

LASSIE GOES TO WASHINGTON . . . AND TO WORK: USE OF SERVICE ANIMALS AS REASONABLE ACCOMMODATIONS IN EMPLOYMENT

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“There is no psychiatrist in the world like a puppy licking your face.”¹ Without question, dogs’ unwavering loyalty, companionship and love for their masters have made them one of man’s best friends and an increasingly visible and important part of our culture since the time of their domestication approximately 12,000 years ago.² Ancient murals and scrolls depict dogs being used to assist blind individuals as early as the first century A.D.³ Centuries later, beginning in the 1920s, “seeing eye” dogs were trained to assist World War I veterans blinded during combat, laying the ground work for the use of dogs and other service animals in modern society to assist persons with disabilities.⁴

During the decades that followed, many states enacted accommodation and equal access laws specifically providing visually-impaired individuals the right to enter public establishments with seeing eye dogs.⁵ In 1990, the federal government enacted the Americans with Disabilities Act (ADA), creating a federal cause of action for persons subjected to discrimination based on their disabilities, including

discrimination based on the use of an assistance animal.⁶ The use of assistance dogs by visually-impaired individuals is now addressed in myriad laws and regulations. Nonetheless, Americans have sought to use an increasing variety of animals in places of public accommodation and their workplaces to treat less readily apparent psychological disabilities, creating issues for the courts and the Department of Justice (DOJ) to address as the law catches up with the path “Lassie” led for the visually impaired years ago.

On September 15, 2010, the DOJ issued revised final regulations regarding the ADA’s service animal accommodation requirements for individuals with disabilities employed by state and local governments (governed by Title II of the ADA)⁷ and disabled individuals’ access to public accommodations and commercial facilities (governed by Title III of the ADA).⁸ Notably, the revised regulations limited the definition of “service animal” to “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.”⁹ With the exception of miniature horses, other species of animals, whether wild or domestic, trained or untrained, do not qualify as service animals for the purposes of Title II and Title III of the ADA.¹⁰

¹ This quote is often attributed to Ben Williams, but the exact source is not certain. See Lois Abrams, Ph.D., *My Dog is My Co-Therapist*, REFLECTIONS: NARRATIVES OF PROFESSIONAL HELPING 1 (2009), <http://www.reflectionsnarrativesofprofessionalhelping.org/index.php/Reflections/article/viewFile/858/681>.

² Bamber Gascoigne, *History of the Domestication of Animals*, HISTORY WORLD, <http://historyworld.net/wrldhis/Plain-TextHistoriesResponsive.asp?historyid=ab57> (last visited May 2, 2017).

³ Michele Fournier, *The History of the Service Dog, Part I—Ancient Humans and Dogs* (Aug. 5, 2013), <http://assistancedogs.wordpress.com/2013/08/05/the-history-of-the-service-dog-part-i-ancient-humans-and-dogs>.

⁴ Kate Kelly, *Buddy, the First Seeing Eye Dog*, AMERICACOMESALIVE.COM (July 19, 2011), <http://americacomesalive.com/2011/07/19/buddy-the-first-seeing-eye-dog#.V2ma5lrLIU>.

⁵ Rebecca F. Wisch, *Detailed Discussion of Assistance Animal Laws*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW ANIMAL LEGAL & HISTORICAL CENTER (2015), <http://www.animallaw.info/article/detailed-discussion-assistance-animal-laws> (last visited Jan. 19, 2017).

⁶ Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990).

⁷ See 28 C.F.R. pt. 35 (2016). Title II entities generally must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go. *Id.* § 35.136.

⁸ See 28 C.F.R. pt. 36 (2016). Title III entities generally must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go. *Id.* § 36.302.

⁹ 28 C.F.R. § 35.104 (emphasis added); *id.* § 36.104.

