SERVICE ANIMALS IN THE WORKPLACE

by

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I. SERVICE AND SUPPORT ANIMALS DEFINED

A. Service Animal. Under Titles II and III of the ADA, a service animal is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. 28 C.F.R. §35.104 (Title II); 28 C.F.R. §36.104 (Title III).

NOTE: This is the same definition as the Florida Service Animal Act, Florida Statute §413.08(1)(d), applicable to public employment, public accommodations and housing.

1. Species. The definition of service animal under Title III of the ADA is limited to dogs, and in certain circumstances, can include miniature horses. 28 C.F.R. §35.136(i); 28 C.F.R. §36.302(c)(9). No other species of animals, wild or domestic, qualify as a "service animal" under Title III of the ADA. 28 C.F.R. §35.104; 28 C.F.R. §36.104.

2. Tasks. A dog must perform work or tasks directly related to the individual's disability. 28 C.F.R. §35.104; 28 C.F.R. §36.104. The definition of service animal under Title III of the ADA specifically excludes animals used for crime deterrence or the provision of emotional support, well-being, comfort, or companionship, on the basis that these benefits do not constitute "work" or "tasks". 28 C.F.R. §35.104; 28 C.F.R. §36.104.

   - Under the ADA, the animal must already have been trained to do a task; a dog "in training" is not sufficient.

     - *Davis v. Ma,* 848 F. Supp. 2d 1105 (C.D. Cal. 2012), *aff'd*, 568 Fed. Appx. 488 (9th Cir. 2014) (unpublished) (Customer's puppy was not a trained service animal able to ameliorate customer's back disability, and therefore, where puppy was 13 weeks old and only had some basic obedience training, customer was still attempting to train puppy to assist him).

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- *But see U.S. v. Dental Dreams, LLC*, 307 F. Supp. 3d 1224 (D.N.M. 2018) (There are no specific requirements as to the amount or type of training for a dog to be deemed a service animal, but the dog should be trained to perform tasks or do work for the benefit of the disabled person, which is a low bar and not a taxing requirement).

    - Although it was undisputed that Boscoe was "in training" and his training would not be complete for up to a year after May 2013, that alone did not preclude a jury from finding Boscoe to be a service animal so long as, at the time of the events at issue, he was trained to perform at least some tasks and work for the benefit of Plaintiff in alleviating his General Anxiety Disorder or PTSD. *Id.*

Compare with the Florida Service Animal Act, which does provide protections for individuals with animals "in training." Florida Statute §413.08(8) specifically states:

> Any trainer of a service animal, while engaged in the training of such an animal, has the same rights and privileges with respect to access to public facilities and the same liability for damage as is provided for those persons . . . accompanied by service animals.

3. Professional Training Not Required. An individual can train their own dog to perform a task.

- *Cordoves v. Miami-Dade County,* 92 F. Supp. 3d 1221, 1231 (S.D. Fla. 2015)

    - Plaintiff alleged her dog Shiloh detected when she was about to have a panic attack. The detection of the panic attack cued Shiloh to "alert" by jumping on Plaintiff, pawing on her, nudging her chin, applying a pressurized licking massage mainly to the left side of her body, and calling Plaintiff's partner Barbara over to assist.

        - Barbara stated she did research online to teach herself how to train Shiloh to help Plaintiff's disability.

        - She provided service-dog training before the incident at issue, and testified that service-dog training was a continuous process.

        - Plaintiff further testified Shiloh could alert even from inside his stroller, where he was during the incident.

        - Also, according to Barbara, Shiloh had an ability to detect and respond to panic attacks "naturally."

            ◊ Defendants argued Plaintiff's assertion that Shiloh does a task "naturally" disproved Shiloh was trained to do that task.

◊ Court held that Shiloh's predisposition to do certain tasks is relevant, and bore upon how much and what kind of individual training Shiloh required to ensure he adequately performed his alleged service task.

◊ Defendants' Motion for Summary Judgment denied.

4. Examples. Work or tasks include, but are not limited to:

- Assisting individuals who are blind or have low vision with navigation and other tasks;
- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds;
- Providing non-violent protection or rescue work;
- Pulling a wheelchair;
- Assisting an individual during a seizure;
- Alerting individuals to the presence of allergens;
- Retrieving items such as medicine or the telephone;
- Providing physical support and assistance with balance and stability to individuals with mobility disabilities; and
- Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.

28 C.F.R. §35.104; 28 C.F.R. §36.104.

B. Assistance Animal. The United States Department of Housing and Urban Development (HUD) uses the term "assistance animal" to cover any animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability. (FHEO Notice: FHEO-2013-01 Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs, Issued: April 25, 2013, at page 2, available at:

https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF).

- No species limitation.

C. <u>Other Terms</u>: Many terms are used when discussing animal accommodations: therapy animal, companion animal, emotional support animal, etc.

D. <u>No Limit</u>. Title I of the ADA does not define service animal or otherwise limit the implication of an animal as a reasonable accommodation request. Technically, there is no limit to what type of animal can be a reasonable accommodation.

II. LAWS THAT APPLY TO ANIMALS IN THE WORKPLACE/PLACES OF BUSINESS

- The Americans with Disability Act ("ADA").
    - Title I – Employment
    - Title II – Public Accommodations (State and Local Government)
        - 28 C.F.R. §35 – Nondiscrimination on the Basis of Disability in State and Local Government Services
    - Title III – Public Accommodations (Commercial)
        - 28 C.F.R. §36 - Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities
- Florida Civil Rights Act ("FCRA").
- Florida Service Animal Act ("FSAA").
- Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA").
- Air Carrier Access Act.
- Individuals with Disabilities Education Act ("IDEA").

III. SERVICE AND SUPPORT ANIMALS IN PUBLIC ACCOMMODATIONS

A. <u>Service Animals Permitted</u>. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a "service animal" by an individual with a disability. 28 C.F.R. §36.302(c)(1). The use of a service animal in public accommodations under the ADA is limited to dogs, and in certain circumstances, miniature horses. 28 C.F.R. §36.302(c)(9).

1. <u>Generally Reasonable</u>. The Title II service animal regulations begin with the overarching proposition that permitting a disabled person use of a service animal is generally reasonable. *See* 28 C.F.R. §35.136(a). *See Alboniga v. Sch. Bd. of Broward County, Fla.,* 87 F. Supp. 3d 1319, 1339 (S.D. Fla. 2015).

