

**A Comparative Study: Service Animals and Emotional Support Animals
under the Fair Housing Act and the Americans with Disabilities Act
&
An Overview of Assistance Animal Laws of Select States**

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Introduction

Pets in America are extraordinarily popular. A survey done in 2007 reported that 69.6% of American households own either a dog or a cat.¹ Animals are generally kept as pets for company, affection, sociability, and often become another member of the family. In fact, a recent Harris Poll showed that roughly 88% of pet owners considered their pet to be a member of the family.² Recent scholarship has found that interaction with an animal can reduce blood pressure, lower cholesterol, and provide a calming effect to the benefit of people with or without certain mental illnesses.³ However, animals are also used as service and companion animals by people with disabilities and are not considered pets.⁴

One can, in fact, separate animals into three realms: pets, service animals, and emotional support animals. We do so for purposes of this essay, whether or not the statutes utilize the same terminology. Pets are animals that live with owners for love, affection, and company, whether or not the owner has a disability. Service animals are trained to perform tasks or specific functions that benefit persons with physical, intellectual, and mental disabilities. Emotional support animals are animals that provide some therapeutic benefit for a person with a mental or

¹ American Veterinary Medical Association, Market Research Statistics – U.S. Pet Ownership (last visited March 3, 2010), available at <http://www.avma.org/reference/marketstats/ownership.asp#companion>.

² Harris Interactive, Pets Are “Members of the Family” (last visited March 3, 2010), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=840. This poll goes on to state that owners do a variety of familial activities with their pets, such as: share a bed with them, buy them holiday and birthday presents, cook for them, and dress them up. *Id.*

³ Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 *Animal L.* 69, 70–71 (2005) (citing Aaron H. Katcher, *How Companion Animals Make Us Feel*, in *Perceptions of Animals in American Culture*, 113, 120, 123 (R.J. Hoage ed., Smithsonian press 1989); Alan M. Beck & Aaron H. Katcher, *Between Pets and People: The Importance of Animal Companionship*, 7 (Purdue U. Press 1996); Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, 75-Mar Fla. B.J. 12 (2001)).

⁴ ADA.gov, <http://www.ada.gov/>.

psychiatric disability or whose mere presence, without any training, ameliorates the effects of a mental or emotional disability.

The Americans with Disabilities Act (ADA) and the Fair Housing Act (FHA) prohibit discrimination on the basis of disability and govern the use of service or emotional support animals in places where pets may not be permitted. However, courts have been struggling with how to define and treat animals that qualify for protection under each law. This has created confusion as to what rights and duties are owed disabled persons and the animals that live with or accompany them. This essay attempts to clarify these two federal laws with regard to service or emotional support animals and the differing parties' rights and interests. It also includes an overview of select state laws that govern assistance animals of all types and our recommendations for enhancing the Iowa Civil Rights Act.

The Fair Housing Amendments Act of 1988

(Thomas R. Cross)

The Fair Housing Act (FHA) was passed as part of the Civil Rights Act of 1968 to protect persons in housing from discrimination based on gender, color, race, or national origin. The Fair Housing Amendments Act of 1988 (FHAA) expanded protections to handicapped persons and familial status.⁵ The law forbids discrimination in three broad areas: (1) in the sale or rental of a dwelling; (2) in the terms, conditions, or privileges of the sale or rental of a dwelling; and (3) in the provision of services or facilities.⁶ An important interest for many disabled tenants is their right to own and live with a service or emotional support animal in their dwelling despite a private landlord or housing provider's policy that excludes pets, restricts the number size and weight of animals, or charges a pet fee or deposit. Tenants with service animals typically ask the landlord to waive the no-pets rule, or the pet fee or deposit, because it is unlawful to refuse to make reasonable accommodations in the rules, policies, practices, or services where such accommodation may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.⁷

Private housing providers subject to the Fair Housing Act have much more freedom to control their rental and sale practices than federally subsidized or publicly operated housing projects. Core materials include the Act, 42 U.S.C. §§ 3602 et seq., and the governing regulations, 24 C.F.R. §§ 100.200 et seq. HUD's Final Rule regarding Pet Ownership for the Elderly and Persons with Disabilities is another important document. It clarifies the agency's interpretation of the Act's provisions relating to pets and to animals used by persons with disabilities in all housing programs. Reasonable accommodations might include service animals, but they also apply to requests to modify rules and lease provisions regarding assigned parking spaces, waiting lists for unoccupied accessible units, and other policy modifications.

The regulations do not include a definition of service animal, emotional support animal, assistive animal, or other terms used in public housing regulations. In the absence of specific direction, courts must rely on other sources, including administrative law decisions and settlements, joint

⁵ 42 U.S.C. §§ 3601 et seq. (2000).

⁶ 42 U.S.C. § 3604 (2000).

⁷ 42 U.S.C. § 3604(f)(3)(B) (2000).

statements made by HUD and the U.S. Department of Justice (DOJ), regulations that cover multi-family dwellings, elder homes, and other public subsidized dwellings, and comments included in the Final Rule. HUD instructs that the requirements for assistance/service animals must be evaluated in the appropriate context of housing are *independent* of the ADA regulations that were formulated to meet the needs of person with disabilities in a different context, and were adopted subsequent to HUD's regulations.⁸

There is no definition in the FHAA or HUD regulations applicable to private landlords regarding service or emotional support animals.⁹ That being said, HUD has furnished guidance as to what it considers to be an "assistance animal" for purposes of subsidized multifamily housing, which the agency has applied to private landlords:

Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person's disability. Assistance animals -- often referred to as "service animals," "assistive animals," "support animals," or "therapy animals" -- perform many disability-related functions Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, no special training is required. The question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.¹⁰

Administrative agency and court decisions have supported this broad definition. It is clear that service or emotional support animals are not confined to dogs or cats. Other animals have been used as assistance animals, including pot-bellied pigs, birds, opossums, and snakes. While there is no statutory limitation on the type or breed of service animal allowed, one court did rule that a landlord could restrict the breed of dog, stating that "an accommodation need not satisfy the particular preferences of the disabled person in order to be held reasonable"¹¹: *Zatopa v. Lowe* involved a pit bull mix that was being used as an emotional support animal. The landlord had agreed to make a reasonable accommodation by waiving the no-pets policy; however, he would only agree to let Lowe keep a breed considered "safe and gentle."¹² After hearing expert testimony about pit bulls in general and Lowe's *specific dog*, the court found that the "landlord's offer of a dog belonging to a safe and gentle breed constitutes a reasonable accommodation under both federal and state law."¹³ A landlord may not make generalizations about an animal or breed; the decisions must be based on a specific animal's behavior and whether it poses a direct threat to the health or safety of others.

⁸ Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, 73 Fed. Reg. 208,63836 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

⁹ See 24 C.F.R. § 100.201 (2009).

¹⁰ HUD Handbook 4350.3 Occupancy Requirements of Subsidized Multifamily Housing Program, Glossary 4 (March 12, 2010), <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3/43503HSGH.pdf>.

¹¹ *Zatopa v. Lowe*, No. C 02-02543, slip op. at 12 (N.D. Cal. Aug. 7, 2002).

¹² *Id.* at 4.

¹³ *Id.* at 15.

*Prima Facie Case of Discrimination:
Claimant Must Have a Handicap/Disability*

To establish a prima facie case of discrimination, a plaintiff must prove four elements:

- (1) she suffers from a handicap as defined in 42 U.S.C. § 3602(h);
- (2) defendant know of the handicap or should reasonably be expected to know of it;
- (3) accommodation of the handicap may be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; and
- (4) defendants refused to make such accommodation.¹⁴

Plaintiffs must first establish that they have a handicap. The FHAA defines handicap as “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such impairment.”¹⁵ The regulations define a “physical or mental impairment” as “[a]ny physiological disorder or condition, cosmetic disfigurement or anatomical loss” of a major body system or “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹⁶ The regulations note some conditions that qualify as a mental or psychological disorder, including visual, speech and hearing impairments, autism, epilepsy, cancer, heart disease, diabetes, emotional illness, drug addiction, and alcoholism.¹⁷ The term “major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeking, hearing, speaking, breathing, learning and working.¹⁸

Congress enacted this broad definition of handicap to protect people, “disabled or not, against the effects of discrimination based on an actual or perceived handicap.”¹⁹ Housing providers, however, have no responsibility to accommodate a person who is *regarded* as disabled because without an actual disability, a tenant cannot satisfy the nexus requirement (discussed below).

