

# LEGAL BRIEFINGS



## Service Animals Under the ADA

This Legal Briefing will discuss current case law and administrative guidance regarding the use service animals under the Americans with Disabilities Act (“ADA”) in public accommodations<sup>1</sup> and as applied to the services, activities, and programs of public entities.<sup>2</sup>

- <sup>1</sup> Title III of the ADA governs public accommodations which includes businesses that serve the public such as restaurants, retail establishments, offices of service providers, taxicab services, and hotels. 28 C.F.R. § 36.101 *et seq.*
- <sup>2</sup> Title II of the ADA governs public entities which includes any state and local government, any department, agency, special purpose district, or other instrumentality of a State or State and local government, the National Railroad Passenger Corporation, and any commuter authority. 28 C.F.R. § 35.101 *et seq.*

This analysis was developed by Equip for Equality for Cherry Engineering Support Services, Inc. (CESSI). It is developed for use by the national network of ADA and IT Technical Assistance Centers and is solely advisory in nature. Equip for Equality and CESSI believe the analysis to be current as of the effective date of the document, but make no representation that the discussion remains good law thereafter. The analysis is not intended to be a legal determination of rights or responsibilities in general or in any specific case. Funding for this information brief is provided in part by NIDRR under contract #ED-02-CO-0008 to CESSI. However, the content and analysis in the document do not necessarily represent the opinion of NIDRR or the U.S. Department of Education and you should not assume endorsement by the Federal government.

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It will also cover technical assistance, settlement agreements, and interpretive memoranda set forth by the U.S. Department of Justice (DOJ), the agency authorized by Congress to enforce the ADA, draft the ADA's corresponding administrative regulations, investigate complaints, initiate and mediate complaints, and monitor settlement agreements. The DOJ's interpretive memoranda, *Commonly Asked Questions About Service Animals in Places of Business (DOJ Guidance)*<sup>3</sup> and the *ADA Business Brief: Service Animals (DOJ Business Brief)*<sup>4</sup> have been relied upon by courts when reviewing service animal cases and as a means to understand how the enforcement agency interprets the ADA and its corresponding regulations.

Note that challenges brought under the ADA regarding service

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3 A copy of the DOJ Guidance can be obtained on the DOJ's website at [www.us.doj.gov/crt/ada/animal.htm](http://www.us.doj.gov/crt/ada/animal.htm)

4 A copy of the DOJ Business Brief can be obtained on the DOJ's website at [www.usdoj.gov/crt/ada/svcanimb.htm](http://www.usdoj.gov/crt/ada/svcanimb.htm)

animals are highly fact specific, often requiring a case-by-case inquiry into the details of the individual's needs as a person with a disability, the services that an animal provides, the defendant's policies, practices, or procedures that give to rise to the alleged discrimination, and any defenses raised by the defendant.

## What is a Service Animal?

A "service animal" is 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. 28 C.F.R. § 36.104.

The ADA does not limit the kind of animal that can provide service or the types of tasks or work a service animal can perform. This issue was raised

in an administrative settlement agreement<sup>5</sup> reached with Arizona Shuttle Service regarding a traveler with a mobility impairment who was informed that her service animal could not accompany her on the defendant's shuttle bus because the animal was not a seeing eye dog. After an administrative complaint was brought, Arizona Shuttle Service agreed to adopt a new written policy broadening its definition of service animals.

## Who is Entitled to Use a Service Animal Under the ADA?

The ADA authorizes the use of service animals for the benefit of individuals with disabilities. While the ADA does not limit the type of disability one must have in order to use a service animal, there must be a di-

rect link between the task an animal performs and the person with a disability. The ADA defines disability to include a “physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102(2)(A).

