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Clearing up the law on service animals

Phyllis W. Cheng is director of the California Department of Fair Employment and Housing.



Sorting through the legal framework on service animals is enough to make anyone feel like a dog chasing its tail. The lack of clarity puts disabled people in danger by causing others to question the legitimacy of their service animals. At the same time, businesses, employers, housing providers and the public can unwittingly violate the law.

Mallory Sepler-King is a Civil Rights Fellow at the Department of Fair Employment and Housing.



Accommodation provisions are contained in the Americans with Disabilities Act, the Air Carrier Access Act, the federal Fair Housing Act, California's Fair Employment and Housing Act, Unruh Civil Rights, Disabled Persons Act, and

various other state and local laws. A virtual hornet's nest, they each define and require different standards for service animals to accommodate persons with disabilities, and are often vague or unclear.

For example, the ACAA mandates that airlines accommodate all service and emotional support animals with a verified therapeutic purpose on their flights, with a few species excepted. In contrast, the ADA, which regulates airports and their stores, permits accommodation only for service, guide and signal dogs trained to assist with disabilities. The inconsistency can trap unwary travelers, businesses, airports and airlines.

Public Accommodations

Under the ADA, persons with disabilities who need a service animal should and must be accommodated. However, when abled persons take advantage by claiming their pets to be service animals, the abuse can open a can of worms.

The inconsistency can trap unwary travelers, businesses, airports and airlines.

The ADA defines a "service animal" as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability" or a similarly trained "miniature horse." California law, however, does not consistently limit service animals by species.

SPECIAL REPORT

The New Lawyer Supplement



Tuesday, December 3, 2013

Litigation

Environmental groups sue state in battle over agricultural runoff

A coalition of environmental and fishing groups has sued the state, claiming it is failing to curb pollution that runs off farmland and into waterways and drinking water wells along California's central coast.

Law Practice

Munger Tolles partner returns after stint as ambassador

Former U.S. Ambassador to Australia Jeffrey L. Bleich returned to Munger, Tolles & Olson LLP on Monday after a roughly four-year diplomatic role under President Barack Obama.

The NFL is not a sport, it's a business

The NFL and the Players Association should amend the collective bargaining agreement so as to allow NDAs. By **Daniel Rapaport**

Litigation

Latham wins dismissal of antitrust case for Apple

A federal judge on Monday dismissed a lawsuit against Apple Inc. claiming the company violates antitrust laws by taking a 30 percent cut of every sale of software applications on mobile devices bought in the "App Store."

Entertainment & Sports

Platters member loses trademark fight over band name

In a case of first impression, the 9th Circuit deems the 'possibility' of irreparable harm insufficient for a preliminary injunction over the use of a trademark.

Litigation

Jackson family attorneys file notice seeking new trial

Attorneys for Michael Jackson's family are seeking a new trial in their quest to hold AEG Live liable for as much as \$1 billion in the superstar's death.

Although service animals are not pets, many owners often elevate their pets' status to bring them into shops and restaurants. Like a pig in a poke, an ordinary pet sometimes passes as an assistive animal when clad in a service vest or other identifying accessories easily purchased through online sites, which claim to "register" service animals without any screening. This monkey business on the Internet can take unfair advantage of policies designed to assist disabled persons, create a culture of distrust towards service animals, and outfox businesses.

Housing Providers

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 Ass'n v. Fair Employment and Housing Com.*, 121 Cal. App. 4th 1578 (2004), that a home owners' association had discriminated against condominium residents, a married couple who suffered from depression and other disorders, in 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.

Employers

Ferretting out a clear policy on animal accommodations in the employment context is no easier. While the Department of Justice has issued an official definition of "service animals" for Articles II and III of the ADA, Article I does not explicitly mention service animals. Likewise, the Equal Employment Opportunity Commission has issued no limiting statement on what type of animals qualify as a "reasonable accommodation" in the workplace. Regulations promulgated by the former Fair Employment and Housing Commission similarly provide for an interactive process and refer to the ADA on allowing service animals at work. Certain exceptions exist in California's Health and Safety Code, for example, excluding live animals in kitchens where raw meat is prepared.

Employers are nonetheless expected to evaluate each request for accommodation on a case-by-case basis, and face lawsuits if they fail to properly accommodate employees who need the use of an assistive animal based on these nebulous standards. Unlike keeping an assistive or companion animal in the privacy of a home, bringing that animal into a workplace - where it can interact with employees, clients, customers and other service animals - is a different kettle of fish. As with public accommodations, employers could be held vicariously liable if the animal causes harm.