The Landlord or Owner Must Know or Have Reason to Know of Plaintiff’s Handicap

A plaintiff must also prove that a landlord knew of the handicap or should have reasonably been expected to have known of it. If a disabled tenant has an observable physical condition, such as requiring the use of a wheelchair, then the landlord will reasonably be expected to know of the disability. However, if the tenant has epilepsy, is deaf, has severe depression, or has any other FHAA disability with no overt physical manifestation, the tenant has an obligation to alert the landlord of her disability. When making the request, the tenant should explain what type of accommodation she is requesting and the relationship between the requested accommodation and

¹⁴ Janush v. Charities Housing Development Corp., 169 F. Supp. 2d 1133, 1135 (N.D. Cal., 2000).

¹⁵ 42 U.S.C. § 3602(h). This essay will use the term “handicap” and “disability” as equivalents.

¹⁶ 24 C.F.R. § 100.201 (2009).

¹⁷ *Id.* With regards to drug addictions, addictions caused by current, illegal use of a controlled substance do not qualify as a handicap. *Id.*

¹⁸ *Id.*

¹⁹ Katie Brewer, *Emotional Support Animals Excepted From “No Pets” Lease Provisions Under Federal Law*, ANIMAL LEGAL & HISTORICAL CENTER, 2005, <http://www.animallaw.info/articles/dduspetsandhousinglaws.htm>.

her disability.²⁰ The tenant can request the reasonable accommodation orally or in writing, and the request should be fairly specific and clear as to “what is being requested and whether the request was made.”²¹

When the disability is obvious, the tenant need not provide information other than that he is disabled and is requesting a reasonable accommodation.²² The landlord may not “ask about the nature or severity of such persons’ disabilities.”²³ However, a landlord may request certain information about a disability if “necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability.”²⁴ Furthermore, if the *need* for the requested accommodation is not apparent, the landlord “may request only information that is necessary to evaluate the disability-related need for the accommodation.”²⁵

If the disability is not obvious, then the landlord may ask for further information about the disability that a) is necessary to verify that the person meets the Act’s definition of disability, b) describes the needed accommodation, and c) shows the relationship between the person’s disability and the need for the requested accommodation.²⁶ A doctor’s note containing the information is generally adequate, though not necessary, and detailed medical records concerning the disability are not required. For a companion or emotional support animal, “documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability” is especially advantageous.²⁷

The Requested Accommodation Must Be Necessary and Reasonable

Plaintiffs must show that accommodation is both *reasonable and necessary* to afford them an equal opportunity to use and enjoy the dwelling.²⁸ This rule applies in the sale or rental of housing and applies to a buyer or renter because of handicap or any person associated with that buyer or renter.²⁹ “Examples in federal regulations and case law have made it clear that a reasonable accommodation may include a waiver of a no-pets rule to allow for a service

²⁰ Joint Statement of The Department of Housing and Urban Development and the Department of Justice: *Reasonable Accommodations Under the Fair Housing Act*, U.S. Department of Housing and Urban Development (last updated July 25, 2008), http://www.justice.gov/crt/housing/jointstatement_ra.php.

²¹ *Id.*

²² These reasonable accommodations can range from requesting a closer parking space, allowing a tenant to mail in her rent despite a hand-delivery requiring, or a waiver of a no-pets policy to allow a service animal to live with a disabled tenant.

²³ Joint Statement of The Department of Housing and Urban Development and the Department of Justice: *Reasonable Accommodations Under the Fair Housing Act*, U.S. Department of Housing and Urban Development (last updated July 25, 2008), http://www.justice.gov/crt/housing/jointstatement_ra.php.

²⁴ *Id.*

²⁵ *Id.* “Example 2: A rental applicant who uses a wheelchair advises a housing provider that he wishes to keep an assistance dog in his unit even though the provider has a ‘no pets’ policy. The applicant’s disability is readily apparent but the need for an assistance animal is not obvious to the provider. The housing provider may ask the applicant to provide information about the disability-related need for the dog.” *Id.*

²⁶ *Id.*

²⁷ Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, 73 Fed. Reg. 208,63835 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

²⁸ *Bronk v. Ineichen*, 54 F.3d 425, 426–27 (7th Cir. 1995).

²⁹ 42 U.S.C. § 3604(f)(1) (2000).

animal.”³⁰ Establishing that an animal is necessary is a predicate to the landlord’s duty to grant the requested reasonable accommodation. Necessity depends on the type of disability that a claimant has, whether it is a physical disability that requires a service animal or a psychological or mental disability that requires an emotional support animal. Oftentimes, emotional support animals will come under stricter scrutiny when a court is determining whether it is necessary to afford a person equal opportunity to use and enjoy a dwelling.

“Service Animals” as a Reasonable Accommodation for Physical Disabilities

The *Bronk* court framed the requirement of necessity as the degree to which a service animal aided the plaintiff in coping with her disability, along with the animal’s ability to actually aid in the person’s daily functions.³¹ Courts have refused to adopt a bright-line rule as to what is considered a reasonable accommodation, with one court stating it would be “per se unreasonable.”³² When the claimant’s disability is predominantly physical, courts will look for an identifiable relationship, or nexus, between the accommodation and the person’s disability (and whether the animal has been trained to perform the task, which will be addressed in later sections).

“Emotional Support” Animals as a Reasonable Accommodation for Mental Disabilities

Many disagreements arise because landlords, like other members of the general public (and some courts), erroneously believe that only ADA service animals trained to perform a specific task apply to fair housing claims.³³ When a claimant has a mental, psychological, or emotional disability, courts take a slightly different approach when determining the necessity of the animal. The courts require there be a relationship between the disability and the benefit the animal provides. The mere presence of an emotional support animal, no more, no less, provides therapeutic value to the tenant and does not require any training. The test is whether the reasonable accommodation affirmatively enhances a disabled plaintiff’s quality of life by ameliorating the effects of the disability.³⁴ For example, the court in *Riverbay*, relying on expert testimony, ruled that the tenant’s dog was necessary to ameliorate the effects of the tenant’s depression and allowed her to keep the dog.³⁵ In another case, a disabled tenant was able to keep his cat over the housing provider’s objections, as the cat relieved mental anxiety and depression caused by his fibromyalgia.³⁶

³⁰ Huss, *supra* note 3, at 74 (citing 24 C.F.R. § 100.204(b) (2003)).

³¹ *Bronk*, at 431.

³² *Janush*, at 1136.

³³ *Majors v. The Housing Authority of the County of Dekalb Georgia*, 652 F.2d 454 (5th Cir. 1981) (holding that a woman with “psychological problems” was entitled to keep a “companion animal,” despite the housing authorities no-pets policy).

³⁴ *Bronk*, at 429 (7th Cir. 1995) (holding that waiving of a no-pets policy is a reasonable accommodation for a person with a hearing disability who requires a hearing dog).

³⁵ *HUD v. Riverbay*, No. HUD ALJ 02-93-0320-1 (Sept. 8, 1994).

³⁶ *HUD v. Dutra*, No. HUD ALJ 09-93-1753-8 (Nov. 12, 1996).

Nexus between the Service or Companion Animal and Disability

Determining the sufficiency of the nexus between the animal and the tenant's disability is a highly fact-specific inquiry, requiring case-by-case determination."³⁷ An extreme example is *Nason v. Stone Hill Realty Ass'n.*, which involved a tenant with disabling physical limitations from multiple sclerosis.³⁸ Nason acquired her mother's cat, and after the tenant's mother's death, the housing authority asked Nason to remove the cat. She provided an affidavit from her neurologist that "indicate[d] that removal of the cat would result in 'increased symptoms of depression, weakness, spasticity and fatigue.'"³⁹ The court stated that she failed to show "a substantial likelihood that maintaining possession of the cat [was] necessary due to her handicap."⁴⁰ The court added that her request for accommodation must be "both reasonable and necessary" and that "Nason needed to provide evidence which would show a clear nexus between MS and the need to maintain the cat."⁴¹

Important to the decision was the doctor's affidavit, which the judge stated did not demonstrate that her symptoms of depression, weakness, spasticity, and fatigue were treatable *solely* by maintaining the cat or whether another more reasonable accommodation is available to address her symptoms."⁴² This far more demanding standard hasn't been followed by any other jurisdiction.

In contrast, the court in *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Commission* found discriminatory an association's policy that permitted cats, but not dogs or other animals in the complex. The association claimed that the presence of a cat could serve the plaintiff's purposes just as well as a dog and would not run afoul of its policy. The court rejected that argument. Even though a different type of animal or another accommodation might assist the owner or tenant's disability, it is not a prerequisite that the tenant prove that her requested accommodation is the *sole* reasonable accommodation that addresses her symptoms.⁴³

Must a Service Animal or Emotional Support Animal Be Specially Trained?