2. Inquiry. A public accommodation may only ask: 1) if the animal is required because of a disability; and 2) what work or task the animal has been trained to perform. 28 C.F.R. §36.302(c)(6).

3. No Inquiry if Need is Readily Apparent. A public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

    - A public accommodation shall not ask about the nature or extent of a person's disability

4. Must be More than a Pet. *See Cordoves v. Miami-Dade County,* 92 F. Supp. 3d 1221, 1231 (S.D. Fla. 2015) (Assuming Shiloh helped plaintiff cope with panic attacks that could otherwise require her hospitalization, Shiloh does more than just provide "emotional support, well-being, comfort, or companionship" and jury could find Shiloh is a service animal and not just "a 10 lb. house-pet that provided comfort to her owner").

5. No certification required. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. 28 C.F.R. §35.136(f). No vest, cards or other documentation required.

    - Entity can require that animal have proof of vaccinations required of all dogs by law in the jurisdiction, but requirement that an individual with a service animal maintain liability insurance for the service animal and/or procure vaccinations in excess of the requirements under applicable law is a surcharge prohibited by 28 C.F.R. §35.136(h). *See Alboniga v. Sch. Bd. of Broward County, Fla.,* 87 F. Supp. 3d 1319, 1339 (S.D. Fla. 2015)

6. Exclusion. A public accommodation may ask an individual with a disability to remove a service animal from the premises only if: 1) the animal is out of control and the animal's handler does not take effective action to control it; or 2) the animal is not housebroken. 28 C.F.R. §36.302(c)(2).

    - If a public accommodation properly excludes a service animal under §36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises. (Exclude the animal, not the person.)

7. Control. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of

work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

- A public accommodation is not responsible for the care or supervision of a service animal.

8. Conflicts with Other Patrons.
   a. *Allergies*. Under Title II or III of the ADA, allergies are not sufficient on their own to justify barring a service animal from public spaces. *See* 28 C.F.R. §36.104. *Maubach v. City of Fairfax,* 1:17-CV-921, 2018 WL 2018552 (E.D. Va. Apr. 30, 2018); Guidance U.S. Dept. of Justice, Civil Rights Division "Service Animals."[2]

      - Title II and III of the ADA address the use of public spaces and public accommodation by the disabled, and if allergies were a sufficient justification to bar service animals from accompanying their owners in public accommodations, then because allergies are so common, the disabled who use a service animal would be effectively barred from use of public accommodations. *Maubach v. City of Fairfax,* 1:17-CV-921, 2018 WL 2018552 (E.D. Va. Apr. 30, 2018);

   b. *Phobias*. Under Title II or III of the ADA, fear of dogs is not a valid reason for denying access or refusing service to people using service animals.

      EXAMPLE: Cab driver with fear of dogs, which qualifies as a mental disability, must pick up blind passengers with service animals as an essential function of being a cab driver. *See Ahmad v. State Dept. of Transp.,* HHDCV136045783S, 2015 WL 897478, at *6 (Conn. Super. Feb. 6, 2015) (The court dismissed the employee's complaint against his employer on the basis that the plaintiff provided no authority that in order to accommodate his disability, the defendant-employer should be forced to violate state and federal laws which prohibit discrimination of another individual based on disability).

   c. *Safety/Health Concerns*:

      - Analyze under the "direct threat" defense.

      - Beware of assumptions, including to specific industries.

         - U.S. Food and Drug Administration model "Food Code" 2013[3] provides local, state, and federal governmental jurisdictions guidance for the regulation of food service, retail food stores, or food vending operations. The Code provides that decisions regarding a food employee or applicant with a disability who needs to use a service animal should be made on a

[2] Available at https://www.ada.gov/service_animals_2010.htm.
[3] Available at https://www.fda.gov/downloads/food/guidanceregulation/retailfoodprotection/foodcode/ucm374510.pdf.

case by case basis, and outlines proposed rules for such employees utilizing a service animal in a food handling environment.

9. Access. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.

10. Surcharges. A public accommodation shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets.

    - If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

IV. SERVICE AND SUPPORT ANIMALS IN EMPLOYMENT

A. **Title I of the ADA**. Employment discrimination claims are the exclusive province of Title I. *Parker v. Metro. Life Ins. Co.,* 121 F.3d 1006, 1014 (6th Cir. 1997) (en banc). The structure of the ADA clearly demonstrates Congress' intent for Title I to govern claims arising out of employment. Title III prohibits discrimination on the basis of a disability in the enjoyment of goods and services in places of public accommodation. An employee claiming discrimination is not seeking goods and services under the language of Title III. *Schultz v. Alticor/Amway Corp.,* 177 F. Supp. 2d 674 (W.D. Mich. 2001), *aff'd,* 43 Fed. Appx. 797 (6th Cir. 2002) (unpublished). Employee requests for a service or support animal should be handled on a case-by-case basis according to the same framework as any other accommodation request.

1. Reasonable Accommodation. In general, a reasonable accommodation is any modification or adjustment to the work environment that enable a disabled employee to (1) perform the essential functions of his or her position, *or* (2) "enjoy equal benefits and privileges of employment as are enjoyed by [his or her employer's] other similarly situated employees without disabilities." 29 C.F.R. §1630.2(o)(1).

2. When is the process triggered? Under the regulations, the interactive process obligation is triggered by knowledge of the need for an accommodation. As a general rule, an employee must inform an employer about the need for a reasonable accommodation.

    - *Gaston v. Bellingrath Gardens & Home, Inc.,* 167 F.3d 1361, 1363 (11th Cir. 1999) (holding that Eleventh Circuit precedent that the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made).

- *But see Assaturian v. Hertz Corp.,* CIV. 13-00299 DKW KS, 2014 WL 4374430, at *3 (D. Haw. Sept. 2, 2014).

    - Employee with Chronic Ulcerative Proctitis, Ulcerative Colitis, Depression, Dysthemic Disorder and Adjustment Disorder brought a Shih Tzu named Sugar Bear to work for about a year, without permission and without informing off-site supervisors. Employee claimed that he could control his emotions and work-related stress with his dog around, and employees remarked how the dog had a positive effect on his mood and emotions and calmed him.

    - The employer learned that the employee was bringing the dog to work, and employee confirmed that the dog was his. Undisputed that conversation about the dog took place.