Policy Considerations

California makes it a misdemeanor to falsely identify a service animal, a crime punishable by six months in jail or a fine of up to \$1000, or both. However, if an animal is brought into a public establishment, the property owner can ask only: (1) whether the animal is a service animal; and (2) what tasks the animal performs. Any additional questioning is in violation of the ADA. Potential liability for failing to accommodate a legitimate service animal is high. The ADA authorizes fines of up to \$55,000 for a first violation and up to \$100,000 for subsequent violations; and California state law provides for additional civil fines. Because the risk of a violation is prohibitive, the hands of business owners are effectively tied if they doubt the validity of a claimed service animal.

No matter how well behaved, a personal pet is not trained to be a working animal. An ordinary pet can create a mess, interact with a service animal trained not to fight back, or interfere with business operations. If things were to go awry, a business, employer or housing provider could be vicariously liable for harm caused on its premises. An establishment forced to regularly accommodate multiple animals can pay for increased cleaning costs or lose customers, tenants or employees, who fear or dislike animals.

A chameleon's camouflage does not hide its true nature. Neither should accessories allow a pet to masquerade as a service animal. Such abuses can only make access more difficult for disabled persons and endanger trained service animals, undermining the very essence of these anti-discrimination policies. Some believe that a universal identification system for service animals would be helpful. California already has a law on the books for creation of a statewide identification tag, and every county in the state requires licensing of animals. To deter fraud, counties can create a

Corporate Dealmakers

A roundup of recent merger and acquisition and financing activity and the lawyers involved.

Government

CalPERS launches search for new general counsel

New leader will oversee the fight to maintain bankrupt cities' contributions to the \$270 billion public retirement and health care fund as part of their reorganization plans, among other responsibilities.

Litigation

Terrorist watchlists under spotlight in 'no-fly' trial

A federal judge considering the case brought up the possibility Monday of suspending the trial so both sides could file writs to the 9th and D.C. Circuit Courts of Appeals.

U.S. Court of Appeals for the 9th Circuit Commercials, political ads to stay off public airwaves, 9th Circuit rules

An en banc panel at the 9th U.S. Circuit Court of Appeals upheld a law banning commercials and political advertisements on public radio and television stations Monday.

Litigation

JAMS neutrals to handle \$2.5 billion settlement over hip implants

John K. Trotter and Catherine Yanni, two longtime neutrals, will oversee the implementation of the massive settlement involving thousands of cases against Johnson & Johnson.

Civil Rights

Judge orders Palmdale to change election system

A Los Angeles County Superior Court judge ruled Palmdale's at-large election system is illegal and the city must institute a district-based model in time for a special election next June.

U.S. Court of Appeals for the 9th Circuit 9th Circuit to begin video streaming en banc hearings

Ninth U.S. Circuit Court of Appeals officials said they believe their court is the first among federal appellate courts in the country to try live streaming such proceedings.

Law Practice

Kaye Scholer's California managing partner decamps

G. Thomas Stromberg, who led the Los Angeles and Palo Alto outposts and served on the firm's executive committee, jumped to the Los Angeles office of Jenner & Block LLP.

visible, unique identification tag, for certified service animal. Because persons with disabilities are already required to license service animals, the added protection should not be unduly burdensome.

The above laws' laudable goal is to provide reasonable accommodation for persons with disabilities. Unfortunately, enforcing expansive protections without a clear distinction between the types of animals and accommodations is putting the cart before the horse. A bright line needs to be drawn, however doggedly, so that these policies can best serve their intended beneficiaries.

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Administrative/Regulatory

Clearing up the law on service animals

The lack of clarity puts disabled people in danger by causing others to question the legitimacy of their service animals. By **Phyllis W. Cheng and Mallory Sepler-King**

Law Practice

John Lennon and his American lawyer

This is the second of a two-part series concerning John Lennon and his lawyer, Leon Wildes. By **Dan Lawton**

Government

Federal 'terminations for convenience' likely to upswing

The recent federal budget showdown and automatic sequestration portend even further tightening of the government's already worn purse strings. By **Roger C. Haerr**

Health Care & Hospital Law

Medi-Cal eligibility changes on horizon

The new changes and requirements take effect Jan. 1, 2014. By **Monica Goel**

Judicial Profile

William B. Shubb

Senior U.S. District Judge Eastern District of California (Sacramento)

Law Practice

As franchising grows, lawyers face evolving regulatory, legal landscape

As the economy pulls out of its slump, attorneys expect the franchising sector to continue to gain momentum. It's recently seen a big surge as a lower cost way to expand businesses, adding 184,000 new jobs nationwide in the past year.