There is no specific requirement as to the amount or type of training a service animal must undergo or the amount or type of work a service animal must provide for a disabled person.⁴⁴ Emotional support animals, by their very nature, and without training, may relieve depression and anxiety and/or help reduce stress-induced pain in person with certain medical conditions affected by stress.⁴⁵ HUD has supported its position and obtained favorable rulings in

³⁷ Brewer, *supra* note 23 (quoting *United States v. California Mobile Home Park*, 107 F.3d 1374, 1380 (9th Cir. 1997)).

³⁸ *Nason v. Stone Hill Realty Association*, 1996 WL 1186942 (Mass. Super. Ct. 1996).

³⁹ *Id.* at *3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Commission*, 121 Cal.App.4th 1578 (Cal.App. 3d Dist. 2004)

⁴⁴ Huss, *supra* note 3, at 75.

⁴⁵ *Pet Ownership for the Elderly and Persons With Disabilities; Final Rule*, 73 Fed. Reg. 208,63836 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

administrative and court proceedings allowing tenants to keep emotional support animals and service animals, despite an animal's apparent lack of formal training.⁴⁶

Bronk v. Ineichen is a pivotal case that involved a deaf tenant whose landlord refused to waive the no-pets policy for her hearing dog.⁴⁷ The landlord did not dispute the disability or the need for a service dog. Instead, it claimed that an animal without credentials or formal schooling did not qualify as a service animal. The court rejected that premise and set out two standards that a disabled person must meet in arguing that an accommodation must be made.⁴⁸ “The accommodation must facilitate a disabled individual’s ability to function, and it must survive a cost-benefit balancing that takes both parties’ needs into account.”⁴⁹ A jury or other fact-finder is meant to evaluate and assign its own weight to the animal’s training or lack of training.⁵⁰ Relying on *Bronk*, the court in *Green v. Housing Authority of Clackamas County* also struck down a requirement that a hearing dog that had been trained produce a formal certificate or verification of training.⁵¹

Two cases suggest that a landlord may require some degree of proof of training. In *In re Kenna Homes Cooperative Corp.*, the court held that the housing association’s requirement that the

⁴⁶ Professor Huss provides several administrative decisions which support this:

See, e.g., HUD v. Raczkowski, HUDALJ 02-99-0830-8 (May 23, 2002), 2002 WL 1264012, at *2 (2002) (providing in a settlement where a payment was made to a tenant who argued that he suffered from a psychiatric disability and that the dog was of “great emotional and social support” for him); *HUD v. Bayberry Condo Ass’n.*, HUDALJ 02-00-0504-8 (Mar. 21, 2002), 2002 WL 475240, at *1–2 (2002) (providing in an initial decision and consent order that a resident of a condominium suffering from depression, generalized anxiety and panic disorder be granted a waiver of a no-pet policy as a reasonable accommodation of her handicap with such animal being referred to as an “emotional support pet”); *HUD v. Meridian Group, Inc.*, HUDALJ 05-98-1418-8 (July 18, 2001), 2001 WL 865717 (2001) (providing in a consent order that a tenant who stated she was handicapped because of manic depression would be given permission to have a cat in her unit); *HUD v. Glenwood Mgmt. Corp.*, HUDALJ No. 02-99-0442-8 (Apr. 14, 2000), 2000 WL 394074, at *2 (providing in an initial decision and consent order that a tenant suffering from anxiety would be able retain her dog or a replacement dog of a similar size upon proof of the alleged handicap in the form of a reasonably descriptive letter from tenant’s physician, psychologist or social worker); *HUD v. North Waterside Redevelopment Co. L.P.*, HUDALJ No. 02-98-0179-8 (Jan. 14, 2000), 2000 WL 46116 at *3 (2000) (providing in an initial decision and consent order that a prospective tenant suffering from anxiety, depression, renal cancer, pulmonary disease and angina pectoris who obtained a pet dog on the advice of his physician to abate symptoms of anxiety and depression will be offered an apartment in a building with a no-pet rule upon receipt of a reasonably descriptive letter from the prospective tenant’s physician). *But see HUD v. Blue Meadows Ltd. P’ship*, HUDALJ 10-99-0200-8, 10-99-0391-8 (July 5, 2000), 2000 WL 898733, at *9–11 (2000) (finding for a landlord who had requested verification that a dog was trained or certified in a case where the dog was used by a prospective tenant to pull his wheelchair).

Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, forthcoming 37 Pepp. L. Rev. ___, n.217 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475443.

⁴⁷ *Bronk*, at 427.

⁴⁸ Huss, *supra* note 3, at 75.

⁴⁹ *Bronk*, at 430.

⁵⁰ *Id.*

⁵¹ *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Oregon 1998).

animal be “properly trained,” without explicitly requiring “professional training,” was not a violation of the federal law.⁵² The cooperative unit’s policy read:

There is excepted, however, seeing-eye and hearing-aid dogs or any other trained dog, provided the animal is *properly trained* and *certified* for the particular disability, *licensed* and provided further that the stockholder or resident has a certificate or authorization request from a licensed physician specializing in the field of subject disability.⁵³

The Jessups, the owners of the apartment, provided a note from their “physician stating that ‘it is a medical necessity for the Jessups with their present health ailments to be able to keep their pets to suppress both the physical and mental need for companionship as well as the confinement to the various illnesses.’”⁵⁴ Despite the Jessups’ health problems (arthritis, depression, and blood pressure difficulties), the housing association refused to waive their no-pets policy.⁵⁵ The court upheld the training requirement and noted the Fair Housing Act does not require accommodations that increase the benefit to a disabled individual above and beyond that provided to non-disabled individuals for matters unrelated to the disability.⁵⁶ “The burden is on the person claiming the need for a service animal as a reasonable accommodation to show that his or her animal is properly trained”⁵⁷ and that it was reasonable, in situations where a tenant suffers from a disability that is not apparent to a person untrained in medical matters, to require a second concurring opinion from a qualified physician selected by the landlord to substantiate the tenant’s need for a service animal.⁵⁸

Prindable v. Association of Apartment Owners of 2987 Kalakaua also upheld a requirement that an animal “be peculiarly suited to ameliorate the unique problems of the mentally disabled.”⁵⁹ The case involved a condominium resident who said he required a dog in order to feel safe. He provided a physician’s statement saying “He believes that his personal safety will be improved if he were to have a dog.”⁶⁰ The court ruled in favor of the association, stating that “where the primary handicap was mental and emotional in nature, an ‘animal . . . must be peculiarly suited to ameliorate the unique problems of the mentally disabled.’”⁶¹ “The court reasoned that most animals are not capable of qualifying as a ‘service’ animal under the FHAA.”⁶² Finding no evidence of training, the court agreed with the *Kenna* court’s logic, finding that landlords could require additional verification of a tenant’s “asserted handicap or the necessity of a requested accommodation.”⁶³

⁵² *In re Kenna Homes Coop. Corp.*, 557 S.E.2d 787 (W. Va. 2001).

⁵³ *Id.* at 792 (emphasis added).

⁵⁴ Brewer, *supra* note 23 (quoting *Kenna*, at 792).

⁵⁵ *Kenna*, at 792.

⁵⁶ Frank W. Young, *Service and Emotional Support Animals as Reasonable Accommodations Under the Fair Housing Act*, The John Marshall Law School Fair & Affordable Housing Commentary, at 25 (2006).

⁵⁷ *Kenna*, at 798.

⁵⁸ Huss, *supra* note 3, at 78 (quoting *Kenna*, at 799).

⁵⁹ *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256 (D. Hawaii, 2003).

⁶⁰ Brewer, *supra* note 23 (quoting *Prindible*, at 1246).

⁶¹ Huss, *supra* note 3, at 79 (quoting 1256).

⁶² Brewer, *supra* note 23.

⁶³ Huss, *supra* note 3, at 79 (citing *Prindable*, at 1260).