In *Access Now, Inc. v. Town of Jasper*, 268 F. Supp. 2d 973 (E.D. Tenn. 2003), a Tennessee district court determined that a nine-year-old girl with spina bifida and hydrocephalus did not have a disability under the ADA. The girl's family had previously requested a reasonable modification to the town ordinance that prohibited animals within 1,000 feet of any residence without a permit from the town health officer. Specifically, the family requested a permit to keep a miniature horse at their residence, describing the horse as a service animal that helped the girl stand, walk, and maintain her balance, and that also picked up unspecified objects off the floor for her. After the town denied issuance of the permit, and the family was declared guilty of violating the town's municipal ordinance,

<sup>5</sup> See Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and Skyway Group, Inc., d/b/a Arizona Shuttle Service, Tucson, Arizona: DJ 202-8-36. [www.usdoj.gov/crt/ada/skywayse.htm](http://www.usdoj.gov/crt/ada/skywayse.htm)

the family filed suit in federal court pursuant to Title II of the ADA. The issue in dispute was whether the girl had a disability. The family contended that she was substantially limited in three major life activities: walking, standing, and caring for herself. However, the district court found that the girl did not have an ADA disability because the majority of the evidence demonstrated that the girl could adequately walk, stand, balance, and care for herself without assistance from the horse. A primary fact for the court was that the girl did not use any other device to assist her in walking, standing, or otherwise moving or traveling outside of her residence where the horse never left. Furthermore, the girl's treating physician testified that he would not recommend the use of the horse as a service animal and stated she did not need one. After finding that the girl was not disabled, the court held that the miniature horse was not a service animal because it did not assist and perform tasks for the benefit of a person with a disability.

In *Proffer v. Columbia Tower*, 1999 WL 33798637 (S.D. Cal. 1999), a California district court found that a landlord did not violate the ADA because the plaintiff tenant could not demonstrate she was discriminated against by reason of her own disability. Although the tenant is paraplegic and uses a service dog for herself, her lawsuit was based on her landlord's refusal to allow additional dogs in her apartment that she hoped to train for other individuals with disabilities. The landlord permitted the tenant to have her own service dog, but otherwise prohibited her from having the additional dogs, unless her own disability required her to have another service animal. The district court agreed with the landlord, finding no ADA violation since the additional dogs were not trained to perform tasks for the tenant's own benefit.



## Can an Entity Require an Individual to Provide Certification That Their Animal is a Service Animal and Not a Pet?

No. The ADA does not mandate that service animals be specifically identified with certification papers, a harness, special collar, or any other form of identification. The ADA regulations merely establish minimum requirements for service animals, namely, that an animal (1) is individually trained and (2) works for the benefit of the individual with a disability.

Policies and practices that require proof of certification or similar documentation violate the ADA. In *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Or. 1998), an Oregon district court found that the county housing authority violated Title II of the ADA, the Fair Housing Amendments

Act and the Rehabilitation Act of 1973<sup>6</sup> after the housing authority threatened to evict a tenant who was deaf for having a dog despite the tenant's explanation that the dog was a service animal. The tenant had previously filed a request for a waiver of the housing authority's blanket "no pets" rule explaining that the dog was a service animal that alerted the tenant to several sounds such as door knocks, the smoke detector, a ringing telephone, and cars arriving in the driveway. Despite the tenant's claim that the dog was trained professionally as well as individually in the tenant's residence, the housing authority claimed the dog was not a service animal because

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<sup>6</sup> The Rehabilitation Act of 1973, which applies to programs receiving federal financial assistance, is the predecessor statute to the ADA. Therefore, although this case was not brought under the ADA, the analysis is virtually identical and courts may look to Rehabilitation Act cases for guidance in determining like cases brought under the ADA.

the tenant could not produce any verification or certification that the dog was trained as a hearing assistance animal by a certified trainer or other “highly skilled individual.” The Court held that the housing authority had no independent authority to determine whether the dog was a service animal as long as the dog was individually trained for the benefit of a person with a disability.

In *Stamm v. New York City Transit Authority*, 2006 WL 1027142 (E.D.N.Y. Feb. 7, 2006), the plaintiff, a woman with post-traumatic stress disorder and a hearing impairment, brought action against the New York Transit Authority under Title II of the ADA. She alleged 43 different instances when she was either denied access to transit vehicles because of her service animal or was improperly asked to provide certification that her dog was a service animal. The Transit Authority moved to dismiss the case claiming that the Department of Transportation regulations plaintiff relied upon did not state a private cause of action. The court held plaintiff’s complaint did state

a valid private cause of action based on regulations that were established to carry out the intent of the ADA.

