Animals in the Workplace: New Accommodation for Employees with Disabilities

By **Phyllis W. Cheng and Mallory Sepler-King**

Phyllis W. Cheng is a partner in the Los Angeles Office of DLA Piper and the former Director of the California Department of Fair Employment and Housing. Mallory Sepler-King is a Civil Rights Fellow at the California Department of Fair Employment and Housing.

Effective 2013, a little-noticed amendment to the disability regulations of the California Fair Employment and Housing Act (FEHA)[1] introduced assistive animals as a reasonable accommodation for employees and applicants with disabilities.[2]

Specifically, the amendment defines "[a]ssistive animal" to mean "a trained animal, including a trained dog, necessary as a reasonable accommodation for a person with a disability."[3] Consistent with the California Disabled Persons Act (DPA),[4] an assistive animal is either: a "'[g]uide' dog . . . trained to guide a blind or visually impaired person;" a "'[s]ignal' dog . . . or other animal trained to alert a deaf or hearing impaired person to sounds;" or a "'[s]ervice' dog . . . or other animal individually trained to the requirements of a person with a disability."[5] Added to the mix is the new category of "'[s]upport' dog or other animal that provides emotional or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities such as major depression."[6]

The regulations further require that the assistive animal be "free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces."[7] The animal must "not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace."[8] Finally, it must be "trained to provide assistance for the employee's disability."[9]

This article identifies points of confusion in the limited body of service animal accommodation law, and calls for clear, employment-specific guidance.

ASSISTIVE ANIMAL RULES IN NON-EMPLOYMENT SETTINGS

Housing

Disability discrimination forms one-third of housing complaints received by the Department of Fair Employment and Housing. In 2004, the court of appeal held in *Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission*[10] that a home owners' association had violated the FEHA and discriminated against condominium residents, a married couple who suffered from depression and other disorders, by failing to reasonably accommodate their disabilities by permitting them to keep a small companion dog. Since *Auburn Woods*, the number of housing disability cases involving companion or comfort animals as a reasonable accommodation has soared.

Similar to FEHA case law in *Auburn Woods*, the federal Fair Housing Act (FHA)[11] has been interpreted to support accommodation of a companion animal as a reasonable accommodation. While the terms of FHA's implementing regulations do not specifically discuss service or companion animals (though seeing-eye dogs are given as an example of a reasonable accommodation), courts have held with increasing consistency that accommodation of a companion or support animal may be a reasonable accommodation under the FHA.[12] HUD Agency decisions further support this reading of the statute.[13]

Public Services and Accommodations

The protections Congress extended to disabled persons under the Americans with Disabilities Act (ADA)[14] are intended to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[15] It is well established under Titles II[16] (public services) and III[17] (public accommodations) of the ADA that an animal that qualifies as a service animal—a dog or miniature horse trained to perform a task in order to aid with a person's disability—must be accommodated by all businesses held open to the public, barring unique health and safety concerns.[18] These requirements are enforced through California's Unruh Civil Rights Act.[19]

ASSISTIVE ANIMALS IN THE WORKPLACE

Less well established are the rights granted to disabled employees who use service animals. There is no case law on accommodation of service animals in the workplace under the FEHA. However, regulations promulgated by the former Fair Employment and Housing Commission provide for an interactive process and refer to the ADA to illustrate that the regulation's terms should be construed to afford broad protection to disabled employees.[20] Title I of the ADA[21] (employment) defines discrimination as "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity."[22] However, Title I does not explicitly mention service animals. Likewise, the U.S. Equal Employment Opportunity Commission (EEOC) has issued no limiting statement on what type of animals qualify as a "reasonable accommodation" in the workplace.

With limited and inconsistent case law on the matter, employers and employees alike are left without accessible guidelines or an understanding of their rights.

Accommodation of Service Animals

The purpose of the FEHA's disability protections is to ensure that an "individual['s] employment opportunities [are] commensurate with his or her abilities" as well as "to ensure discrimination-free access to employment opportunities."[23] With no FEHA case law on point, we look to similar anti-discrimination laws for guidance on accommodation of assistive animals in the workplace.

In *Schultz v. Alticor/Amway Corp.*, a Michigan federal district court limited the accommodation requirement to situations in which it is necessary for the employee to perform the essential functions of his or her job.[24] In evaluating an employer's refusal to accommodate an employee's service dog, used for hearing assistance as well as to assist with tasks to alleviate pain from a back injury, the court established a standard based on necessity. The court considered the tasks of the job in a vacuum, noting that the employee's job as a designer required "working at an easel or desk or on a computer" and that "contact with other employees was minimal." The court determined that since these tasks require neither extensive hearing nor retrieving dropped items, the service dog was "not necessary in carrying out the essential functions of his job."[25] Summary judgment was therefore granted for the employer.