    - Supervisor claimed that employee never mentioned during the course of their conversations about bringing the dog to work that plaintiff had a disability nor did he explain that bringing the dog to work was related to any alleged disability or health condition.

    - Employee claimed that his supervisor asked him if he had any paperwork allowing him to bring Sugar Bear to work, and he told her that he had "a service animal card" and that Sugar Bear helped with his "anger issues," and "helped control [his] 'emotions' and 'anger.'"

    - The disputed record precluded summary judgment.

      TIP: Document, document, document.

3. Is the person a qualified person with a disability? Employee must show that they have a disability, and that they can perform the essential functions of the job with or without an accommodation.

    - *See Arndt v. Ford Motor Co.,* 247 F. Supp. 3d 832 (E.D. Mich. 2017), *aff'd*, 716 Fed. Appx. 519 (6th Cir. 2017) (unpublished).

        - Employee suffering from Post-Traumatic Stress Disorder ("PTSD") alleged employer failed to accommodate request to have service dog.

        - Employee argued no evidence in the record that having a service dog with employee at all times as a manufacturing supervisor at the plant, including on the factory floor, would have enabled him to perform the essential functions of his job as a process coach.

        - Employer argued this relieved it of liability for a failure to engage in good faith in the interactive process.

- Employee's treating psychologist never opined that his service dog could enable him to perform specific job functions he was incapable of performing due to his PTSD.

- It was employee who suggested to his physician that he needed to have his dog with him and employee informed her that his dog was trained to get in between him and strangers and to sense when he was getting anxious.
- His physician had no professional knowledge of how service dogs were trained and could not express an opinion on how the dog would have helped employee to deal with certain situations on the plant floor when his PTSD otherwise would prevent him from performing his job.

- Physician did not mention how the dog would assist employee on the plant floor. She only mentioned that the dog helped employee to relax in social situations, going into stores, movie theaters and other public places.

- Physician opined that if employee could have his dog in the car with him on his commute to work and under his desk at his office, the dog would provide calming interventions that would enable employee to complete his job duties, but she never opined about employee's ability to meet the challenges presented by the plant floor environment with the assistance of his service dog.

- Physician testified that she was unfamiliar with the work environment at the plant and is not qualified to suggest specific accommodations, and questioned whether employee could sustain a position in the manufacturing environment for any length of time with or without a service dog.

- The Court found that the physician never actually opined on the most critical question that employer Ford was attempting research—*i.e.* what specific job functions employee was prevented from performing due to his PTSD and how the service dog would assist employee in enabling him to perform those functions.

- The dog's trainer testified about the dog's capabilities but offered no testimony about the specifics of how the dog would enable employee to be able to perform the essential functions of his job as a production supervisor at the Ford plant.

- Trainer was unable to opine on how the dog would react or, more specifically, how the dog would be able to assist the employee in the event of a trigger, to continue to perform his manufacturing supervisor responsibilities.

- Employer's expert opined that there was no evidence that employee's symptoms could be adequately controlled by presence of his service dog.

- Court found employee thus failed to demonstrate that he was qualified for his position as a manufacturing supervisor at an automobile assembly plant with or

without a reasonable accommodation, and, thus, he could not establish a prima facie case of discrimination against his employer under ADA.

TIP: Ensure prescribing physicians/trainers understand job functions, duties, environment, etc.

NOTE: An employer may seek only medical information that is sufficient to explain the nature of the disability, the individual's need for reasonable accommodation, and how the requested accommodation will assist the individual to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of the workplace. Any information obtained in connection with the reasonable accommodation request must be kept confidential.

4. Is the animal a reasonable accommodation? A reasonable accommodation is any modification or adjustment to the work environment that enable a disabled employee to (1) perform the essential functions of his or her position, *or* (2) "enjoy equal benefits and privileges of employment as are enjoyed by [his or her employer's] other similarly situated employees without disabilities." 29 C.F.R. §1630.2(o)(1).

5. Does the animal assist the employee is carrying out the essential functions of the job?

   - *Schultz v. Alticor/Amway Corp.*, 177 F. Supp. 2d 674 (W.D. Mich. 2001), *aff'd* 43 Fed. Appx. 797 (6th Cir. 2002), the court held that an employer was not required to accommodate an employee with hearing loss and mobility issues by allowing him to bring his service dog to work because the animal was not needed to carry out the "essential functions" of his job. Notably, the plaintiff admitted in a letter to his employer that he does not require the service dog at work. "I don't drop think [sic] often enough to have her pick them up (Back problems) so she would not [sic] a great benefit in the office."

   - *U.S. v. Dental Dreams, LLC,* 307 F. Supp. 3d 1224 (D.N.M. 2018) (to survive summary judgment on failure to accommodate claim under the ADA based on use of a service animal, plaintiff must provide evidence of specific work or tasks the animal was trained to perform for the plaintiff's benefit.)

   - *Clark v. Sch. Dist. Five of Lexington and Richland Ctys.,* 247 F. Supp. 3d 734 (D.S.C. 2017).

     - Whether teacher with PSTD and Panic Disorder with Agoraphobia was able to perform essential functions of her job without accommodation of a service animal was material fact issue precluding summary judgment.

     - Employee argued she was unable to do her job without suffering anxiety, panic, and weight loss. "I am able to perform my duties; however, without the assistance of my dog, the following situations place me in extreme jeopardy: monitoring students at times when they are released en mass (sic) rather than in

an orderly manner such as fire drills, emergency evacuations, or when students are released to the front foyer for lunch during inclement weather; attending meetings at other schools which are held at student dismissal time; attending district meetings or in-service training days, or other occasions when large crowds are expected."

- Employer removed several job functions, but employee still advised that her PTSD limited her ability to "function as a teacher," and she continued to experience anxiety, weight loss, and panic attacks.

- Court held that this created a question of fact as to whether employee was able to perform the essential functions of teaching without accommodation.

6. Equal Enjoyment. Rather than proceeding under the first part of the "reasonable accommodation" definition, an employee may plead the second part of the "reasonable accommodation" definition: equal enjoyment of the privileges and benefits of employment perhaps with more success.

   - *See Branson v. West*, No. 97 C 3538, 1999 WL 311717, at *12 (N.D. Ill. May 11, 1999) (summary judgment for employee where employee was able to perform all the functions of her job without her service dog, but without the dog to pull her manual wheelchair, she suffered fatigue and stress on her upper extremities, hindering her from enjoying the "privileges and benefits" of employment equal to those of similarly situated employees without disabilities. *Id.* at *2, 11-13 (noting that the hospital did not dispute the employee's claim that a manual wheelchair provided her more independence than an electric wheelchair)).