¹⁰ See also 28 C.F.R. § 35.136 (requiring public entities to make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to

The same revised definitions and rules, however, do not apply to Title I of the ADA governing disability discrimination in private-sector employment. According to the Equal Employment Opportunity Commission, although an increasing number of Americans with disabilities have sought to bring their service animals to work in recent years, Title I does not require employers to automatically allow employees to do so.¹¹ Instead, allowing a service animal into the workplace is one form of reasonable accommodation an employer must consider providing to a disabled employee if it will enable him to perform the essential functions of his job without creating an undue hardship for the employer.¹² Notably, the ADA allows employers to choose among effective accommodations identified by the employer and the employee and his medical provider through an “interactive process,” intended to identify the most workable and effective accommodation for all parties.¹³

Limited and inconsistent case law on the subject of service animals as reasonable accommodations in employment, however, has left employers and employees alike without reliable guidelines or a clear understanding of their rights.¹⁴ Because Title I of the ADA does not contain a specific definition of service animal, must an employer consider allowing a disabled employee to bring to work an animal other than a trained assistance dog if it benefits the employee and assists the employee in performing his job functions? Are employers required, for example, to countenance “puppy psychiatry”¹⁵ or allow for the presence of mere companion animals in their workplaces?

do work or perform tasks for the benefit of the individual with a disability); See also 28 C.F.R. § 36.302 (stating same for places of public accommodation).

¹¹ See *Disability Accommodations: Must Employers Allow Service Animals in the Workplace?*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Dec. 2, 2012), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disabilityaccommodationsmustemployersallowserviceanimalsintheworkplace.aspx>.

¹² SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 11. See also *Schultz v. Alticor/Amway Corp.*, 177 F. Supp. 2d 674, 677–78 (W.D. Mich. 2001).

¹³ *Schultz*, 177 F. Supp. 2d at 677.

¹⁴ Phyllis W. Chen and Mallory Sepler-King, *Animals in the Workplace: New Accommodation for Employees with Disabilities*, 28 CAL. LAB. & EMP. L. REV. 15, 16 (2014).

¹⁵ See *supra* note 1 and accompanying text.

In *Schultz v. Alticor/Amway Corp.*, a Michigan federal district court limited the accommodation requirement to situations in which the accommodation is *necessary* for the employee to perform the essential functions of his or her job.¹⁶ *Schultz* used a service dog for assistance with hearing as well as further assistance with certain tasks that caused pain from a previous back injury. In evaluating the employer’s refusal to accommodate *Schultz*’s service dog, the court established a standard focused on necessity. The court considered the duties of the employee’s position in isolation, 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.”¹⁷ The court subsequently held that since these tasks required neither extensive hearing nor retrieving dropped items, the service dog was “not necessary in carrying out the essential functions of his job.”¹⁸

In contrast to the narrow analysis taken by the *Schultz* court, the Montana Supreme Court espoused a more expansive view of an employer’s reasonable accommodation obligations in *McDonald v. Department of Environmental Quality*.¹⁹ *McDonald*, an employee with a leg injury and dissociative identity disorder, used a service dog trained to assist her in walking and recovering from dissociative episodes. When *McDonald*’s service dog had difficulty traversing slick tile floors in some of the office building’s hallways, *McDonald* requested the company place non-slip mats in the tiled hallways where she and her service dog traveled. The employer, however, refused and asserted that only accommodations indispensable to an employee’s ability to perform his or her job are required. Because the requested runners were not related to *McDonald*’s job functions as a fiscal officer, the employer argued it was not obligated to provide them as an accommodation. The court disagreed, holding that “an employer is obligated not to interfere, either through action or inaction, with a handicapped employee’s efforts to pursue a normal life.”²⁰

Notably, the *McDonald* court also found that

¹⁶ *Schultz*, 177 F. Supp. 2d at 674.

¹⁷ *Id.* at 678–79.

¹⁸ *Id.* at 678.

¹⁹ *McDonald v. Dep’t of Env’tl. Quality*, 214 P.3d 749, 751 (Mont. 2009).

