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SERVICE ANIMAL OR PAMPERED POOCH?

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A customer approaches your business with a large dog on a leash. Another enters with a cat in her coat pocket. A third arrives with a small monkey perched on his shoulder. Your immediate reaction may be one such as: "Not in my store. I sell food here. What will the health department say?" Or, "That animal will cause a mess or scare my other customers away." You approach the person with the animal and politely point out that the business has a "no pets" policy and deny him entry to your business. He, however, asserts that he is disabled and that the animal is a "service animal." You are familiar with seeing-eye dogs, and you let the visually impaired enter with their dogs, but this person does not look visually impaired; nor does the animal look like a seeing-eye dog. What do you do?

Title III of the Americans with Disabilities Act (ADA) protects the rights of the disabled to equal access to the goods and services that are generally available to the public. The ADA prohibits public accommodations from discriminating against any individual "on the basis of disability…." Congress intended the ADA to remove the obstacles that disabled individuals must overcome to participate fully in our society. Because individuals with disabilities suffered from various forms of discrimination as a result of architectural, transportation and communications barriers, public accommodations must make reasonable modifications to their policies and practices so that their goods and services are available to the disabled. This means that businesses must modify their policies and practices to allow the disabled to use service animals on the business premises. Moreover, because the ADA is a federal statute, it trumps local health codes that might otherwise prohibit service animals from entering food service establishments.

While business owners must permit the disabled to enter their establishments with a service animal, the care and well-being of the service animal remain the responsibility of the owner. To the extent that the service animal causes any damage or disturbance on the premises, the business owner is within its rights to ask the animal's handler to remove it from the premises.

There are many different types of disabilities, and there is no limit on which type of disability can use service animals or what types of animals the disabled individual can use. Service animals do not require any special certification, licensing or training. Instead, a service animal is simply any animal that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items. 28 CFR 36.104(c)

Most retailers have no objection to the use of service animals by the disabled on their premises. Typically, the retailer's sole concern is to distinguish service animals from pets so that the retailer can facilitate the entry of service animals and deny access to other animals. With certain disabilities, the retailer can easily and quickly accomplish this result.

For example, a dog in a harness accompanying an obviously visually impaired individual, and a dog pulling a wheelchair, are easily recognizable service animals. There are many disabled individuals, however, who suffer from so-called "invisible disabilities" and do not give outward indications of their disability. One common example of an invisible disability is an epileptic who uses a seizure alert animal for warnings of imminent seizures. Here, the epileptic has as much right as the visually impaired individual to use her service animal on your premises. The retailer's challenge is to develop a policy that allows its employees to distinguish easily between service animals and other animals without unnecessarily inconveniencing the disabled.

The ADA, however, prohibits public accommodations from requiring that service animals bear any identifying clothing or other markings. Similarly, there is no requirement that the disabled individual carry certification papers for his animal. Nor is there any specific training requirement(s) mandated for the service animal. Similarly, there is no requirement that the animal be trained by a professional or experienced animal trainer. The ADA also prohibits unnecessary inquiries into an individual's disability.

The Department of Justice has advised businesses that they cannot require special identification cards for service animals or ask about the customer's disability. While many disabled individuals mark their service animals with vests or capes to identify them as service animals, businesses cannot require that animals wear some sort of marking to be treated as a service animal.

We are a nation of pet lovers, and many of us pamper our pets. Some people even like to shop or dine with their pets. Many are overindulgent of their pets and, unfortunately, neither as conscientious nor considerate of others as they should be. However, even if they were, their pets still present risks to others who are sensitive to animals, whether by reason of allergy or psychology. Putting aside sensitivity to animals, the mere presence of pets (as opposed to service animals) still puts the retailer at risk of health code violations. How does a retailer prevent people from bringing their pets into his business without violating the requirements of the ADA?

When facing the customer with the monkey perched on his shoulder, the retailer cannot simply be limited to asking whether this is an animal required by a disability. The customer's affirmative response does little to demonstrate that the customer is aware of what a service animal is and whether that animal qualifies as a service animal. Moreover, those inclined to bring their pets into the business are simply likely to respond "yes" to the retailer's inquiry.