7. Supporting Documentation. Documentation should demonstrate the animal will ameliorate the disability and allow employee to better perform the duties of the job.

   - *Edwards v. U.S. E.P.A.,* 456 F. Supp. 2d 72 (D.D.C. 2006) (Employee verbally requested permission to bring his 10-week-old puppy to the office. Employee told employer that his doctor had recommended that he bring the dog to work to ameliorate work-related stress.)

     - Employer requested that employee submit medical documentation and information on the dog's training. Employee responded by submitting a memorandum detailing his medical condition and a note from his doctor.

     - However, the doctor disclaimed expertise on the concrete benefits that the dog could confer, emphasizing that "[t]he need for the dog is beyond the realm of [his] discussion here," but also expressed support for what he described "as a holistic and experimental approach" and concluded, "I would say 'go for it!' It certainly cannot hurt."

- Employer asked employee "if he could perform the duties of his job without the dog," and that employee responded that "he had a very easy job and could perform his duties without the dog, but he felt he could do a better job with the dog."

- Employer rejected the request.

- Court found for employer, holding that employee did not present objective evidence that bringing his young puppy to the office would have ameliorated his stress and thus allowed him better to perform the duties of his job.

8. Interactive Process. Once an employer becomes aware of the need for an accommodation (*i.e.*, an employee requests an accommodation to bring his or her animal to work), that employer has a mandatory obligation to engage in an "interactive process" with the employee to identify the limitations caused by the employee's disability and potential reasonable accommodations that could overcome those limitations. *Assaturian v. Hertz Corp.*, 2014 WL 4374430, at *8 (D. Haw. Sept. 2, 2014).

   a. *Consideration*. Beware of dismissing the request for a service animal without due consideration.

      - *Baker v. Dupnik*, 2011 WL 13183250, at *29–30 (D. Ariz. Mar. 31, 2011).

        - Merely going through the act of an interactive process meeting, alone, does not negate a finding that an employer failed to act in good faith.

        - To show cooperative behavior, the employer should meet with the employee, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show signs of having considered the employee's request, and offer and discuss available alternatives when the request is too burdensome.

        - An employer "may not merely speculate that a suggested accommodation is not feasible."

        - Employee requested a "brace" dog due to her mobility impairments.

        - Employee alleged that her service dog assisted her by walking "beside me on my left side, at my pace, so that I can support myself with his body when I collapse. He takes a stationary stance once I start falling so that I don't collapse all the way to the floor. His retrieving skills include getting items I have dropped so that I don't put myself in precarious positions trying to get items that are otherwise out of my reach."

- Prior to meeting with the employee, Lt. Sacco, the decision maker, and others had already determined that the employee's request to bring her service dog to work would be denied.

    - Chief Gagnepain, Lt. Sacco's superior, found it "absurd" that the employee would request a dog to fall on.

    - Employer did little, if anything to educate themselves about how the employee's service dog could assist her while at the Communications Center or what impact the dog's presence would have at the Communications Center.

    - Chief Gagnepain had no information regarding the use of service dogs by persons with disabilities.

    - Ms. Molina conceded that she did not take any steps to determine what it was that the employee's service dog did for her.

    - Employee was not permitted to bring her service dog to the meeting to demonstrate or explain how he could assist her at the Communications Center.

    - Statements in the record supported the conclusion that Lt. Sacco assumed and speculated, without questioning the employee or others, that the presence of the service dog would require a change in the cleaning schedule, that the dog would distract employees, and that the dog would be a trip hazard.

    - When another Communications Center employee claimed an allergy to dogs, no inquiry was made to confirm this contemporaneously to the decision to deny the employee's request, and later, the co-worker stated that he had never been medically diagnosed with an allergy to dogs and that the presence of a dog in the Communications Center may not affect him so long as he did not have contact with the dog.

    - No consideration given to scheduling the employee and any employees with allergies so that their shifts did not overlap.

Beware of insisting on alternative accommodations.

- Employee also demonstrated genuine issues of material fact as to whether employer' alternative accommodation was reasonable under the applicable statute.

- Prior use of crutches at the Communications Center did not, standing alone, support the notion that crutches were a reasonable alternative accommodation to the service dog.

- Employer *required* employee to use the crutches while at work regardless of whether she felt she needed them and regardless of whether her doctor ordered her to use them.

- Employee's treating physician, Dr. Arnold, was of the opinion that employee *should not* use crutches when she was not experiencing pain because such use would prevent maintaining "good muscle tone and good mobility." Prolonged use of crutches could cause neck, shoulder, and hand pain.

- "Changes that fail to address the employee's limitations are not accommodations and thus, do not satisfy the employer's duty under the Act."

- *U.S. v. Dental Dreams, LLC,* 307 F. Supp. 3d 1224 (D.N.M. 2018) (question for the jury to determine whether employer engaged in the interactive process in good faith and whether the breakdown in the interactive process was caused by employer's obstruction and refusal to communicate and propose further accommodations, when viewing the evidence in employee's favor, a jury could find that employer already closed off the possibility of allowing any service dog, however well-trained, in the office, refused to discuss how a service dog could assist employee, refused to consider any paperwork employee claimed to have regarding the dog's training, and did not consider or propose alternative accommodations).

- *Assaturian v. Hertz Corp.,* CIV. 13-00299 DKW KS, 2014 WL 4374430, at *3 (D. Haw. Sept. 2, 2014) ("It appears that neither side fully participated in the interactive process, if indeed, it had been triggered.").

  - A reasonable factfinder could conclude that Assaturian was in a superior position to propose an alternative accommodation and to provide documentation to support his request to bring Sugar Bear to work.

  - On the other hand, Hertz did not establish that it "did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith."

b. *Limited Request for Information*. Regarding a service animal request, the employer should request just enough information to learn (1) why the animal is necessary; (2) what the animal does for the employee; (3) that the animal is trained; (4) that the animal will not disrupt the workplace; and (5) that the animal will be able to

safely navigate the workplace. *See Arndt v. Ford Motor Co.,* 247 F. Supp. 3d 832, 858-65 (E.D. Mich. 2017).

c. *Barriers*. An employer is required to address any barriers to an employee's ability actually to *use* an assistive device, such as a service animal, effectively in the workplace. *McDonald v. Dep't of Envtl. Quality,* 214 P.3d 749, 760 (Mont. 2009) (holding that the employer was obligated to provide the reasonable accommodation of nonskid floor coverings for an employee's service dog).

d. *Reasonable Parameters*. An employer is also allowed to place reasonable parameters on the animal in the workplace, such as requiring that the animal be fully trained and capable of functioning appropriately in the workplace.

