Is That Really a Service Animal?

Today we see more and more "service animals." At times they are in places some feel are inappropriate. Other times we question whether the animal even is a service animal and what service it possibly could be providing. However, many people are afraid to confront the issue or are mistaken as to what the law requires.

While certain states define issues around service animals differently, the Americans with Disabilities Act (ADA) sets the bar. The United States Department of Justice (DOJ), Civil Rights Division, defines service animals as "dogs that are individually trained to do work or perform tasks for people with disabilities." In March, 2011, the DOJ confined its definition of service animals exclusively to dogs. Certainly the abuses of the law that are occurring played a role. However, the state of Washington, for example, does not confine its definition of service animals to dogs. Regardless, most states, as does the DOJ, spell out clearly that a service animal is not a "pet." Furthermore, "service animals in training," by definition, are not considered service animals.

Thus, you are dealing with three elements when defining a service animal. First, the animal is individually trained. Second, the animal has been trained to perform specific tasks. Third, the tasks the animal is trained to perform relate specifically to the disability of the person-at-issue. The ADA does not require that a service animal be certified. However, a number of states have instituted rigorous certification procedures and a number also require the service animal to wear something that visibly identifies it as a service animal. It is unclear how some of these state regulations would fare if challenged under the auspices of the ADA. A federal district court found that an Oregon law requiring hearing assistance animals to have an orange leash countermanded the ADA's less restrictive requirements for identifying service animals. (*Green v. Housing Authority of Clackamas County*, 994 F.Supp. 1253 (D. Oregon, 1998)).

The DOJ states that effected parties may ask two questions of someone with a purported service animal when inquiring as to the legitimacy of the purported service animal. The effected party may ask if the animal is required because of a disability, and what tasks the animal has been individually trained to perform. Clearly, if someone

cannot answer such questions satisfactorily or it later comes to light that the purported service animal does not meet the federal or respective state's definition of a service animal, an effected party would be fully within his or her rights to deny access to the animal. (See, for example, *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 (Del. Super. Ct. 2005)). I am aware of no state that does not clearly define the parameters of a service animal as being an animal "trained to conduct specific tasks" related to a legally recognized "disability."

Service animals also must be under control. Typically this means leashed or tethered, unless it interferes with the animal's function. Under all circumstances the animal must be under control of some kind, which can include voice, whistle, or some other signal method. If the animal is not under control, is not housebroken, or is proactively endangering others, the *animal* may be denied access according to the DOJ.

However, absent the issues discussed above, someone with a service animal has wide access, and the definition of disability includes many unseen disabilities, including emotional or mental conditions. In fact, the vast majority of disabilities are not apparent to the naked eye.

Businesses that sell or prepare food must accommodate service animals, regardless of regulations normally barring animals from proximity. Those with service animals cannot be isolated or segregated, and typically are exempt from "pet" deposits. However, an owner is responsible for the fees that an establishment normally assesses for damage caused by animals.

While it has not been clearly defined who might take precedence in a situation involving a service animal and someone allergic, or with other negative reactions, to animals, DOJ guidance leads one to believe it certainly would not, by default, automatically be the person negatively affected by the service animal. DOJ guidance suggests trying to find a way to accommodate both parties.

Issues involving landlords and tenants often invoke the Fair Housing Amendments Act of 1988 (FHAA), which requires landlords, under normal conditions, to rent to those with service animals. (See *Joint Statement of the Department of Housing & Urban Development and the Civil Rights Division of the Department of Justice* (May 17, 2004)). However, the FHAA does not cover landlords with fewer than four rental

properties, buildings with four or fewer units, where the owner occupies one of the units, or private organizations that restrict tenancy to its members.

The Air Carrier Access Act of 1986 allows service animals on flights. It requires airlines to make the more spacious bulkhead seats available and to block off a certain amount of seats to accommodate the disabled. A passenger also may be asked to move to accommodate someone with a service animal. However, a passenger cannot be asked either to give up space in front of his seat to accommodate a service animal or to give up a reservation. Flights involving foreign carriers and destinations operate, at times, under a somewhat different framework.