## **If Entities Cannot Require Certification, What Questions Can They Ask to Determine Whether an Animal is a Service Animal?**

The *DOJ Business Brief* and *DOJ Guidance* clarify that entities may inquire whether an animal is a service animal and may also ask what tasks the animal has been trained to perform. However, entities may not ask specific questions about the person’s disability.

In *Grill v. Costco Wholesale Corp.*, 312 F. Supp. 2d 1349 (W.D. Wash. 2004), a Washington district court upheld a private membership club’s written policy that required store employees to first look for visible identification that the animal was a service animal and, if no identification existed, to ask what task or function the animal performed that its owner could not otherwise perform.

The club's policy prohibited employees from asking specific questions about the person's disability. The court referenced the *DOJ Business Brief* and *DOJ Guidance* in finding that the policy complied with the ADA, stating that the DOJ's interpretation of its own regulations should be entitled deference absent a contrary reading of the regulation.

In *Thompson v. Dover Downs, Inc.*, 887 A.2d 458 (Del. Super. Ct. 2005), the Delaware Supreme Court said a business could exclude a service animal if the owner refused to answer questions about its training. Although this case was brought under Delaware state law, the court stated that the state law and the ADA's provisions regarding service animals were essentially the same. Also, the court relied on the fact that the business owner had contacted the Department of Justice's ADA information line and confirmed that while the business owner could not ask the individual about his disability, he was permitted to ask about the dog's training.

## **To What Extent are Covered Entities Required to Modify Their “No Pets” Policies, or Like Policies, Practices, and Procedures to Allow the Use of Service Animals?**

### **In General**

Covered entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability in any area open to the general public, unless the entity can demonstrate (1) that making such modifications would fundamentally alter the nature of the entity's goods, services, facilities, privileges, advantages, or accommodations, (2) the safe operation of the entity would be jeopardized, or (3) such modifications would result in an undue financial or administrative burden. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164, 36.301(b), 36.302 (c)(1), and 36.303(a). DOJ commentary suggests that Congress intended the ADA to allow service animals the “broadest feasible access” to public accommodations

and public entities and to avoid unnecessarily separating service animals from their owners. 28 C.F.R. pt. 36 App. B.

Covered entities that have blanket policies or practices that exclude service animals may be subjected to a court orders or settlement agreements requiring modification of the relevant policy or practice. For example, following a complaint filed by three individuals who are blind after they were refused airport shuttle service unless their guide dogs were restrained in kennels, Budget Rent A Car Systems modified its car rental policies to allow individuals with disabilities to use service animals without being separated from them at any time.<sup>7</sup>

Businesses that have taken the initiative to modify their own policies and practices in effort

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<sup>7</sup> See, e.g, Settlement Agreement Under the Americans With Disabilities Act of 1990 Between the United States of America and Budget Rent A Car Systems, Inc., DJ 202-79-16, 202-79-42, and 202-79-50. (1997). [www.usdoj.gov/crt/ada/budget.htm](http://www.usdoj.gov/crt/ada/budget.htm)

to remedy past ADA violations may avoid court ordered injunctions and other sanctions. For example, in *Stan v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 119 (N.D. N.Y. 2000), a shopper who is legally blind filed suit against Wal-Mart and Sam's Club stores alleging the stores violated the ADA when store employees challenged her as she tried entered the stores with her guide dog, including one incident where an employee asked the shopper about her disability. A New York district court found that the shopper was unable to satisfy her request for injunctive relief to bar future harassment, which required a showing of irreparable harm and a likelihood of future discrimination. The New York district court found that while the shopper should not be subjected to embarrassing and humiliating personal questions about her disability, she could not demonstrate a likelihood of future harassment because the stores had already taken action to fix their policies and practices in compliance with the ADA by training their employees on service animals, placing signs at store entrances that welcomed service animals,

and implementing policies permitting service animals as an exception to the stores' general "no pets" rule.