What is troubling about the *Kenna* and especially the *Prindable* cases is the express importation of the ADA definition of service animal into a claim based exclusively on the FHAA. As the court in *Prindable* states:

The term “service animal” is not defined by the FHAA or the accompanying regulations, but it is understood for purposes of the Americans with Disabilities Act of 1990 (“ADA”) to include “any guide dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability” 28 C.F.R. § 36.104 (2002). This description comports with the example of a reasonable accommodation for a blind rental applicant provided by the agency regulations to the FHAA, *see* 24 C.F.R. § 100.204(b) (2002), and with case law. The Court agrees with and adopts the ADA definition for purposes of the reasonable accommodation requirement of § 3604(f)(3)(B).⁶⁴

As noted previously,⁶⁵ this contradicts HUD’s position and its unequivocal response to rulemaking by the Justice Department pursuant to ADA Titles II and III that animals and pets are treated differently under the ADA and the Fair Housing Act for important reasons.⁶⁶

Exceptions and Defenses to Reasonable Accommodation Requirement

Housing providers must only make *reasonable* accommodations, and the requested policy modification cannot impose undue financial and administrative burdens or fundamentally alter the nature of the housing program.⁶⁷ The *Green* court nicely sums up the bulk of the exceptions available to a landlord, stating, “The only way defendant can avoid modifying its ‘no pets’ policy is if the animal fundamentally alters the nature of the program or if the defendant suffers undue financial and administrative burdens.”⁶⁸ This determination must be done on a case-by-case basis and take into account:

The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester of the requested accommodation, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident’s disability-related needs must be considered in determining whether a requested accommodation poses an undue financial and administrative burden.⁶⁹

⁶⁴ *Prindable*, at 1256.

⁶⁵ *See supra* note 13 and accompanying text.

⁶⁶ Pet Ownership for the Elderly and Persons With Disabilities; Final Rule, 73 Fed. Reg. 208,63836 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

⁶⁷ 24 C.F.R. § 100.204 (2009).

⁶⁸ *Green*, at 1256.

⁶⁹ Joint Statement of The Department of Housing and Urban Development and the Department of Justice: *Reasonable Accommodations Under the Fair Housing Act*, U.S. Department of Housing and Urban Development (last updated July 25, 2008), http://www.justice.gov/crt/housing/jointstatement_ra.php.

Fundamental alteration defenses are rare because no-pets policies are not a fundamental part of most housing programs, a waiver does not impose costs on the landlord, and any administrative burdens imposed in having to keep a record of the animal are minimal.⁷⁰

Another exception to allowing landlords to refuse modifying a no-pets policy is when the animal poses a direct threat to the health or safety of others.⁷¹ Speculation of a safety threat will not suffice.⁷² Landlords may not consider subjective or objective generalizations or stereotypes of that species or breed of animal.⁷³ Rather, they must make a detailed, individualized investigation of the animal and determine whether reliable, objective qualities or past incidents of that animal suggest it poses a direct threat to the health, safety, or property of others.

Finally, if a tenant refuses to comply with general, legitimate tenancy rules and restrictions that apply to everyone, the landlord may evict him despite his disability. In *Woodside Village v. Hertzmark*, a landlord had waived the no-pets policy for a tenant who had a mental disability and emotional dependence on his dog. The tenant later failed to comply with rules requiring that dogs be walked in certain areas and that the owner clean up the dog's waste.⁷⁴ Due to the tenant's failure to comply with reasonable and legitimate rules that were generally applicable to all tenants, the landlord was able to remove the tenant from the premises.

Do Residential Fees and Deposits Apply to Service Animals and Emotional Support Animals?

Landlords are allowed to impose many types of residential fees and deposits, including deposits to protect and indemnify them against damage caused by pets. Handicapped and non-handicapped pet owners are subject to these fees; however, owners of animals that assist, support, or provide service to persons with disabilities are treated differently. For example, tenants with disabilities in public housing⁷⁵ and federally-assisted housing for the elderly and disabled⁷⁶ are expressly exempt from pet deposits and fees.

⁷⁰ Brewer, *supra* note 23.

⁷¹ 42 U.S.C. § 3604(f)(9) (2000).

⁷² Brewer, *supra* note 23.

⁷³ See *supra* note 13 and accompanying text (discussing breeds of animals and pets).

⁷⁴ *Woodside Vill. v. Hertzmark*, 1993 WL 268293 (Conn. Super. Ct. 1993).

⁷⁵ 24 C.F.R. § 960.705 (2009).

Subpart G—Pet Ownership in Public Housing; Animals that assist, support, or provide service to persons with disabilities.

(a) This subpart G does not apply to animals that assist, support or provide service to persons with disabilities. PHAs may not apply or enforce any policies established under this subpart against animals that are necessary as a reasonable accommodation to assist, support or provide service to persons with disabilities. This exclusion applies to such animals that reside in public housing, as that term is used in § 960.703, and such animals that visit these developments.

Id.

⁷⁶ 24 C.F.R. § 5.303 (2009).

Subpart C—Pet Ownership for the Elderly or Persons with Disabilities; Exclusion for animals that assist, support, or provide service to persons with disabilities.

(a) This subpart C does not apply to animals that are used to assist, support, or provide service to persons with disabilities. Project owners and PHAs may not apply or enforce any policies established under this subpart against animals that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities. This exclusion applies to animals

Even though regulations for private housing providers do not contain similar exemptions, HUD and the DOJ state unequivocally that requiring tenants to pay an extra fee or deposit as a condition of allowing their assistance animal as a reasonable accommodation constitutes unlawful discrimination.⁷⁷ However, all housing providers may charge the disabled tenant for the cost of repairing damage caused by the assistance animal or deduct it from the standard security deposit imposed on all tenants, if that is the provider's practice.⁷⁸

HUD has asserted this position in administrative and court proceedings, including consent orders and charges of discrimination involving landlords who attempt to assess pet fees or deposits for assistance animals. Some of the fact finders characterize assistance animals as auxiliary aids and services.⁷⁹ Moreover, the agency's website includes a question and answer about a man named John with severe depression whose dog helps alleviate symptoms of the illness. The agency responds that the landlord cannot charge John a \$250 pet deposit because the dog it is not a pet, but rather, a service/companion animal required for disability.⁸⁰

that reside in projects for the elderly or persons with disabilities, as well as to animals that visit these projects.

Id.

⁷⁷ Joint Statement of The Department of Housing and Urban Development and the Department of Justice: *Reasonable Accommodations Under the Fair Housing Act*, U.S. Department of Housing and Urban Development (last updated July 25, 2008), http://www.justice.gov/crt/housing/jointstatement_ra.php.

⁷⁸ Joint Statement of The Department of Housing and Urban Development and the Department of Justice: *Reasonable Accommodations Under the Fair Housing Act*, U.S. Department of Housing and Urban Development (last updated July 25, 2008), http://www.justice.gov/crt/housing/jointstatement_ra.php.

11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation? No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.

.....

Example 2: Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation. The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal. However, if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

Id.

⁷⁹ See, e.g., HUD v. Purkett, HUDALJ 09-89-1495-1 (July 31, 1990), 1990 WL 547183 (1990); HUD v. Guenther, HUDALJ 08-00-0390-8 (Mar. 9, 2003), 2003 WL 1311333 (2003); HUD v. Southmore Park Apartments, Ltd., FHEO No. 06-04-1178-8 (December 31, 2005), HUD v. Reading Hous. Auth., FHEO No. 03-04-0346-8 (August 17, 2005).

⁸⁰ U.S. Department of Housing and Urban Development, Questions and Answers about Fair Housing, <http://nhl.gov/local/shared/working/r10/fh/questions.cfm?state=ak> (last updated April 1, 2010).

Situation 1

John has been diagnosed with severe depression and is disabled as defined by the Fair Housing Act. His doctor prescribes John a dog to help alleviate some of his symptoms. John asks his landlord if he can have a dog as a reasonable accommodation for his disability. His landlord says yes, but tells John he'll need to pay a \$250 pet deposit and must provide proof that the animal is trained.

Question: Did John's landlord correctly handle John's request under the Fair Housing Act? What if John wanted a cat or a ferret instead?

While there is a dearth of case law on this point, one appellate court has examined the financial implications of reasonable accommodations arising from a landlord's refusal to waive guest and parking fees charged for a disabled household member's home health care aide.⁸¹ The decision noted that "the history of the FHAA clearly establishes Congress anticipated that landlords would have to shoulder certain costs involved, so long as they are not unduly burdensome."⁸² The three-judge panel held that such charges must be examined, case-by-case, to determine if a waiver of the charge, in whole or in part, is necessary to afford the person an equal opportunity to use and enjoy a dwelling or whether it would impose an undue burden on the landlord.⁸³

One commentator warns housing providers to be careful when considering whether to impose fees, deposits or other charges for assistance animals. "In the absence of case law or a regulation specifically addressing this issue, and given HUD's position charging discrimination when such fees are imposed, landlords should be extremely cautious in requiring these types of fees."⁸⁴

The Americans with Disabilities Act (Jill D. Sechser)

The Americans with Disabilities Act (ADA) was enacted in 1990 to provide a clear and comprehensive national mandate for the elimination of disability-based discrimination.⁸⁵ The law was intended to ensure that the federal government played a central role in enforcing standards that provide equal access to the workplace, marketplace, and government and public services. In this respect, the ADA provides greater coverage than its predecessor, the Rehabilitation Act of 1973, which applies only to recipients of federal funds, contractors, and specific federal agencies.⁸⁶

Congress understood that discrimination manifests in many forms, ranging from intentional, outright denial of access or service, to more subtle behaviors that result from a lack of awareness. One of its findings emphasizes that:

[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,

Answer: No, John's landlord did not handle his request correctly. The landlord cannot charge John a pet deposit for his animal because it is not a pet, but rather a service/companion animal required for disability. Further, the landlord cannot ask for proof that the animal is trained. Lastly, service/companion animals do not have to be just dogs; they can also be other animals, such as cats or ferrets.

