband. At the final Costco visit, she was carrying the dog in her arms and was asked to leave and not return with the animal. She sued under various state and federal laws. The court did not find Costco's questioning unreasonable; rather the judge characterized it as "trying to get more information and how the animal performed tasks" and if the animal was a bona fide service animal. Costco had determined it was an "emotional support animal" and therefore a pet and not allowed under their store policy. The court agreed with Costco's decision and specifically stated that the repeated questioning was not disability harassment as the plaintiff had argued. If the animal did not meet the ADA definition of a service animal, Costco was not obligated to allow the pug in its warehouse.

A final incident worth noting involved a service miniature horse that entered a restaurant with her owner in Florida.[95] Although according to the press report, there were some concerned customers and the manager was not sure what to do initially, the horse stayed, the manager handled it without incident and there is no indication that there will be any legal action. What the case did confirm is that at least some of the public would like clarity on whether a specific animal is a bona fide service animal without having to ask questions of the owner and risk any offense or violation of the ADA.

Transportation Network Companies (TNCs)

As stated earlier, there is a finite list of categories of private businesses providing services to the public that are covered by Title III. The list was considered comprehensive when Congress passed the ADA in 1990. However, it became clear within a few years that the list did not specifically include services that were available to the public but not located in a physical location—such as the internet marketplace. Whether internet businesses or services are covered by Title III remains unclear. This issue has become important for individuals with service animals. First, a bit of background on the debate related to the internet and ADA.

DOJ drafted proposed amendments to the regulations during the Obama Administration that would have clarified ADA coverage of websites, but those were withdrawn in December 2017. Due to the increase litigation related to accessible websites, members of the House of Representatives wrote to the DOJ requesting guidance on website accessibility under ADA. The response received in September 2018 stated that the department was considering whether specific regulations related to web accessibility standards was necessary to ensure compliance with the ADA. DOJ reiterated that it has

[95] http://www.orlandosentinel.com/opinion/audience/george-diaz/os-ae-service-horse-florida-restaurant-20180619-story.html

consistently held that ADA applies to public accommodations websites. However, it also included a statement that Title III entities have flexibility in how to "comply with ADA's general requirements of nondiscrimination and effective communication." Finally, DOJ suggested that the concerns might be best addressed "through the legislative process."

Although the Title III obligations are relatively straightforward, and the courts have little difficulty applying the regulations to the facts in most Title III cases, the obligations of transportation network companies (TNCs), such as Uber and Lyft, to allow service animals is unsettled. TNCs are a new variation in the traditional public or private transportation systems that do not neatly fit into the Title III definition of a public accommodation. The TNCs connect drivers using their personal vehicles through mobile applications and GPS data with individuals needing transportation. Both Uber and Lyft have been sued under ADA Title III when drivers refused to transport service animals or wheelchairs. [96] But before the issue of discrimination—i.e., failure to allow the service animal or the wheelchair—is determined by the courts, the threshold legal question is whether TNCs are covered by Title III. If they are not, there is no obligation to follow the ADA regulations.

Courts are struggling with whether TNCs are like taxicabs or transportation services (which are Title III accommodations) and therefore obligated to follow the service animals DOT regulations or are really technology (an internet platform) companies and therefore fall outside Title III. Under the DOT regulations, taxi services cannot refuse to serve people with disabilities who can use a taxi, refuse to assist an individual with mobility devices, or charge people with disabilities more. Service animals as defined by DOJ must be allowed to accompany their handlers. If the individual can ride in the taxi and requires only minimal assistance to do so, the transportation service or taxicab must transport the individual.[97] If TNCs are determined to be transportation services covered by Title III, service animals as defined by DOT regulations would, as a general rule, have to be allowed in Uber or Lyft vehicles.

Two federal district cases have presented the issue before the court. In *Ramos v. Uber Technologies, Inc*.,[98] plaintiffs with mobility impairments sued both Uber and Lyft for violations under ADA Title III Section 12184 that prohibits discrimination by providers of

---

[96] For a thorough review of the options available for coverage of TNCs under Title III of the ADA, see Reed, R. Note & Comment: Disability Rights in the Age of Uber: Applying the Americans with Disabilities Act of 1990 to Transportation Network Companies, 33 Ga. St.U.L.Rev. 517. Winter 2017.

[97] 49 C.F.R. §37.5(b), 37.29(c), 37.167(d).

[98] Ramos v. Uber Techs., Inc., 2015 U.S. Dist. LEXIS 20914, 2015 WL 758087 (W.D. Tex. February 20, 2015)

public transportation services. The companies denied they were covered under ADA because they were not in the "business of transporting people." Instead, they were "simply mobile-based ridesharing platforms to connect drivers and riders." They argued their ADA responsibility extended only to ensuring that people with disabilities can access and use the company's mobile application. The case was before the court on a motion from the TNCs to dismiss based on the lack of coverage under ADA. The judge disagreed and held that there was enough evidence presented by the plaintiffs to further develop the issues and hold a full hearing. There has been no further legal action reported on this case to date.

In *National Federation of the Blind v. Uber Technologies, Inc*.,[99] blind individuals sued Uber for failure to accommodate their service animals under two different sections of Title III—i.e., Section 12184 covering "transportation services" as in the *Ramos* case and Section 12182 that prohibits discrimination in the full and equal enjoyment of "services" provided by a covered public accommodation. Uber again asked the court to dismiss the case based on the lack of ADA applicability. As in the *Ramos* case, the federal district court in California rejected the motion to dismiss, held that the plaintiffs had a plausible claim under the public accommodation "travel services" category, and that the Title III applicability issue for TNCs needed further legal development. Before the case was litigated, the parties settled.[100]

Both *Ramos* and *National Federation* left unanswered questions as to the application of ADA Title III to TNCs. However, as with other web-based cases, the courts acknowledge that the world is a different place today than when ADA became law and Congress could not have foreseen the impact of the internet on public transportation services. Further, they recognize that TNCs are a growing transportation option for people that may well outpace the use of taxis and other transportation services. If individuals with disabilities are going to find TNCs difficult or impossible to use, the equal opportunity goal of ADA will never be achieved. However, without final judicial rulings in these two cases and/or other regulatory action related to public transportation systems under ADA Title III, DOJ regulatory amendments, or final judicial decisions, it remains unclear as to whether TNCs are covered entities under Title III of the ADA.

[99] 103 F. Supp. 3d 1073 (N. D. Cal. 2015).
[100] 2016 U.S. Dist. LEXIS 192176 (N.D.Cal. 2016).

Content was developed by the ADA Knowledge Translation Center and is based on professional consensus of ADA experts and the ADA National Network.

ADA Knowledge Translation Center

http://adata.org/ADAKTC

The contents of this case law brief were developed under a grant from the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant number 90DP0086). NIDILRR is a Center within the Administration for Community Living (ACL), Department of Health and Human Services (HHS). The contents of this case law brief do not necessarily represent the policy of NIDILRR, ACL, HHS, and you should not assume endorsement by the Federal Government.