Unless retailers are willing to allow anyone to enter their premises with any kind of animal (and risk health code violations or offending other customers), they face a quandary about appropriate and effective inquiries to determine whether the animal is a service animal or a pet. The courts have provided very little guidance to businesses on the subject. In the only reported case discussing the issue, a federal court in Seattle recently upheld a retailer's policy concerning service animals and, in doing so, rejected a state Human Rights Commission determination that the policy violated both the ADA and a state civil rights statute. *Grill* v. *Costco Wholesale Corp.*, 312 F.Supp.2d 1349 (W.D.Wash. 2004).

In the *Costco* case, the retailer had modified its policy to allow animals' entry to its business if either of two criteria were met: First, the retailer permitted animals to enter when it was visually apparent that the animal was a service animal — by virtue of the

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presence of an apparel item, apparatus or some other visual evidence that the animal served as a service animal. Second, when the animal was without some visual evidence that it was a service animal, the customer must be prepared to establish that the animal did, in fact, perform some task or function that the customer cannot otherwise perform. If that customer cannot (or refuses to) identify a task or function that the animal performs, the retailer denied entry to the animal.

The Washington State Human Rights Commission determined that the retailer's "task or function" inquiry violated both the ADA and state law because it resulted in "a direct restriction on the access of customers with disabilities accompanied by service animals." The federal court rejected the Commission's finding. Instead, the federal court found that the policy allowed quick and unhindered access to service animals upon visual identification as a service animal. When visual identification was not possible, the customer needed only to identify the task or function that the animal performed so that the retailer could determine for itself whether the animal was a service animal. The retailer was not required simply to take the customer's word that an animal was a service animal, but was instead entitled to determine for itself whether the animal was a service animal.

The federal court also faced the disabled individual's argument that identifying the "task or function" performed by her service animal necessarily disclosed her disability. While the disabled individual could easily avoid this potential disclosure by having the service animal don apparel marked for a service animal, there was some risk that the answer to the question may have disclosed an individual's disability. The federal court determined, however, that a "task or function" inquiry could

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be answered without necessarily disclosing one's disability. For example, "the animal is trained to alert me when a medical condition is about to occur." The federal court determined that the retailer's use of a "task or function" inquiry is not a failure to modify its policies reasonably to permit the use of service animals.

The retailer's policy still includes some risks. While it seems unlikely that customers will dress up their pets as service animals to gain entry to public accommodations, it is not that far-fetched to believe that those who pamper their pooches will learn acceptable responses to a "task or function" inquiry to gain entry to a retail establishment for their pet. The policy, however, does expedite the entry of service animals into the retailer's premises with no intrusive questioning of the customer when there is visible indicia that the animal is a service animal. When questioning is necessary, it is limited and focused narrowly on the underlying facts that distinguish the service animal from a pet.

Adopting a policy that is compliant with the ADA is only part of the battle; retailers must take steps to ensure that the policy adopted can be applied by its employees, consistent with the requirements of the ADA. For example, one risk that the Seattle court did not address is what the retailer does with the answer to its "task or function" inquiry. If the customer identifies a "task or function," and the retailer's employee mistakenly determines that the customer is not entitled to use a service animal and denies that animal entry, the retailer runs the risk that the ADA would indeed permit the customer to use a service animal for that "task or function." If so, the retailer would be in violation of Title III of the ADA. If, on the other hand, the customer fails to provide a response to the retailer's inquiry, the retailer is well within its rights to deny entry to the animal.

Title III of the ADA certainly provides challenges for retailers. To the extent that Title III requires altering physical attributes of the retailer's premises, those challenges can be easily addressed - e.g., installing water fountains at appropriate heights. The ability to distinguish between a service animal and a pet, however, is far more problematic.

As it turns out, the monkey perched on your customer's shoulder is trained to retrieve items for which your customer would otherwise be required to reach down. The cat in the coat pocket is trained to alert its owner when a medical condition is about to occur. But the man with a large dog on a leash simply likes dogs. n

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