Id.

⁸¹ U.S. v. California Mobile Home Park Mgmt. Co., 29 F.3d 1413 (9th Cir. 1994).

⁸² *Id.* at 1416.

⁸³ *Id.* at 1418.

⁸⁴ Huss, *supra* note 3, at 88, n.158.

⁸⁵ 42 U.S.C. § 12101(b) (1990).

⁸⁶ 29 U.S.C. § 794(a) (1990).

exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.⁸⁷

A growing population of children and adults with disabilities confront many of these barriers on a daily basis, particularly individuals with physical, cognitive, sensory, and mental impairments who use and benefit from animals that perform a variety of tasks for them. In many cases, they are unable to perform everyday tasks without such assistance. Moreover, this segment of the population relies on animals -- guide dogs, hearing dogs, service animals, alert dogs, seizure animals, etc. -- to accompany them outside of their homes when shopping, dining, socializing, seeking medical care or legal help, attending movies, working, or riding in buses or taxis.

People generally do not have the freedom to bring their pets with them when they go out into the public, except perhaps to walk them. Many landlords, condominium associations, and other housing providers also strictly enforce no-pets rules. Likewise, business establishments, schools, government offices, and other covered entities are free to exclude pets; many do so because of concerns about health, safety, cleanliness, sanitation, and noise. This accepted practice generates conflicts and sometimes confrontations.

Take the commonplace example of a patron who, with or without a visible disability, enters the children's section of a public library accompanied by a dog, when the library has a no-pets policy. Library staff and patrons are uncertain what to do and what the law allows. They are not alone. The U.S. Justice Department, which has been entrusted with promulgating regulations to implement ADA Title II and Title III, has received many complaints from covered entities that are confused about their obligations. That agency has devoted extensive time and rulemaking to help clarify the difference between pets and ADA "service animals."⁸⁸

What is an ADA Service Animal?

Looking to the law itself will not provide much help because the ADA does not provide a definition of "service animal" anywhere in the statute. Justice Department regulations in 28 C.F.R. § 36.104 do fill that gap, but otherwise provide little formal guidance; that definition reads:

"Service animal means any guide dog, signal dog, or other animal 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."

The DOJ publishes an informal business brief, a guide for small business, and technical assistance manuals that address service animals. These and other materials about ADA Title II and III are online at <http://www.ada.gov/business.htm#Anchor-ADA-11481>. In 2009, the Justice

⁸⁷ ADA Amendments Act: Findings and Purposes §2(a)(5).

⁸⁸ Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 117,34465, 117,34473, (June 17, 2008) (to be codified at 28 C.F.R pt. 35).

Department entered into a settlement agreement with Wal-Mart Stores, Inc. that defines service animals, clarifies management and worker responsibilities, and includes a store policy that Wal-Mart must implement. While not precedential, it does provide a plain language description of the issues and what terms one of the largest global retail companies and the U.S. Attorney found acceptable.⁸⁹

This section examines the rights and responsibilities both of individuals with disabilities and “covered entities” (state and local government and public accommodations) with regard to service animals. The ADA is basically a non-discrimination law that is divided into five titles, each of which governs a particular entity or activity: Title I applies to employment; Title II to state and local public services and transportation; Title III to privately-owned public accommodations and commercial facilities; Title IV to telecommunications; and Title V to miscellaneous issues, including how the ADA applies to the States and Congress, coercion, retaliation, and technical assistance.⁹⁰

What Constitutes Discrimination Against Service Animal Handlers under Titles II & III?

Government entities and privately-owned public accommodations are the exclusive focus of this paper. Title II targets and forbids discrimination in public services, programs, and activities. Title III is directed toward acts that impede or prevent persons with disabilities from fully enjoying the goods, services, facilities, advantages, and accommodations of public accommodations. These public and private sector entities have different obligations under the law. Except as otherwise noted, their responsibility to accommodate persons with disabilities who require service animals is basically the same.⁹¹

Under Title III, discrimination also includes a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. This subsection creates an affirmative obligation to treat persons with disabilities differently and more favorably than other patrons.

Courts utilize a now-familiar paradigm to analyze Title III reasonable accommodations service animal cases. A 1997 decision illustrates how judges evaluate ADA discrimination claims in a case involving a brewery that refused to permit Franklin Johnson, a blind person, from taking a

⁸⁹ To read the Settlement Agreement between the U.S. and Wal-Mart Stores, Inc., see <http://www.ada.gov/walmart.htm>.

⁹⁰ 42 U.S.C. §§ 12101 et seq. (2009).

⁹¹ “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (2009). Title III’s basic non-discrimination clause reads:

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

28 C.F.R. § 36.201 (2009).

public tour with his guide dog. Although the company would have allowed him to take the tour with a human guide, it refused to budge from its blanket no-animals policy, claiming that allowing guide dogs would either require it to violate food and drug laws or to shut down beer production while a dog was present to avoid risk of exposure or contamination.⁹²

The trial judge determined that the animal policy, which included service animals, was not compelled by any law and violated the ADA. The court ordered the brewery "to modify or establish policies, practices, or procedures to ensure that disabled persons with guide dogs or other service animals have the broadest feasible access to the public tour of the Spoetzl Brewery consistent with the brewery's safe operation," to seek guidance from the Justice Department, and to submit to the court a written policy carrying out its order.⁹³ The company appealed the order, which the court characterized as being very similar to a desegregation order.⁹⁴

The appellate court decision recounted the duties imposed on public accommodations and the standards and burdens of proof required to assert or defend a Title III claim. It also reviewed how the trial judge evaluated testimony and evidence regarding the risk of contamination from guide dogs and humans during the brewing process and tour. The opinion also addressed whether allowing guide dogs would fundamentally alter the nature of the tour itself, leaving room for the brewery to develop that defense in the future.⁹⁵ The court rejected the argument that food and drug laws prevented the brewery from allowing guide dogs or animals anywhere within the brewery. It affirmed the company's duty to submit a plan for the court's approval that provides "the broadest feasible access consistent with the safe operation" of the brewery, which is consistent with DOJ regulations, and upheld an award of damages to Johnson based on Texas law.⁹⁶

The regulations reflect the general intent of Congress that public accommodations take the necessary steps to accommodate service animals and to ensure that individuals with disabilities are not separated from their service animals. "It is intended that the broadest feasible access be provided to service animals in all places of public accommodation, including movie theaters, restaurants, hotels, retail stores, hospitals, and nursing homes (*see* Education and Labor report at 106; Judiciary report at 59)."⁹⁷ The responsibility for compliance falls on the owner, operator, or

⁹² *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.3d 1052 (5th Cir. 1997)

⁹³ *Id.* at 1056.

⁹⁴ *Id.* at 1057.

⁹⁵ *Id.* at 1062.

All parties agree that in the entire history of the brewery, there have only been three known visits by guide dogs and only one known request to take a guide dog on a tour. By contrast, over 5800 tourists visit the brewery annually. The district court found that guide dogs are groomed daily and likely to shed less hair than dogs that are not groomed daily. By contrast, the tourists are not required to wear any hair or beard covering, even though tourists often put their faces directly into the opening of the brewkettle. Based on these findings, the district court concluded that [t]he marginal increase in contamination risk associated with over 5,000 annual human visitors to the Spoetzl Brewery is greater than the marginal increase in contamination risk associated with the maximum foreseeable number of annual guide dogs visits by at least an order of magnitude. More likely than not, these risks differ by several orders of magnitude.

Id.

⁹⁶ *Id.* at 1065.