### **The Fundamental Alteration Defense**

Service animals may be excluded if the covered entity can demonstrate that the presence of such animal would fundamentally alter the nature of the entity's goods, services, facilities, privileges, advantages, or accommodations. It is the entity's burden to allege and prove the existence of a fundamental alteration. The outcome of such defense will depend on the distinct facts of each case.

For example, a California district court found that the California Center for the Arts violated the ADA when it refused to allow a patron with quadriplegia to continue attending music performances with her service dog that had previously yipped or barked during the intermission of two Center concerts. The district court ordered the Center to modify its "policies, practices and procedures such that they

did not exclude a service animal who has made a noise on a previous occasion, even if such behavior is disruptive, if the noise was an intended to serve as a means of communication for the benefit of the disabled owner or if the behavior would otherwise be acceptable to the Center if engaged by humans." The Center appealed the district court's order and in *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837 (9th Cir. 2004) the Ninth Circuit Court of Appeals<sup>8</sup> affirmed, finding it to be a reasonable and necessary accommodation under the ADA. The Center argued that the modified policy would fundamentally alter the Center's services because permitting a dog to make noise may deter patrons and artists from coming to the Center. However, the Ninth Circuit stated that whether an accommodation causes a fundamental alteration is an "intensively fact-based inquiry" and the facts of this case showed that

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<sup>8</sup> The Ninth Circuit covers the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, and Oregon.

although the patron's service dog did yip or bark twice, no patron ever complained and the two incidents did not cause a significant disturbance. The Center's mere speculation of potential future disturbances was undercut by evidence that demonstrated otherwise. Although no monetary damages are available for a violation of Title III of the ADA, the Ninth Circuit ordered damages under California state law against the Center, and also against the Director of Center Sales & Events and the house manager in their individual capacities.

In *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.3d 1052 (5th Cir. 1997), the Fifth Circuit Court of Appeals<sup>9</sup> affirmed the district court's decision that a brewery violated the ADA when it refused to permit an individual who is blind to take a public brewery tour with his guide dog. The Fifth Circuit also upheld the district court's order that the brewery modify its policies to ensure

that individuals with disabilities and their service animals have the "broadest feasible access" to the brewery tour consistent with the brewery's safe operation. The brewery argued that permitting animals on the tour would fundamentally alter the nature of the tour and that the Food, Drug, and Cosmetics Act prevented the brewery from modifying its blanket "no animals" policy. The Fifth Circuit disagreed holding that the Act did not prevent the brewery from allowing guide dogs on at least part of the tour and that the risk of contamination posed by the few foreseeable service animal visits was minimal, if not altogether unlikely or impossible in certain locations within the brewery. Finally, the Court affirmed an award of monetary damages under state law that specifically prohibits businesses from excluding individuals with disabilities because of their use of an assistance dog or other specified assistive devices.

### **The Safety Defense**

A showing that health and safety will be jeopardized if an animal is present could serve as

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<sup>9</sup> The Fifth Circuit covers the following states: Louisiana, Mississippi, and Texas.

a basis for excluding a service animal. However, allegations of safety risk must be based on actual risks rather than on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. § 36.301(b). A perceived threat without evidentiary basis will not likely support exclusion. Moreover, if other alternatives exist that can alleviate health and safety concerns while allowing service animals to accompany their owners, these should be considered before a blanket exclusionary policy is implemented.

In *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), the Ninth Circuit Court of Appeals found that, without reasonable modifications, the State of Hawaii's 120-day quarantine on carnivorous animals entering Hawaii, which was designed to prevent the importation of rabies, violated Title II of the ADA. Pursuant to Hawaii law, any person who entered, visited or returned to Hawaii with a dog, cat, or other carnivorous animal was required to have their animal quarantined for 120 days upon entering the State. Upon writ-