Such a narrow application of reasonable accommodation standards not only provides lesser protections than, but also inherently interferes with the success of, the other Titles of the ADA and anti-discrimination laws that are not limited to the workplace. Employees who cannot have their service animal accommodated are not only disenfranchised at work, but in their ability to travel to and from their workplace, or participate in society as they normally would during the work day.

The Montana Supreme Court recognized this fundamental conflict in 2009. In response to an employer's assertion that only accommodations that are indispensible to an employee's ability to perform his or her job duties are required, the court stated that fundamentally, "an employer is obligated not to interfere, either through action or inaction, with a handicapped employee's efforts to pursue a normal life."[26] The court also found that employers are not relieved of the duty to accommodate when the employee is already able to perform the essential functions of the job. The duty to accommodate includes making modifications or adjustments that enable an employee with a disability to enjoy "equal benefits and privileges of employment" as are enjoyed by similarly situated employees without disabilities.[27]

Furthermore, an employer should not limit the scope of the accommodation analysis so narrowly that it will inhibit the requesting employee's ability to function on a day-to-day basis. When an accommodation that an employee enjoys outside the workplace is not reasonably possible at work, an employer should engage in the interactive process with the employee to find a suitable alternative accommodation that will allow the employee to perform the job, while minimizing any extra burden placed on the employee.

Practice Pointer— Interactive Process:

While accommodation provisions should be construed broadly in favor of disabled parties, employers are not required to accommodate *any* animal that is requested by an employee with a disability. An employer is required to "engage in a good faith interactive process to identify and implement the employee's request for reasonable accommodation."[28] This requires "timely, good faith communication between the employer . . . and the applicant or employee . . . to explore whether or not the applicant or employee needs reasonable accommodation . . . and, if so, how the person can be reasonably accommodated."[29] An employer must respond to an accommodation request within 10 days of receiving notice.[30]

Practice Pointer—Defenses:

Employers who are evaluating a requested accommodation may deny the accommodation if they can, after engaging in the interactive process, establish any of the following:

- Providing the accommodation would create an undue hardship, considering the employer's size, budget, work type, workforce, and other factors;[31]
- No reasonable accommodation would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health and safety, because the job inherently imposes an imminent and substantial degree of risk;[32]
- No reasonable accommodation would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger the health or safety of others, because the job imposes an imminent and substantial degree of risk to others.[33]

Accommodation of Support Animals

On the other end of the spectrum are cases that are beginning to emerge regarding support animals in the workplace. As accommodation of companion or support animals in housing becomes more commonplace, and support for these accommodations is established through judicial applications of the FEHA and FHA, similar accommodations are being requested of employers. This issue was addressed in *Edwards v. EPA*, where a district court was faced with a claim by a disabled employee whose employer denied accommodation of the employee's puppy, which he had gotten to "ameliorate work-related stress."[34]

The court in *Edwards* explicitly rejected the limited reading applied in *Schultz*, explaining that without "a firm basis in the text of the statute or regulations, it was reluctant to conclude that insufficient proof the requested accommodation was 'necessary' constitutes an independent basis for rejecting the accommodation."[35] Instead, the court focused on whether the requested accommodation would be an *effective* means of aiding or alleviating the employee's disability.[36] The court then determined that the plaintiff employee had "not presented objective evidence that bringing his untrained dog to work would have been an effective means of resolving his stress."[37]

Practice Pointer—Multiple Accommodations Requested:

An employer may be faced with multiple employees requesting accommodations involving animals. An employer is required to engage in the interactive process with all employees requesting accommodation, and accommodation of one employee is not a defense for failing to provide reasonable accommodation to another. However, if the accommodations conflict with each other to the extent that an employer would need to physically separate them, this may create an undue hardship, or a threat to employee health and safety, even though the accommodations may otherwise be reasonable. It is important to consider all alternatives in order to best accommodate all employees equally.

Conflation of Employment Protections With Other Laws

The *Edwards* decision provides language that can be useful in analyzing a reasonable accommodation request. However, in reaching its decision, the court referenced the Fair Housing Act as having an "analogous reasonable-accommodation provision" to Title I, and borrowed from cases under that authority. The Department of Justice's Civil Rights Division has commented on the importance of distinguishing between housing and other arenas, noting that "[a]lthough in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes."[38] Similarly, the *Edwards* court did not fail to recognize the inherent risk in requiring employers to consider requests for accommodation of animals that do not reach the definition of a service animal under Titles II and III of the ADA.[39]

There are a multitude of distinctions that do and must exist between a person's home and their work place. An untrained animal, which may be reasonable to accommodate in a home where it only comes in contact with its owner, may not be reasonable to accommodate elsewhere. Consequently, in order to aid employers in making determinations when an accommodation is requested, and protect them from fear of a lawsuit when the requested accommodation is found to be unreasonable, clear and distinct guidance must exist for accommodation of animals in each of these areas.