⁹⁷ 28 C.F.R. Part 36 App. B (1991).

lessee of a place of public accommodation provided the change in practice or policy is necessary to provide equal enjoyment and benefit of its goods and service by an individual with a disability.⁹⁸

A common example is when an individual enters a restaurant accompanied by a dog. Restaurant owners normally prohibit animals in their restaurants to eliminate diners' concerns that the animal would bark, defecate, destroy the ambience, bite or threaten other customers, or carry fleas or diseases. However, the owner must waive the no-pet rule and allow the dog in the restaurant, provided the individual is entitled to protection under the ADA. For the plaintiff diner to succeed in a discrimination claim against the defendant restaurant, she must prove that:

- (1) She is disabled as defined under the ADA;
- (2) The defendant owns, leases, or leases to a place of public accommodation;
- (3) The defendant took adverse action; [denied entry to the service animal or diner based on the diner's disability] and
- (4) The defendant failed to make reasonable modifications that would accommodate the [diner's] disability but not fundamentally alter the nature of the [restaurant's] services.⁹⁹

*Prima Facie Case of Discrimination:
ADA Disability*

This determination is a fact-specific analysis and requires an individualized, sequential, case-by-case analysis. First, the individual must prove he has an ADA disability, which can be established in three ways: disability in fact, perceived disability, or having a history of a disability. Disability is defined as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”¹⁰⁰ Major life activities include, but are not limited to “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹⁰¹

Before 2009, proving ADA disability was nearly impossible to do. A series of Supreme Court cases had established a new and demanding standard. Many individuals with conditions and impairments that lawmakers and advocates assumed would be covered by the law were not protected. Congress responded with the Americans with Disabilities Act Amendments Act of 2008, effective January 1, 2009, that explicitly rejected the restrictive case law and interpretations of ADA disability. It also shifted the focus from establishing disability to considering whether reasonable accommodations are being made for persons with disabilities. The “primary object of attention is whether covered entities have complied with their obligations, and the question of whether an individual's impairment is a disability should not

⁹⁸ 42 U.S.C. § 12182(b)(1)(A)(ii) (2009).

⁹⁹ *Rose v. Springfield-Greene County Health Dep't*, No. 608CV03292, 2009 WL 3461296 at *7 (W.D. Mo. 2009).

¹⁰⁰ 42 U.S.C. § 12102(1) (2009).

¹⁰¹ *Id.*

demand extensive analysis.”¹⁰² Equally important, Congress instructed that the ADA shall be construed “in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”¹⁰³ The Act also amended the Rehabilitation Act’s provisions.

Place of Public Accommodation

Second, the defendant must own, operate, lease, or lease to a place of public accommodation, which is a facility operated by a private entity whose operations affect commerce and fall within at least one of twelve categories. This is most times a straightforward determination.

Discrimination: Exclusion or Denial of Services

Third, the defendant must have taken adverse action against the plaintiff based on his or her disability. This can occur when the restaurant denies entry to a service animal and its handler. Discrimination can also include denying entry to person with or without a disability who is a guest of the diner, based on the person’s association with the diner. Under Title III a public accommodation cannot lawfully exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Failure to Make Reasonable and Necessary Modifications for a Service Animal Handler

Finally, the defendant must have failed to make a reasonable modification to accommodate the plaintiff. In the case of service animals, the Department of Justice requires a public accommodation to modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. The regulations address service animals in the context of when covered entities must modify or waive no-pets rules or similar policies or practices. The general rule is that modification is required when necessary to afford the disabled person access to the goods and services unless doing so would fundamentally alter the nature of the goods, services, etc.¹⁰⁴ Moreover, the service animal owner, not the business or agency, must supervise and care for the animal.¹⁰⁵ Similar rules apply to government entities in 28 C.F.R. § 35.130(b)(7).

In order for a public accommodation or government entity to accurately determine whether an animal is a service animal, its employees are allowed to ask the animal’s owner about its training.¹⁰⁶ If the owner refuses to answer, the employees may deny access to the animal and are not responsible for making a reasonable modification.¹⁰⁷ There are no specific requirements as

¹⁰² ADA Amendments Act: Findings and Purposes §2(b)(5). ADA Amendments Act of 2008, PUBLIC LAW 110–325 (Sept. 25, 2008), *available at* <http://www.access-board.gov/about/laws/ada-amendments.htm>; <http://www.law.georgetown.edu/archiveada/documents/ADAAACR9.17.08.pdf>.

¹⁰³ *Id.*

¹⁰⁴ 28 C.F.R. § 36.302(a) (2009).

¹⁰⁵ 28 C.F.R. § 36.302(c)(2) (2009).

¹⁰⁶ *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 465–66 (Del. 2005).

¹⁰⁷ *Id.*

to the amount or type of training the animal must undergo.¹⁰⁸ Documented evidence of training is not required.¹⁰⁹ A public accommodation is not required to watch over or care for a service animal on its premises.¹¹⁰ Even if they deny access to the animal, they must still allow access by the individual to their goods, services and facilities (or governmental programs, services and activities as the case may be).

To determine whether an animal is a service animal rather than a pet requires an individualized assessment of the particular animal and the individual purporting to have a disability. The key factor is whether the animal is trained to perform a task or function for the individual with a disability.¹¹¹ Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are *not* service animals. In the proposed regulations, the Justice Department distinguishes support animals from psychiatric service animals that are trained by the handler to take medicine, provide safety checks or room searches, turn on lights for persons with Post Traumatic Stress Disorder; interrupt self-mutilation by persons with dissociative identity disorders; and keep disoriented individuals from danger.

A 2009 federal court decision illustrates how courts analyze a service animal claim, the level of training required of service animals, and the interplay between the ADA, the Rehabilitation Act, state public health law, and direct threat defenses. In this case brought under Title II, Plaintiff Kristy Pruett filed suit to force Arizona to modify or waive public health laws and regulations that did not allow individuals to possess chimpanzees as pets or service animals.¹¹² Pruett had diabetes that required her to take oral medications every morning, self-administer insulin injections five to seven times per day and monitor her glucose levels as often as ten times daily. Despite these measures, her condition made her unaware when her glucose level was dropping and prevented her from knowing that she would soon become lightheaded, dizzy and sometimes fall into unconsciousness.

For nearly ten years, she had a Tonkean ape weighing forty-two to forty-eight pounds living in her home. She trained the ape to retrieve sugar and press a medical alert button on the telephone to summon help without her commands.¹¹³ Although the ape did not leave the grounds, Pruett considered the ape a service animal because it was individually trained to perform tasks linked to her disability. Under state law, it is legal to import and own a non-infant Tonkean ape after receiving a health certification, provided the animal is confined to the owner's property.

¹⁰⁸ *Rose v. Springfield-Greene County Health Dep't*, No. 608CV03292, 2009 WL 3461296 at *6 (W.D. Mo. 2009) (“There are no requirements as to the amount or type of training that a service animal must undergo, nor the type of work or assistance that a service animal must provide, but the animal be trained to perform tasks or do work for the benefit of a disabled individual.”).

¹⁰⁹ *Vaughn v. Rent-A-Center, Inc.*, No. 2:06CV01027, 2009 WL 723166 at *10 (S.D. Ohio 2009).

¹¹⁰ 28 C.F.R. § 36.302 (2009).

¹¹¹ *Vaughn v. Rent-A-Center, Inc.*, No. 2:06CV01027, 2009 WL 723166 at *10 (S.D. Ohio 2009) (“[T]here is no requirement regarding the type or amount of work a service animal must provide for the disabled person. Instead, the relevant question is whether the animal helps the disabled person perform tasks to ameliorate the ADA disability.”).

¹¹² *Pruett v. Arizona*, 606 F. Supp. 2d 1065 (D. Ariz. 2009).

¹¹³ *Id.* at 1068–69, 1078.

After the ape died, she flew to Texas to purchase a two-year old chimpanzee for \$25,000 even though she was aware that private possession of chimpanzee was forbidden under state law.¹¹⁴ When state officials denied her request for a license, Pruett filed suit to enjoin the state from taking the chimp because it was an ADA service animal, and to modify its public health law to accommodate her disability. The court compared both animals. Unlike the ape, the young chimpanzee was not able to detect when Pruett's blood glucose level dropped too low, provide her with sugar or summon help without command when Pruett passed out.¹¹⁵ The animal did sit with her, retrieve candy or sugared beverages on command, turn lights on for her, and pick up remote controls and telephones. However, Pruett herself was not able to care for the chimp on her own, feed the animal, or change its diaper (her ex-husband did so).