ten request, a person with a disability seeking to bring a service animal into Hawaii could stay in the State without cost for the duration of the quarantine period in the quarantine station, a remote area within Hawaii. A class of plaintiffs with visual impairments alleged that this restriction denied them the ability to make meaningful use of Hawaii's services, programs, and activities without their guide dogs. The plaintiff class also argued that separating the dogs from their owners rendered the animals susceptible to irretrievable loss of their training as service animals. The Ninth Circuit agreed, holding that reasonable modifications were necessary to avoid such discrimination unless they would fundamentally alter the nature of the service, program, or activity. Because plaintiffs contended that there were more effective means to prevent the importation of rabies by guide dogs such as a vaccine-based system, the Ninth Circuit sent the case back to the district court to determine whether plaintiffs' proposed alternatives were reasonable modifications or fundamental alterations.

In *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006), the court found that a public housing authority did not violate Title II of the ADA after the housing authority refused to allow the tenant to keep snakes, which the tenant maintained were service animals. The tenant provided two letters from his doctor to support his request. The first stated that the tenant had depression and that the snakes were “therapy pets” from which the tenant derived “much comfort and mental benefit.” The second letter explicitly stated that the snakes were service animals. After the housing authority received the second letter, it allowed the tenant to maintain the snakes if he provided a declaration that the snakes were necessary and not poisonous or dangerous. The housing authority further required that the tenant keep the snakes in a cage when staff members were in his apartment or when he transported the snakes. The tenant refused to provide the requested declaration and continued to carry the snakes around the housing complex

without a cage. The court stated that the housing authority made a reasonable request in asking for additional information to assess potential safety risks, and did not discriminate against the tenant.

The DOJ has opined that the presence of a service animal could pose a significant health risk in certain areas within a hospital. In such situations, the DOJ has stated that determination of such risk should be based on a decision made by appropriate medical personnel who, upon finding such a risk, should list specific areas where exclusion is appropriate (e.g., intensive care unit), and permit the service animal in all other areas.<sup>10</sup>

In *Pool v. Riverside Health Services, Inc.*, 1995 WL 519129 (D. Kan. Aug. 25, 1995), a Kansas district court held that a hospital did not violate the ADA when it refused to allow a service dog to accompany its

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<sup>10</sup> See, e.g., DOJ Technical Assistance Letter, Doc. 302, May 10, 1993, Danforth, John C., service animals in hospitals.

owner who uses a wheelchair and who was visiting her fiancé in the hospital. The hospital subsequently adopted a written policy permitting the presence of service animals in public areas, but excluding them from non-public areas such as the emergency room. The court found this policy reasonable based on the hospital's medical testimony that explained the purpose of the partial exclusion was to safeguard infection control, cross-exposure, and allergic reactions.

In *Smith v. Moorman*, 2002 WL 31182451, (6th Cir. Sept. 20, 2002), the Sixth Circuit Court of Appeals held that the Veterans Administration Medical Center did not discriminate based on disability under the ADA by refusing the veteran's request to keep his dog with him during the veteran's hospitalization. Without much elaboration, the Sixth Circuit found that the record showed Smith received medical treatment and his disability played no part in the Medical Center's decision to prohibit the dog from staying with him.

Unlike the *Pool* and *Moorman* cases, in *Branson v. West*, 1999 WL 1129598 (N. D. Ill. 1999), amended memorandum opinion and order at 1999 WL 1186420 (N.D. Ill. 1999), an Illinois district court held that a Veterans Administration hospital violated the federal Rehabilitation Act when it refused to permit its employee, a physician with a spinal chord injury, use of service dog while at work. The physician, who became paraplegic following a horseback riding accident, used the service dog primarily to pull her manual wheelchair so the physician would not overuse her upper extremities. The hospital was unable to demonstrate any threat to health or safety because it already permitted seeing-eye dogs in its facility and other Veterans Administration hospitals allowed individuals with disabilities to be accompanied by their service animals except where a significant health risk existed or the animal's behavior became disruptive. The court ordered the hospital to allow the physician use of her service dog. The court further ordered that the hospital refrain from attempting to minimize the

presence of the dog unless a qualified medical professional determined with specificity the reason the dog would pose a threat to health or safety in the hospital that a human would not pose.