- *See Mennen v. U.S. Postal Serv.,* EEOC Appeal Decision No. 01A13112 (Sept. 25, 2002)
    - EEOC rejected a postal employee's claim that he was discriminated against because his employer would only allow him to keep his bird on the premises if the bird stayed in its cage (which he claimed made the bird unhappy) and the cage was kept clean.
    - The EEOC stated that a disabled employee is not entitled to accommodations of his or her choice, but rather, the employee is entitled to an effective accommodation.

e. *Training Leave*. Leave to obtain training for service animal may be a reasonable accommodation.

- *Nelson v. Ryan,* 860 F. Supp. 76 (W.D.N.Y. 1994)
    - Refusal to provide blind employee with *paid* leave for training guide dog did not deny benefit based upon handicap, and allowing employee to use accrued sick, annual, or personal leave credits for the seeing eye dog training was reasonable accommodation.
    - Paid leave to obtain training for guide dog was distinguishable from employer providing fellow visually impaired employees with equipment such as special computers and training as reasonable accommodation with no charge to leave credits, because employee owned guide dog personally.

f. *Explanation of Denial*. If an employer chooses to deny a request for a reasonable accommodation, it should provide an explanation for the denial and/or suggest an alternative accommodation.

- *But see Arndt v. Ford Motor Co.,* 17-1415, 2017 WL 6375584, at *8 (6th Cir. Dec. 13, 2017). "Moreover, an employer is not required to counter with an

alternative accommodation in order to have participated in the interactive process in good faith."

- *Miranda v. Schlumberger Tech. Corp.,* No. SA-13-CA-1057-OLG (HJB), 2014 WL 12489995, at *4 (W.D. Tex. Nov. 24, 2014). An employer has the final discretion regarding the most effective accommodations that satisfy both an employee's and the employer's needs, and the employer is not obligated to adhere to the employee's preference.

9. Unreasonable Accommodations. An employer is *not* required to provide a reasonable accommodation when: 1) the employer can demonstrate that the accommodation would impose an "undue hardship" on the operations of the employer; or 2) when a requested accommodation would pose a direct threat to the health or safety of the employee, other employees, or the public. 42 U.S.C. §12112(b)(5) (A); 29 C.F.R. §§1630.9(a) and 1630.15(d). *See* 29 C.F.R. §1630.2(r).

   a. *Undue Hardship*. Undue hardship is defined as an action requiring significant difficulty or expense. 42 U.S.C. §12111(10)(A). An accommodation is considered an undue hardship if it requires significant difficulty or expense for the employer in light of various factors:

      - The nature and cost of the accommodation needed;

      - The overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources or the impact otherwise of such accommodations upon the operation of the facility;

      - The employer's overall financial resources; the overall size of the employer's business with respect to the number of its employees; and the number, type, and location of its facilities;

      - The type of operation, including the composition, structure, and functions of the employer's workforce; and the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer;

      - The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business. 29 CFR §1630.2(o).

      - Co-worker allergies that cannot be mitigated can create an undue burden for the employer.

        - *Bonnette v. Shinseki,* 907 F. Supp. 2d 54, 79 (D.D.C. 2012)

- Employer allowed employee to bring service animal to work, but some co-workers were allergic to dog hair.

- Employer arranged for more frequent vacuuming, paid $800 for a special air filter for dog dander, and addressed mistreatment from her co-workers about her service dog.

- *Maubach v. City of Fairfax,* 2018 WL 2018552, at *1 (E.D. Va. Apr. 30, 2018)

  - Employee, a 911 dispatcher, was allowed to bring her dog to work as an emotional support animal to calm her when she suffered from panic attacks on a trial basis.

  - The undisputed material facts demonstrated that the dog's presence in the Emergency Operations Center ("EOC") imposed an undue hardship because the dog caused several individuals to suffer from allergies with significant discomfort, and there was no record evidence that showed plaintiff could have taken steps to alleviate or minimize the allergies.

  - Employee presented an affidavit in which she claims to have cleaned up after the dog and to have vacuumed his hair, but employee did not dispute that the complaints continued even after she vacuumed the dog's fur or dander.

  - Although another employer might be able to give employee or allergic employees a different work space, that is not an option here because it would be prohibitively expensive for employer to provide a new EOC solely for employee or solely for allergic employees. Employee and her co-workers needed to be stationed in the EOC to answer 911 calls and to dispatch emergency assistance, there was no way to allow the dog in the EOC while also eliminating the risk of allergic reactions to employees.

    ◊ The Court distinguished this case from a public accommodations case, explaining that if the dog were a service animal under Title II or III of the ADA, then allergies would not be sufficient on their own to justify barring the dog from public spaces. *See* 28 C.F.R. §36.104.

  - Titles II and III of the ADA address the use of public spaces and public accommodation by the disabled, and if allergies were a sufficient justification to bar service animals from accompanying their owners in public accommodations, then because allergies are so common, the disabled who use a service animal would be effectively barred from use of public accommodations.

- Undue burden can be caused by the attention employee must give to care for the dog.

    - *See Maubach v. City of Fairfax,* 2018 WL 2018552, at *1 (E.D. Va. Apr. 30, 2018).

        - Undue burden when employee left her emergency response post without a proper substitute dispatcher to walk service animal, and thereby created a risk that emergency calls would be missed or that personnel would not be properly dispatched to the locations where they were needed.

        - Although this problem might be alleviated by having employee work the day shift where there would be more dispatchers available to cover for employee in the event she needed to take time off to address her disability, employee refused to consider that as an alternative accommodation.

b. *Direct Threat*. "Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

- The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.

- This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

- In determining whether an individual would pose a direct threat, the factors to be considered include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.

10. Privacy. An employer should not tell other employees that someone is receiving a reasonable accommodation, because this usually amounts to a disclosure that the individual has a disability.[4] The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to co-workers. EEOC suggests:

[4] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, available at https://www.eeoc.gov/policy/docs/accommodation.html#20.