²⁰ *Id.* at 760.

employers are not relieved of the duty to accommodate when the employee is already able to perform the essential functions of the job.²¹ According to the court, 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.²² Likewise, the court noted that the duty includes providing an opportunity to attain “the same level of performance” as the average similarly situated nondisabled employee.²³

So what about service puppies, cats, or perhaps even monkeys? If Michael Jackson had been a regular employee, would his employer have had to permit him to bring Bubbles, his chimpanzee, to work?²⁴ In *Edwards v. Environmental Protection Agency*, the federal district court for the District of Columbia addressed whether an employee could bring his untrained puppy to work to ameliorate job-related stress.²⁵ The *Edwards* court explicitly rejected the limited “reasonable accommodation” analysis applied in *Schultz*

noting that “it was reluctant to conclude that insufficient proof the requested accommodation was ‘necessary’ constitutes an independent basis for rejecting the accommodation” and focused instead on whether the requested accommodation would be an effective means of aiding or alleviating the employee’s disability.²⁶ Although the court held for the employer, it did so because the employee had not presented sufficient proof that bringing his untrained puppy to work would have been effective in alleviating his stress.²⁷

In light of the emerging broad view of what may constitute a reasonable accommodation and the range of non-obvious disabilities now recognized in our modern age, employers must likely consider an equally broad range of service animals as possible accommodations. Bear in mind (no pun intended), however, this obligation does not require an employer to adopt the particular accommodation sought by the employee. An employer is only required to provide a reasonable and effective accommodation.²⁸ Accommodations that pose an undue hardship on the employer given its size, budget, work type, workforce, and other factors or that would pose an imminent and substantial degree of risk to the health and safety of the employee or other workers are not required. Nor is a company ultimately required to retain an individual that cannot perform the essential functions of his or her job without a *reasonable* accommodation. Until further guidance comes from the courts or the DOJ that clarifies employers’ obligations and employees’ rights, “puppy psychiatry” may remain at least a “pawsible” reasonable accommodation.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ For the sake of argument and a heart-warming story, the authors note that, during the late 1800s, a baboon named “Jack” assisted a paraplegic signalman for the Port Elizabeth Mainline Railroad in South Africa to operate signal boxes that changed track segments and allowed locomotives to reach coal sheds. See Michael Williams, *Stranger than Fiction: Jack the Signalman*, KNOXVILLE DAILY SUN (Aug. 2, 2012), <http://www.knoxville-failysun.com/news/2012/august/jack-the-signalman.html>; see also Dorothy L. Cheney & Robert M. Seyfarth, BABOON METAPHYSICS: THE EVOLUTION OF A SOCIAL MIND 30–31 (The University of Chicago Press 2007). In exchange for a “tot” (a small amount) of brandy each evening, Jack dutifully performed his duties; he would pout and refuse to work the next day if the tot was not provided the night before. Robert L. Adair, *Monkeys and Horses and Ferrets... Oh My! Non-Traditional Service Animals Under the ADA*, 37 N. KY. L. REV. 415, 418 (2010). When a prominent female passenger reported a baboon was operating the signals, the railroad investigated and terminated the signalman, but reinstated him after giving Jack a skills test, which Jack passed with “flying colors.” Williams, *supra* at paras. 8–10. In fact, the railroad system manager was so impressed with Jack that it “hired” him to work alongside his master, making Jack the first and “only baboon in history to go to work for the railroad.” *Id.* In exchange for his help, Jack was given monthly rations from the government (in addition to his evening tot of brandy) and also received an employee number. Adair, *supra* at 418.

²⁵ *Edwards v. Env'tl. Prot. Agency*, 456 F. Supp. 2d 72 (D.D.C. 2006).

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²⁶ *Id.* at 74–75.

²⁷ *Id.* at 77–81.

²⁸ *Id.* at 66–69.