

## Barking Up the Wrong Tree?

*What you need to know about service animals, emotional support animals, other kinds of animals at work*

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By June D. Bell 12/17/2014

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A dog walks into a bar. Or a department store. Or perhaps it's carried into a supermarket and set in the seat of a grocery cart.

More pets than ever before are accompanying their owners everywhere, even to places that were once off-limits to animals, such as restaurants and other businesses. And these pet owners are taking offense—and sometimes, legal action—when anyone questions their right to canine companionship while they shop, eat and browse.

“A lot of people are kind of pushing the envelope by claiming their dogs are service animals,” said Andrew M. McNaught, a partner in the labor and employment group at Seyfarth Shaw’s San Francisco office. “You see more and more people bringing purported service animals into these places,” he said. He noted an increase in litigation brought by irate pet owners against businesses for allegedly violating the law by barring their dogs.

Federal and state law make a clear distinction between service animals and “emotional support” animals, though some zealous pet owners seem intent on blurring that line. Service animals are dogs (and in some cases, miniature horses) that are specially trained to help disabled people. Guide dogs assist the blind and visually impaired with navigating streets and public transit. Other dogs can retrieve objects, alert deaf owners to sounds or provide support for victims of post-traumatic stress disorder.

In contrast, the mere presence of an “emotional support” animal may provide comfort and companionship, but the animal has not been trained to assist with a documented disability. Its owner may feel happier gazing into its eyes and stroking its soft fur, but it’s nonetheless considered a pet.

If pets seem to be everywhere these days, it's because they are. Animal ownership in America has skyrocketed in the past four decades. The Humane Society estimates that pet ownership has tripled since the 1970s, with more than 164 million households—62 percent of American homes in 2012—sharing their home with cats, dogs or both.

### **Reasonable Accommodations**

The federal Americans With Disabilities Act (ADA) requires businesses to make reasonable accommodations for service animals. Failure to do so can result in fines of up to \$55,000 for the first violation and \$100,000 for subsequent violations. California state law provides identification tags for “assistance dogs” and makes denying access to a disabled person a misdemeanor, subject to a fine of up to \$2,500. But the ADA's requirement of reasonable accommodation specifically excludes emotional support animals. So does California law.

The state law goes one step further and imposes misdemeanor penalties on anyone who falsely claims that their pet is a service animal. Though California's labor and employment laws often diverge from federal law, they're in sync here, McNaught noted, because California law says any violation under the ADA is also a violation of state law as well.

Yet, ferreting out a true service animal from a run-of-the-mill canine companion can be challenging. Managers of stores and restaurants are often forced to make split-second decisions about when to accommodate customers with animals. Businesses don't want to turn away prospective customers, but they also have an obligation to ensure a sanitary, safe environment for all their patrons. Compounding the problem is that many people do not know that an emotional support animal is not considered a valid service animal under ADA rules. “A lot of people legitimately think they are” considered to be service animals, McNaught said.

Managers, security guards or other front-line personnel may ask only two questions when someone tries to enter a business with an animal: Is the animal required due to a disability? What tasks has the animal been trained to perform?

The animal's owner cannot be asked to disclose his or her disability or to present any paperwork certifying the animal as a service animal. The owner also cannot be asked to demonstrate the skills or tasks that the dog assists with.

### **Alpaca, Turtle and Snake**

*The New Yorker* writer Patricia Marx recently explored the phenomenon of omnipresent “emotional support” animals when she documented her adventures with an “emotional support” alpaca and an “emotional support” turtle. She also toted a 30-inch Mexican milk snake to a Chanel boutique in New York City, ostensibly to find a handbag that would match it. (An employee suggested a \$9,000 python purse.)

“Why didn’t anybody do the sensible thing and tell me and my turtle to get lost?” she mused. She was never denied entry to any restaurant, store or museum. Perhaps that’s because when she was confronted by skeptical workers and security guards, she brandished a letter from a California clinical social worker—whom she’d paid \$140 for a cursory phone consultation—classifying her critter as an emotional support animal that helped her cope with anxiety. Marx noted that the for-profit National Service Animal Registry, which sells certificates, vests and IDs, registered 2,400 emotional support animals in 2011. Last year, she wrote, it registered 11,000.

Jane Flower has noticed an increase in the number of dogs in malls and stores in Marin County, Calif., where she lives and works. “It’s getting to be a real problem,” said Flower, who has a progressive retinal degenerative disease and relies on her guide dog Anja for navigation help. She and her visually impaired colleagues—she is the outreach manager for Guide Dogs for the Blind, a San Rafael, Calif. nonprofit organization that trains Seeing Eye dogs—are concerned about the distractions that other people’s companion animals pose to working dogs. While Seeing Eye dogs are trained to remain focused, they are, after all, animals. Other dogs in their environment, particularly dogs that are aggressive or running loose, can distract them. “It can be dangerous for the person using the dog as a guide,” Flower said.

### **Animals at Work**

Employees who claim their disability requires the presence of an assistive animal at work must provide their employer with documentation explaining the animal’s role in helping them manage their work-related duties, said Michael Newman, a Hinshaw & Culbertson partner in Los Angeles. The employer can also request proof of training, and the service animal must be housebroken, well behaved and groomed.

Under the ADA’s Title III regulations, businesses must make reasonable accommodations for workers who need a service animal on the job. Generally, the larger the business, the more it is assumed to be able to accommodate employees’ reasonable needs. It’s much easier for a company of a thousand people to accommodate both a Seeing Eye dog and employees who claim allergies to animals than it would be for a business with three workers to do so. Balancing one worker’s needs and rights against another’s is a challenge, said Larry Drapkin, chair of the labor and employment department of Los Angeles-based Mitchell Silberberg & Knupp, who has litigated such cases.

Employers might consider the mere presence of a service animal in an office to be an undue hardship, but if the animal is not disruptive, the employer should generally consider accommodating it, Newman said. However, what measures constitute “reasonable accommodation” or “undue hardship” are fairly nebulous, he noted.

What about employees who want to bring an emotional support animal or “assistive animal” to the office to help with anxiety or a stress-related disorder? Drapkin recommends that employers go through an interactive process with the individual worker to determine if the business can accommodate the animal without undue hardship. That would likely result in Marx’s alpaca being barred from most offices, whereas some employers might be able to accommodate her snake, provided it remained caged—and perhaps out of sight of those with ophidiophobia, or fear of snakes.

### **Little Guidance for Employers**

There’s still little case law to guide attorneys and HR professionals on how to handle animals in the workplace that aren’t designated as “service animals” because this is a relatively recent phenomenon. “If someone said, ‘I feel more comfortable with a snake wrapped [around] my neck’ ... you’d have to look at whether that kind of scenario would cause an undue hardship in the workplace context,” Drapkin said.

“We haven’t had those cases yet. But I suspect that some day, someone will push that envelope and say [that] the presence of an animal like a rat, that isn’t trained per se, serves a benefit for someone’s disability.” When thorny questions arise, he recommends consulting an employment attorney to avoid the potential for disability-law-related litigation.

Some employers do allow their workers to bring canines to the office for companionship, but with some caveats. Amazon.com welcomes dogs at its Seattle headquarters and makes accommodations for workers with allergies or “other concerns,” a spokesman said in an e-mail. Google, based in Mountain View, Calif., also allows dogs, though the company’s code of conduct notes that bringing a dog to work should be “an occasional practice, not an everyday occurrence.”

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