- An employer may certainly respond to a question from an employee about why a co-worker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that their privacy would similarly be respected if they found it necessary to ask the employer for some kind of workplace change for personal reasons.

V. AMERICANS WITH DISABILITY ACT.

A. General Prohibition. The ADA prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

B. "Disability." The ADA defines disability broadly as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. §12102(1)(A). "Major life activities" include seeing, hearing, performing manual tasks, reading, concentrating, thinking, and learning. 42 U.S.C. §12102(2)(A).

- The ADA Amendments Act of 2008 (ADAAA) retained the basic definition of "disability", but broadens the definition by modifying key terms of that definition by: expanding the definition of "major life activities"; redefining who is "regarded as" having a disability; modifying the regulatory definition of "substantially limits"; specifying that "disability" includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active; and prohibiting consideration of the ameliorative effects of "mitigating measures" when assessing whether an impairment substantially limits a person's major life activities, with one exception.

C. Prominent ADA Titles/Sections. The ADA is divided into various titles (or sections) that relate to different areas of public life.

1. Title I: Employment. Prohibits covered employers from discriminating against an individual on the basis of his or her disability in regard to hiring, compensation, advancement, terms and conditions of employment, or termination.

2. Titles II & III: Public Accommodations. Govern accessibility standards and protect disabled individuals' access to facilities, goods, services, privileges, etc. Title II applies to public entities, whereas Title III applies to private entities that are places of public accommodation. Generally speaking, Titles II and III require governmental agencies and private businesses to make their goods and services as accessible to individuals with disabilities as they are to those without disabilities.

D. Agency Enforcement and Regulations.

1. Enforcement of the ADA. The EEOC regulates and enforces Title I, while the DOJ regulates and enforces Titles II and III. However, all state and local governments are covered by Title II—which the DOJ enforces—whether or not they are also covered by Title I (which the EEOC enforces). 29 C.F.R. §1630, Appendix. So, a state or local governmental employer in an ADA employment discrimination case is covered by both Title I and II and the DOJ may enforce the ADA in such a case.[5]

2. Regulations. Section 204(a) of Title II and §306(b) of Title III direct the Attorney General[6] to promulgate regulations to carry out the provisions of Titles II and III, other than certain provisions dealing specifically with transportation. 42 U.S.C. §§12134, 12186(b) (2011); 75 Fed. Reg. 43461.

E. Standing under Titles II and III.

1. General. Article III of the United States Constitution requires three threshold elements in order to have standing:[7]

   - an injury-in-fact;
   - a causal connection between the asserted injury-in-fact and the challenged action of the defendant;[8] and
   - the injury will be redressed by a favorable decision.

2. Injury-in-Fact. An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[9] When injunctive relief is sought—as in an ADA accessibility case under Titles II or III[10]—an additional showing is required for standing: "In addition to

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[5] *See, e.g.,* DOJ's June 2014 settlement announcement with Florida State University. Available at http://www.justice.gov/opa/pr/justice-department-reaches-settlement-florida-state-university.

[6] The Attorney General is the head of the DOJ. 28 U.S.C. §503.

[7] *Houston v. Marod Supermarkets, Inc.,* 733 F.3d 1323, 1328 (11th Cir. 2013); *New v. Lucky Brand Dungarees Stores, Inc.,* 51 F. Supp. 3d 1284, 1285 (S.D. Fla. 2014).

[8] In the context of an ADA accessibility case, a causal connection exists where the barriers to access are under the defendant's ownership or direct control. *See De Palo v. Walker Ford Co., Inc.,* No. 8:15-cv-169-T-27AEP, 2015 WL 4506890, at *3 (M.D. Fla. July 23, 2015).

[9] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted); *De Palo,* 2015 WL 4506890 at *2. When a disabled person is entitled to access a private or public entity and that access is limited on the basis of his or her disability, this constitutes an invasion of the individual's statutory rights and an injury-in-fact for the purposes of standing. *Houston,* 733 F.3d at 1332; *De Palo,* 2015 WL 4506890 at *2.

[10] As discussed under Sections III and IV of this outline, *infra*, other than reasonable attorneys' fees, injunctive relief is the only remedy available to plaintiffs suing under Titles II or III of the ADA. *Houston,* 733 F.3d at 1329; *Newman v. Piggie Park Enters., Inc.,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968) (noting that Title II of the Civil Rights Act of 1964 permits injunctive relief only).

past injury, a plaintiff seeking injunctive relief must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future."[11]

- "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party shows 'a real and immediate—as opposed to a merely conjectural or hypothetical—threat of *future* injury.'"[12]

- "Immediacy in this context is an elastic concept, and 'means reasonably fixed and specific in time and not too far off.'"[13]

3. Testers. A plaintiff's status as an ADA compliance "tester" rather than a bona fide patron does not deprive him or her of standing to sue for violations of Titles II or III. A disabled individual's right to access "*does not* depend on the motive behind" his or her attempt to enjoy the goods, services, or facilities.[14]

4. Serial Litigants. A plaintiff's history of filing "serial" lawsuits does not deprive him or her of standing to sue for violations of Titles II or III. The Southern District of Florida held that the number of ADA lawsuits filed by a Plaintiff is not itself indicative of an improper motive.[15] The Court held that the legal right created by the ADA *does not* depend on the motive behind Plaintiff's attempt to enjoy the facilities. Therefore, regardless of Plaintiff's true motive for visiting Defendant's gas station, he was nevertheless protected by the ADA from alleged discrimination on the basis of his disability.