The court ruled that the chimpanzee was not yet individually trained to do work or perform tasks specifically related to Pruett's disability.¹¹⁶ Furthermore, modifying state law to permit the chimp to live with her was not necessary because the chimp could not respond to diabetes-related emergencies. Moreover, the request was not reasonable because state officials had determined that chimpanzees represent an actual threat to health and safety because of their size and unpredictable and potentially aggressive behavior. State officials had not evaluated Pruett's animal specifically; however, she conceded that she may not be able to control the chimp, which doomed any argument that changing state law was reasonable in her circumstances.¹¹⁷

An animal that merely provides comfort for an individual with a disability, without performing a task or function for the individual, is not a service animal.¹¹⁸ In another case, a plaintiff who suffered from anxiety disorder and agoraphobia claimed her Bonnet Macaque monkey was a service animal.¹¹⁹ She alleged the monkey alleviated her anxiety disorder and allowed her to go out in public more often.¹²⁰ Specifically, the monkey was trained to block people from getting too close to her in public, sit on her lap to relieve emotional overload, alert strangers to stay away, and hug her to relieve anxiety. The court held the evidence insufficient to establish the monkey as a service animal because the majority of tasks the monkey performed involved nothing more than providing comfort.¹²¹

In 2008, the DOJ proposed limiting service animals to domestic animals and excluding emotional support or companion animals whose sole function is to provide comfort, therapy, companionship, or therapeutic benefits. If that position is codified, persons with disabilities could no longer be accompanied by nonhuman primates born in captivity, reptiles, rabbits, farm animals (including any breed of horse, pony, miniature horse, pig, and goat), ferrets, amphibians, or rodents. The Department noted that its proposal under the ADA is not intended to affect the

¹¹⁴ *Id.* at 1069.

¹¹⁵ *Id.* at 1071.

¹¹⁶ *Id.* at 1078.

¹¹⁷ *Id.*

¹¹⁸ *Rose v. Springfield-Greene County Health Department*, No. 608CV03292, 2009 WL 3461296 at *6 (W.D. Mo. 2009).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

rights of people with disabilities who use service animals, emotional support and assistance animals in their homes under the Fair Housing Act.¹²²

Exceptions and Defenses to Reasonable and Necessary Accommodations

The obligation of public accommodations and state and local governments to make reasonable and necessary modifications for an individual with a service animal is not absolute. A public accommodation does not have to honor requests for modifications that fundamentally alter the nature of the goods and services offered. Public entities do not have to make modifications that fundamentally alter the nature of the service, program, or activity provided, or modifications that would result in an undue administrative and financial burden.¹²³ Although rare, fundamental alteration defenses are not unknown. For example, a woman who was legally blind tried to bring her guide dog into a rehabilitation program operated by the Iowa Department for the Blind. She was told to use her white cane because participants in its orientation and adjustment program needed to learn to be self-reliant and independent. Ultimately, she filed suit under the ADA, Rehabilitation Act and Iowa Civil Rights Act, but lost on the merits. One of IDB's defenses was that the presence of guide dogs would frustrate the purpose and fundamentally alter the nature of the program by in part providing opportunity for students new with canes to start considering getting a dog.¹²⁴

Moreover, a modification is not required if the individual or the service animal poses a "direct threat to the health and safety of others."¹²⁵ In determining direct threat, the entity must make an individualized assessment to ascertain the nature and severity of the risk posed by the individual and whether any steps or modifications could be taken to mitigate the risk.¹²⁶

One decision addresses many of these defenses in a case involving the owner of St. Bernard dog who wanted her service animal to stay in her room with her twenty-four hours a day during an extended hospitalization. The dog "Cretia" assisted Jane Roe by retrieving objects, supporting her when she transitioned between standing and sitting, and performing other tasks.¹²⁷ The dog had accompanied her to the hospital numerous times pursuant to the hospital's service animal policy without incident.¹²⁸ During the last stay, visitors and staff soon noticed that a "putrid odor" permeated the entire seventh floor (it took twenty-four hours to clean and air the room out after plaintiff left the hospital).¹²⁹ The hospital requested that Roe close her door to contain the smells, but she refused. Administrators also offered to provide her with a HEPA air filter system, but again she refused. Some staff members developed allergic reactions to the dog and experienced respiratory problems and skin rashes.¹³⁰ Cretia was so large she blocked and

¹²² Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 117,34465, 117,34479, (June 17, 2008) (to be codified at 28 C.F.R pt. 35).

¹²³ 28 C.F.R. § 36.302 (2009).

¹²⁴ Stephanie Dohmen v. IDB, in the District Court for Polk County Iowa, Case no. CV4991, <http://www.gdui.org/complaint.html>.

¹²⁵ 28 C.F.R. Part 35 App. A (2009), 28 C.F.R. § 36.208 (2009).

¹²⁶ 28 C.F.R. § 36.208(c) (2009).

¹²⁷ Roe v. Providence Health System-Oregon, 655 F. Supp. 2d 1164, 1166 (D. Or. 2009).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

prevented nurses from helping her owner in and out of bed; staff sometimes had to step over her just to get to her bedside.¹³¹ A petite, unit host who had a disabled arm asked the husband to help carry a heavily-loaded meal tray over Cretia, but he refused to do so and laughed at her. Hospital staff had to take Cretia outside to relieve herself when a handler was not available.¹³² To make matters worse, Cretia had many infections that the hospital believed presented a risk of infection to other people at the hospital.¹³³

In rejecting the patient's bid to have the dog remain with her, the court noted that her requests and continuing refusal to cooperate with the hospital's attempts to accommodate her were unreasonable. The dog's presence was not necessary to provide the plaintiff with the benefits of the hospital's services and facilities, and Cretia posed a direct threat to patients, visitors and hospital staff; the defendant had legitimate and concrete concerns about the canine's causing infections, allergies, and noxious odors.¹³⁴ The court also found that the direct threat could not be eliminated by modification of hospital policies, practices, or procedures because of the plaintiff's refusal to comply with suggested compromises.¹³⁵

Can A Public Accommodation or Public Entity Impose a Fee or Surcharge for Service Animals?

The DOJ's answer is no -- covered entities must not require an individual with a disability to pay a fee or surcharge or post a deposit as a condition of permitting a service animal to accompany its handler, even if such deposits are required for pets. Congress and the DOJ intended that the "broadest feasible access be provided to service animals" to ensure that handlers and their service animals are not separated except in extremely limited circumstances, even if compliance results in some additional costs.¹³⁶

Federal enforcement efforts have led to the elimination of fees and charges in the marketplace. The DOJ has entered into settlement agreements and required many types of businesses to revise their policies and eliminate fees.¹³⁷ In one instance, a California Travel Inn advised a guest she would have to pay an extra ten dollars per night to have her service animal stay in the room; the motel agreed to change its policy to read:

The Travel Inn may not require an individual with a disability who requires the assistance of a service animal to pay a deposit or an extra fee as a condition to permitting a service animal to stay with its owner in a Travel Inn room. Also, the Travel Inn cannot require a person with a disability who requires the assistance of a service animal to be isolated from other guests, or treated less favorably than other guests.¹³⁸

¹³¹ Roe v. Providence Health System-Oregon, 655 F. Supp. 2d 1164, 1167 (D. Or. 2009).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Roe v. Providence Health System-Oregon, 655 F. Supp. 2d 1164, 1167-68 (D. Or. 2009).

¹³⁵ *Id.* at 1168.

¹³⁶ 28 C.F.R. Part 36 App. B (2009), available at http://www.ada.gov/NPRM2008/t2NPRM_federalreg.htm; 28 C.F.R. § 36.302(c)(1) (2009).

¹³⁷ See Department of Justice, ADA Settlements and Consent Agreements, <http://www.ada.gov/settlemt.htm> (last updated April 15, 2010).

¹³⁸ Settlement Agreement Between the U.S. and The Travel Inn, DJ # 202-11e-82 (2006), <http://www.ada.gov/travelinn.htm>.

Another agreement involved an Arizona shuttle service that refused to transport a customer who used a service animal to address mobility impairments because it was not a "seeing eye dog." The company's new policy included the clause "No additional fee or deposit may be charged to transport service animals."¹³⁹

The DOJ has also tried to eliminate this access barrier through policy interpretations, technical assistance manuals, business briefs, and proposed rulemaking.¹⁴⁰

¹³⁹ Settlement Agreement Between the U.S. and Skyway Group, Inc., DJ # 202-8-36 (2001), <http://www.ada.gov/skywayse.htm>.