Need for Clarifying Guidelines on Service Animal Accommodation

There should be no doubt that the primary intent in the passage and update of disability accommodation

laws is to remove barriers to equal enjoyment of all life activities for disabled persons to the greatest extent possible, while maintaining a reasonable level of protection for employers. As stated, the purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." In order to fulfill this purpose, both through future applications of the ADA and federal statutes, and through amendments to and application of the FEHA, additional guidance is necessary to allow employers and employees to fully understand and uphold their intended rights and duties.

ENDNOTES

1. Cal. Gov't Code §§ 12900 *et seq.*
2. Cal. Code Regs. tit. 2, § 11065(a), (n)(1), (p)(2)(B).
3. Cal. Code Regs. tit. 2, § 11065(a).
4. Cal. Civ. Code § 54.1.
5. Cal. Code Regs. tit. 2, § 11065(a)(1)(A)-(C).
6. Cal. Code Regs. tit. 2, § 11065(a)(1)(D).
7. Cal. Code Regs. tit. 2, § 11065(a)(2)(A).
8. Cal. Code Regs. tit. 2, § 11065(a)(2)(B).
9. Cal. Code Regs. tit. 2, § 11065(a)(2)(C).
10. 121 Cal. App. 4th 1578 (2004).
11. 42 U.S.C. §§ 3601–19.
12. *See, e.g., Overlook Mutual Homes, Inc. v. Spencer,* 415 Fed. Appx. 617 (6th Cir. 2011); *Janush v. Charities Housing Dev. Corp.*, 169 F. Supp. 2d 1133 (N.D. Cal. 2000); *Oras v. Housing Authority of City of Bayonne*, 373 N.J. Super. 302 (2004).
13. *See, e.g., HUD (Durand) v. Dutra, Fisher, Stone, Hunt, and River Gardens Apartments, LP*, HUDALJ 09-93-1753-8, 1996 WL 657690 (H.U.D.A.L.J. 1996).
14. 42 U.S.C. §§ 12101–213.
15. 42 U.S.C. § 12101(a)(7).
16. The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–213).
17. *Id.* at 42 U.S.C. §§ 12181–89.
18. *See, e.g.*, FDA Food Code § 2-403.11.
19. Cal. Civ. Code §§ 51–54.
20. Cal. Code Regs. tit. 2, § 11064(b).
21. 42 U.S.C. §§ 12111–17.
22. 42 U.S.C. § 12112; 29 C.F.R. app. § 1630.
23. Cal. Code Regs. tit. 2, § 11064(b).
24. *Schultz v. Alticor/Amway Corp.*, 177 F. Supp. 2d 674 (W.D. Mich. 2001), *aff'd* 43 Fed. Appx. 797 (6th Cir. 2002).
25. *Id.* at 678.
26. *McDonald v. Department of Envtl. Quality*, 351 Mont. 243, 259, 214 P.3d 749 (2009) (*citing Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993)); *cf. McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) ("The Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives, not merely accommodations that facilitate the performance of specific tasks.").
27. *McDonald*, 351 Mont. at 259, *citing* 29 C.F.R. § 1630.2(o)(1)(iii) (internal citations omitted); *see also Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 546 (7th Cir. 1995) ("The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.").
28. Cal. Code Regs. tit. 2, § 11040(a)(2)(B).
29. Cal. Code Regs. tit. 2, § 11065(j).
30. Cal. Code Regs. tit. 2, § 11050(a)(5).
31. Cal. Code Regs. tit. 2, § 11062(b).
32. Cal. Code Regs. tit. 2, § 11067(d).
33. Cal. Code Regs. tit. 2, § 11067(c).
34. *Edwards v. EPA*, 456 F. Supp. 2d 72, 79 (D.D.C. 2006).
35. *Id.* at 100.
36. *Id.* ("Employers must make changes to their policies and practices so as to place disabled employees on the same footing as nondisabled ones. Changes that are not effective do not qualify as 'reasonable accommodation.'").
37. *Id.*
38. *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 75 Fed. Reg. 56236, 56239-40 (Sept. 15, 2010) (to be codified at 28 CFR pt. 36).
39. "[T]he Court finds noteworthy—though not surprising—the lack of authority holding that an employee is entitled to bring an untrained dog to work as a reasonable accommodation for stress caused by his or her disabilities. The absence of such authority likely stems from the disconnect between bringing a dog to work and stress-related discomfort, and also from the consequences that would flow from requiring employers to grant such accommodations." *Edwards*, 456 F. Supp 2d at 101; *see also Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1257 n.25 (D. Haw. 2003) (accommodation of emotional support animals "permits no identifiable stopping point: every person with a handicap or illness that caused or brought about feelings of depression, anxiety or low self esteem [sic] would be entitled to the dog of their choice, without regard to individual training or ability").
40. 29 C.F.R. app. § 1630; 42 U.S.C. § 12101(b).