5. Other Standing Issues.

   a. *"Near Future" = Standing.*

   - *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336, 1339-1340 (11th Cir. 2013) (serial ADA tester—271 previous cases—had standing to assert a Title III claim regarding access to supermarket located 31 miles from his home where supermarket was along a "routine travel route" and he "definitely" anticipated traveling that route "in the near future")

   - *But see, Access for the Disabled, Inc. v. Rosof,* 2005 WL 3556046, *2 (M.D. Fla. 2005) (plaintiff insufficiently pled the threat of a real future injury even though he alleged that he intended to return to the site "annually" and in the "near future" to verify compliance with ADA; the Court noted that the plaintiff

[11] *Houston,* 733 F.3d at 1328 (internal quotation marks omitted).
[12] *Houston,* 733 F.3d at 1328 (quoting *Shotz v. Cates,* 256 F.3d 1077, 1081 (11th Cir. 2001)). *See also New,* 51 F.Supp.3d at 1285; *Stevens v. Premier Cruises, Inc.,* 215 F.3d 1237, 1239 (11th Cir. 2000).
[13] *New,* 51 F.Supp.3d at 1285 (quoting *Houston,* 733 F.3d at 1339-1340); *Payne v. Gulfstream Goodwill Industries, Inc.,* No. 15-cv-81120-BLOOM, 2015 WL 6123529, *4 (S.D. Fla. Oct. 19, 2015).
[14] *Houston,* 733 F.3d at 1332-1334, 1336; *Payne,* 2015 WL 6123529 at *4; *De Palo,* 2015 WL 4506890 at *2.
[15] *Johnson v. Griffin Prop. Inv., LLC,* 18-CV-62577, 2019 WL 451190, at *3 (S.D. Fla. Feb. 5, 2019).

did not reside in the county where the facility was located and did not allege any regular contact with the facility)

- *Stevens v. Premier Cruises, Inc*., 215 F.3d 1237, 1238-1239, 1242-1243 (11th Cir. 2000) (plaintiff took trip aboard defendant's cruise ship and allegedly encountered multiple ADA violations; plaintiff's allegation that she would take another cruise aboard defendant's ship "in the near future" was sufficient to allege standing for injunctive relief under Title III).

- *Seco v. NCL (Bahamas), Ltd*., 588 Fed. App'x 863, 866 (11th Cir. 2014) (noting that future injury requirement was "satisfied" where plaintiff alleged that she would utilize defendant's services "in the near future").

- *De Palo v. Walker Ford Co., Inc*., No. 8:15-cv-169-T-27AEP, 2015 WL 4506890, at *3 (M.D. Fla. July 23, 2015) (plaintiff had standing where his complaint alleged that he intended to visit defendant's place of business "again in the near future").

b. *Past Injury is Inadequate*. *Shotz v. Cates,* 256 F.3d 1077, 1081-1082 (11th Cir. 2001) (plaintiffs' complaints did not allege facts giving rise to an inference that defendant will cause them future discrimination where the complaint alleged only past incidents of discrimination).

c. *Unspecific "Someday" Allegations do not Give Standing*.

- *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that [Article III] require[s].")

- *New v. Lucky Brand Dungarees Stores, Inc*., 51 F.Supp.3d 1284, 1285-1286 (S.D. Fla. 2014) (blind customer brought Title III action against clothing retailer for discriminatory use of touchscreen point of sale devices that required blind customers to disclose personal identification numbers to store employees when making debit card purchases; dismissed for lack of standing because plaintiff did "not adequately plead a risk of imminent future injury" by merely pleading an intent to make future debit card payments at the store; complaint "fails to expressly identify a reasonably fixed period of time not too far off within which Plaintiff intends to visit" the store, and does not imply such an intent where it did not allege that plaintiff frequently stops at the store or that it is in close proximity to where he lives or frequents).

- *Payne v. Gulfstream Goodwill Industries, Inc*., No. 15-cv-81120-BLOOM, 2015 WL 6123529, *4 (S.D. Fla. Oct. 19, 2015) (plaintiff's "vague, conclusory allegation of future harm, devoid of factual enhancement" did not give her

standing; although plaintiff alleged that she regularly travels through the counties in which defendant's stores are located, she made "no mention of specific, future plans to visit the Subject Property, nor does she include concrete facts which would allow for an inference of the same;" plaintiff merely alleged that she "desires to visit" the property and "plans to return to" the property; although plaintiff "need not provide Defendant or the Court with a date-certain on which she plans to return to the Subject Property, the single nebulous allegation that she will visit the Subject Property in the future is inadequate")

d. *"Concrete" Injury Required*.

- *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (May 16, 2016) (Plaintiff brought a putative class action against a company that operated an online background search service, alleging that information provided about him in a background report was inaccurate. Plaintiff asserted that the company willfully violated the Fair Credit Reporting Act ("FCRA") by failing to adopt procedures to ensure the accuracy of its reports. The Ninth Circuit held that the *Spokeo* complaint sufficiently alleged the required injury-in-fact for standing; but the Supreme Court disagreed and remanded the case. The Court found that the Ninth Circuit failed to consider whether the alleged injury was sufficiently "concrete." To qualify as a "case or controversy" for jurisdiction purposes, there must be a concrete injury (i.e., it must "actually exist") that is "real" rather than "abstract." The Court reasoned that the *Spokeo* complaint was deficient because a violation of the FCRA's procedural requirements may result in no harm. On remand, the Ninth Circuit was instructed to consider "whether the particular procedural violations alleged . . . entail a degree of risk sufficient to meet the concreteness requirement.")

    - Following remand, the Ninth Circuit once again held that the Plaintiff had standing because the Plaintiff alleged a statutory cause of action and potential harm to him, because Congress crafted those FCRA provisions to protect consumers' concrete yet intangible interests in accurate credit reporting. Spokeo appealed, and on January 22, 2018, the Supreme Court denied Spokeo's petition.

    - Although *Spokeo* did not involve the ADA, some believe that its holding may make it more difficult for Title III plaintiffs to have standing.[16] Such people question whether – under *Spokeo*'s analysis – an ADA tester (not a bona fide patron) suffers a "concrete" injury; whether a plaintiff's serial status has any bearing on whether he or she suffered a concrete injury; and whether plaintiffs can allege all barriers they observe or only those that actually limit their access to the public accommodation.

    - On the other hand, *Spokeo* does not appear to limit a disabled individual's right to full access under Title III. The Eleventh Circuit has held that an

[16] *See, e.g.*, *Spokeo May Raise the Bar for Standing in ADA Title III Cases*, John W. Egan, LEXOLOGY (June 1, 2016).

injury-in-fact exists when a disabled person is denied full access on the basis of his or her disability. *Houston*, 733 F.3d at 1332; *De Palo*, 2015 WL 4506890 at *2. Under those decisions, violations of Titles II and III of the ADA necessarily result in harm (denial of right to full access)—unlike a violation of the FCRA's procedural requirements as was the case in *Spokeo*. Also, see the "serial litigant" case cited above.