¹⁴⁰ 28 C.F.R. § 35.130(f) (2008):

A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Id.; 28 C.F.R. § 36.301 (2008):

(c) *Charges.* A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, *and reasonable modifications in policies, practices, or procedures*, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Id. (emphasis added); DOJ Technical Assistance Manual for Title II, II-3.5400 ("Surcharges: Although compliance may result in some additional cost, a public entity may not place a surcharge only particular individuals with disabilities or groups of individuals with disabilities to cover these expenses."); DOJ Technical Assistance Manual for Title III II-4.2300 ("A public accommodation may not require an individual to post a deposit as a condition to permitting a service animal to accompany its owner . . ."); U.S. Department of Justice, Disability Rights Section, Commonly Asked Questions About Service Animals in Places of Business, <http://www.ada.gov/qasrvc.htm>:

7. Q: Can I charge a maintenance or cleaning fee for customers who bring service animals into my business?

A: No. Neither a deposit nor a surcharge may be imposed on an individual with a disability as a condition to allowing a service animal to accompany the individual with a disability, even if deposits are routinely required for pets. However, a public accommodation may charge its customers with disabilities if a service animal causes damage so long as it is the regular practice of the entity to charge non-disabled customers for the same types of damages. For example, a hotel can charge a guest with a disability for the cost of repairing or cleaning furniture damaged by a service animal if it is the hotel's policy to charge when non-disabled guests cause such damage.

Id. Proposed rulemaking, later withdrawn, was drafted to expressly import prohibitions on fees and surcharges into Title II and Title III respectively:

6. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity must not require an individual with a disability to pay a fee surcharge or post a deposit as a condition of permitting a service animal to accompany its handler in a public entity's facility, even if such deposits are required for pets, and that if a public entity normally charges its citizens for damage that they cause, a citizen with a disability may be charged for damage caused by his or her service animal in Sec. 35.136(h).

Notice of Proposed Rulemaking to Amend 28 C.F.R. Part 35: Nondiscrimination on the Basis of Disability in State and Local Government Services, *Service Animals: Wheelchair and Other Power-Driven Mobility Devices*, available at http://www.ada.gov/NPRM2008/t2NPRM_federalreg.htm.

State Laws That Regulate or Protect the Rights of Persons Who Use Assistance Animals (Joshua W. Newman and Jiajun Zhu)

The Americans with Disabilities Act (“ADA”) and the Fair Housing Act (“FHA”) differ in how they define the types of animals that qualify under federal law to accompany persons with disabilities in places where pets are not permitted. They also differ in the protections and rights and responsibilities they bestow upon owners, landlords, businesses, etc.¹⁴¹ Furthermore, states have added to the confusion by adopting laws that do not refer to, incorporate, or directly parallel provisions in these federal laws. For example, Nevada defines “service animal” in three separate ways, without any explanation as to how the definitions should be reconciled.

Due to such inconsistencies, litigation concerning the scope of service animal rights continues to arise, with judges struggling to determine which definition, if any, should apply. In an effort to eliminate such confusion, the Iowa Civil Rights Commission is contemplating ways in which it can amend Iowa Code Chapter 216 (Civil Rights) and 216C (Rights of People with Disabilities). To this end, it has asked the University of Iowa Legal Clinic to explore the various ways in which other states regulate the use of service animals in housing, public accommodations, and employment settings.

The Iowa Civil Rights Act expressly forbids disability-based discrimination and requires certain housing providers and public accommodations to modify their policies, practices and procedures when doing so is necessary to afford a disabled person equal opportunity to use and enjoy housing, goods, or services.¹⁴² For our purposes, this is referred to as a “reasonable modification model.” By contrast, section 216C, which provides disabled persons with housing and public accommodation rights,¹⁴³ is known as an “affirmative model,” because the chapter mostly describes the rights of persons with disabilities rather than prohibited practices.

The accompanying chart, which compares Iowa’s statutory framework to other states in the Eighth Circuit, as well as a handful of other states, provides an at-a-glance summary of our findings. In particular, the chart addresses four main topics: (1) the extent to which each state has defined or incorporated the term “service animal” into the housing and public accommodations provisions of its state Civil Rights Act; (2) whether each state has a provision requiring reasonable modifications (or accommodations) of policies and practices; (3) the scope of coverage for individuals and animals under each state’s freestanding service animal laws, the “affirmative model”; and (4) the number of states that opted to merge their freestanding and civil rights protections.

Though the Legal Clinic is of the opinion that no state has yet developed a perfect framework, we believe the Commission should consider incorporating certain provisions into Chapter 216. In particular, Iowa should:

- Use the term “Assistance Animal,” to mean an animal that works, provides assistance or performs tasks for the benefit of a person with a disability, or an animal that provides

¹⁴¹ Americans with Disabilities Act, 42 U.S.C. § 12101 (1990); Fair Housing Act, 42 U.S.C. § 3604 (2000).

¹⁴² IOWA CODE § 216 (2009).

¹⁴³ IOWA CODE § 216C (2009).

emotional support that alleviates one or more identified symptoms or effects of a person's disability.

- Alternatively, use the term "Assistance Animal," to mean any animal that assists, supports or provides a service to a person with a disability, including a "Service Animal" and an "Emotional Support Animal." Define Service Animal using the ADA or similar definition and Emotional Support Animal to mean an animal that provides emotional support or therapeutic value that alleviates one or more identified symptoms or effects of a person's disability.
- Affirmatively require employers, educators, credit companies, public accommodations, and fair housing providers to modify their policies and practices to permit a person with a disability to own, live with or be accompanied by an assistance animal. In non-housing sections, the requirement might extend only to service animals.
- Alternatively, delete references to reasonable modifications or accommodations and affirmatively state that it is unlawful to refuse to permit a person with a disability to live with, own or be accompanied by an assistance animal.
- Expressly note that a service animal must be trained, but it should not require certification, badges, emblems or identity cards; and that emotional support animals do not require any training at all or certification, badges, emblems, etc.
- Alternatively, amend the public accommodations and fair housing provisions as follows, which is based on regulations and proposals from DOJ and HUD:

"Emotional Support Animal" means an animal, the presence of which ameliorates the effects of a mental or emotional disability, provides an individual with a disability with emotional support, comfort, therapy, companionship or therapeutic benefits, or promotes the individual with a disability's emotional well-being. An emotional support animal is not a pet.

"Service Animal" means any dog or animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities. A service animal is not a pet.

A public accommodation shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability;

A public accommodation may ask an individual with a disability to remove a service animal from the premises if: (i) The animal is out of control and the animal's handler does not take effective action to control it; (ii) The animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public

accommodation provides (e.g., repeated barking during a live performance); or (iii) The animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.

If an animal is properly excluded: If a place of accommodation properly excludes a service animal, it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.

General requirements: The work or tasks performed by a service animal shall be directly related to the handler's disability. A service animal that accompanies an individual with a disability into a place of public accommodation shall be individually trained to do work or perform a task, housebroken, and under the control of its handler. A service animal shall have a harness, leash, or other tether.

Care or supervision of service animals: A public accommodation is not responsible for caring for or supervising a service animal.

Inquiries: A public accommodation shall not ask about the nature or extent of a person's disability, but can determine whether an animal qualifies as a service animal. For example, a public accommodation may ask if the animal is required because of a disability; and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified or licensed as a service animal and the animal need not wear any special collar, harness, vest, emblem or other means of identifying it as a service animal.

Access to areas open to the public, program participants, and invitees: Individuals with disabilities who are accompanied by service animals may access all areas of a place of public accommodation where members of the public, program participants, and invitees are allowed to go.

Fees or surcharge: A public accommodation shall not ask or require an individual with a disability to post a deposit, pay a fee or surcharge, or comply with other requirements not generally applicable to other patrons as a condition of permitting a service animal to accompany its handler in a place of public accommodation, even if people accompanied by pets are required to do so. If a public accommodation normally charges its clients or customers for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.

- Fair Housing:

Unfair and discriminatory practices include . . . a refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling;

A person or entity subject to this section shall modify its policies, practices, or procedures to permit an individual with a disability to use, own, live with or be accompanied by a

service animal or emotional support animal when necessary to afford that individual equal opportunity to use and enjoy a dwelling. A person or entity subject to this section shall not a) ask or require an individual with a disability to post a deposit, pay a fee or surcharge, or comply with other requirements not generally applicable to other applicants, tenants or owners, even if people who live with or are accompanied by pets are required do so, b) require documentation, such as proof that the animal has been certified or licensed as a service animal or emotional support animal, c) require that an emotional support animal have any training, or d) require the service animal or emotional support animal to wear or carry any special collar, harness, vest, emblem or other means of identifying it as an emotional support or service animal. An individual with a disability may be charged for damages caused by his or her service animal or emotional support animal if the person or entity normally charges pet owners or handlers for damage caused by their pets.