## **Who is Responsible for Supervising the Service Animal?**

In the event that a service animal must be separated from an individual to avoid a fundamental alteration or threat to safety, the individual, and not the covered entity, is responsible for securing supervision and care for their service animal, including provision of food or finding a special location for the animal. 28 C.F.R. § 36.302(c)(2) & DOJ Guidance.

## **What if a State Law Conflicts With the ADA Regarding Service Animals?**

The ADA must prevail over any conflicting state law unless the state law provides greater or equal protection for individuals with disabilities than is provided by the ADA. For example,

in *Green v. Housing Authority of Clackamas County*, the court determined that an Oregon state law requiring hearing assistance animals to be on an orange leash was more restrictive than the ADA's requirements for service animals. In that instance, the ADA prevailed over Oregon law. Because plaintiff's hearing assistance dog still met the ADA definition for service animal even though it did not have an orange leash, the housing authority was required to modify its policy to allow for plaintiff's use of the dog.

## **If a Court Finds a Business Violated the ADA, What Kind of Relief Can Be Granted?**

The remedy for an ADA violation is injunctive relief, which means the court can order the defendant to do (or refrain from) an action like modifying a policy or providing an auxiliary aid or service. Monetary damages are not recoverable unless the United States brings the complaint or the defendant consents to pay damages in a settlement agreement.



In *Thompson v. Dover Downs, Inc.*, 2003 WL 22309082 (D. Del. 2003), a Delaware district court dismissed a service animal case brought under Title III of the ADA because the plaintiff's only requested relief was \$500,000 in punitive damages and an apology. However, when the United States initiated a suit in *USA v. Top China Buffet, Inc.*, Cause No. IP 02-1038 C Y/F (S.D. Ind. 2003), a consent order required the defendant restaurant to pay monetary damages to the plaintiff family and a monetary penalty to the DOJ as a result of the restaurant's refusal to modify its "no pets" policy to permit the family's service animal in the restaurant.<sup>11</sup> In another govern-

<sup>11</sup> See [www.usdoj.gov/crt/ada/topchina.htm](http://www.usdoj.gov/crt/ada/topchina.htm) for a copy of the Consent Order.

ment initiated settlement agreement, a taxi company agreed to send a complainant 25 free fare certificates after one of its drivers refused to pick up the complainant and her service animal.<sup>12</sup> Monetary damages and other relief may also be granted pursuant to other state and federal laws.

The ADA and court cases are clear that policies and practices must be modified to allow individuals with disabilities to be accompanied by their service animals. The greatest area of dispute arises when a covered entity alleges that a fundamental alteration or health and safety risk is present. The outcomes of such cases undoubtedly turn on the particular facts presented in each case.

Finally, although ADA cases were highlighted in this Legal

<sup>12</sup> See, e.g., Settlement Agreement under the Americans with Disabilities Act of 1990 between the United States of America and Yellow Cab Drivers Association, Inc., of Salt Lake City, Utah, DJ 202-77-34 (2003) [www.usdoj.gov/crt/ada.yellocab.htm](http://www.usdoj.gov/crt/ada.yellocab.htm)

Briefing, individuals with disabilities and their service animals may have other protections under other laws including the federal Fair Housing Amendments Act, the federal Rehabilitation Act of 1973, the Air Carrier Access Act, as well as state civil<sup>13</sup> and criminal<sup>14</sup> statutes and local anti-discrimination ordinances.

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13 For example, in Illinois, its a civil rights violation for a landlord to refuse to sell, rent, negotiate the sale or rental of, discriminate against, require an extra charge, or otherwise make unavailable or deny any property to any person who is blind, hearing impaired, or has a physical disability, because such person uses a guide, hearing, or support dog. 775 ILCS 5/3-104.1.

14 For example, in Pennsylvania, an owner, manager, or employee of a public accommodation may be found guilty of violating the Pennsylvania Crimes Code if he or she refuses, withholds, or denies access to an individual with a disability who is using a guide, signal, or service dog, or other aid animal certified by a recognized authority. 18 Pa. C.S.A. § 7325.