VI. TITLE III OF THE AMERICANS WITH DISABILITIES ACT ("TITLE III")

A. General Overview of Title III of the Americans with Disabilities Act.

1. Private Entities Constituting Public Accommodations. Title III applies to any "private entity" that is considered a "place of public accommodation."

   a. *Private Entities*. Title III defines a "private entity" simply as "any entity other than a public entity" as defined in Title II. 42 U.S.C. §12181(6). Under Title II, public entities are any state or local government and any department or agency of a state or local government. 42 U.S.C. §12131(1).

   b. *Public Accommodations*. Title III provides that private entities are considered places of public accommodation if their operations affect commerce and fall within at least one of the following 12 categories:

   - An inn, hotel, motel, or other place of lodging;
   - A restaurant, bar, or other establishment serving food or drink;
   - A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
   - An auditorium, convention center, lecture hall, or other place of public gathering;
   - A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
   - A laundromat, drycleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
   - A terminal, depot, or other station used for specified public transportation;
   - A museum, library, gallery, or other place of public display or collection;
   - A park, zoo, amusement park, or other place of recreation;

- A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

- A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; or

- A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. §12181(7).

c. *Exemptions*. Title III does "not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000–a(e))[17] or to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. §12187.

2. Prohibited Discrimination. Title III **requires** places of public accommodation to make their goods, services, and accommodations equally accessible to individuals with disabilities:

> 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.

42 U.S.C. §12182(a).

3. Remedies. Title III adopts the remedies set forth in §204(a) of the 1964 Civil Rights Act (42 U.S.C. §§2000a-3(a)). 42 U.S.C. §12188(a). These remedies include:

a. *Injunctive Relief*. 42 U.S.C. §2000a-3; 28 C.F.R. §§36.501(a) and (b).

b. *Reasonable Attorneys' Fees and Litigation Expenses (including experts' fees) to the Prevailing Party*. 42 U.S.C. §2000a-3; 42 U.S.C. §12205; 28 C.F.R. §36.505; *Lovell v. Chandler*, 303 F.3d 1039, 1058-1059 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (Title II case).

c. *Monetary Damages*. Only recoverable in an action brought by the Attorney General in cases of general public importance or a "pattern or practice" of discrimination is alleged. 42 U.S.C. §12188(b)(2)(B); *Powell v. National Bd. of Medical Examiners*, 364 F.3d 79, 86 (2d Cir. 2004); *Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002); *Hobleman v. Kentucky Fried Chicken*, 260 F. Supp. 2d 801,

[17] 42 U.S.C. §2000a(e) exempts "a private club or other establishment not in fact open to the public . . . ."

805 (D. Neb. 2003); *Dorsey v. Detroit*, 157 F. Supp. 2d 729, 733 (E.D. Mich. 2001); *U.S. v. Morvant*, 843 F. Supp. 1092, 1095-1096 (E.D. La. 1994).

4. Increased Prevalence of Title III Claims. The number of ADA Title III lawsuits filed in federal court in 2018 hit a record high of 10,163 – up 34% from 2017 when the number was a mere 7,663.[18] This is a substantial increase from 2,722 in 2013 and 4,789 in 2015.[19] Florida is third behind New York and California, leading other states by a wide margin, with 1,941 ADA Title II federal cases in 2018, compared to the next highest State—Texas with only 196.[20]

5. Liability Under Title III.

   - Multiple entities or individuals may be simultaneously liable under Title III as the owner, lessee, or operator of a place of public accommodation.[21]

     EXAMPLE: If an office building contains a law office, both the owner of the building and the law office are required to comply with the ADA and may be liable under Title III.[22]

   - Although entities such as the law office and the building owner in the foregoing example may contract for an indemnification provision between themselves, neither entity is able to contract away liability under Title III. In other words, both entities remain fully liable for compliance with the ADA notwithstanding any indemnification agreement between the parties against losses caused by a failure to comply with the ADA.[23]

VII. TITLE II OF THE AMERICANS WITH DISABILITIES ACT ("TITLE II")

A. General Overview of Title II of the Americans with Disabilities Act.

1. General Overview of Title II of the ADA.

   a. *Public Entities*. Title II applies to public entities, which the statute defines as any state or local government, any department or agency of a state or local government,

[18] "Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000," Seyfarth Shaw LLP (Jan. 22, 2019), available at https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

[19] "ADA Title III Lawsuits Continue to Rise," Seyfarth Shaw LLP (Jan. 15, 2016), available at http://www.adatitleiii.com/2016/01/ada-title-iii-lawsuits-continue-to-rise-8-increase-in-2015/. Discussing the rise of Title III ADA cases in general, i.e., not Title III just website accessibility cases.

[20] See Note 14, *supra.*

[21] *Botosan v. Paul McNally Realty,* 216 F.3d 827, 832-834 (9th Cir. 2000); *Howard v. Cherry Hills Cutters, Inc*., 979 F. Supp. 1307, 1309 (D. Colo. 1997).

[22] *Botosan,* 216 F.3d at 832; *Howard,* 979 F. Supp. at 1309 n. 1.

[23] *Botosan,* 216 F.3d at 832-834; *Connors v. Orlando Regl. Healthcare System, Inc.,* No. 6:08CV206-ORL35-DAB, 2009 WL 2524568 at *2 (M.D. Fla. June 12, 2009).

and the National Railroad Passenger Corporation and any commuter authority. 42 U.S.C. §12131(1).

b. *Prohibited Discrimination*. "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 the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

Thus, Title II requires public entities to make their programs, services and activities equally accessible to individuals with disabilities.

c. *Remedies*. Title II provides that the remedies for disability discrimination are the same as those set forth in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794a, which in turn adopts the remedies available under Title VI of the Civil Rights Act of 1964. These remedies include:

- Injunctive relief.

- Reasonable attorneys' fees to the prevailing party. 29 U.S.C. §794a(b).

- Compensatory damages. Private individuals may recover compensatory damages under Title II, but only in cases of intentional discrimination. *Liese v. Indian River County Hosp. Dist.,* 701 F.3d 334, 346 (11th Cir. 2012). The Eleventh Circuit held that in the context of either the Rehabilitation Act or Title VI, a plaintiff may establish discriminatory intent by showing deliberate indifference. *Id*. at 347-348.

- Punitive damages are NOT available. *Barnes v. Gorman,* 536 U.S. 181, 189, 122 S. Ct. 2097 (2002).

B. <u>The Rehabilitation Act of 1973, as Amended in 1992 and 1998 ("Rehab Act")</u>.

1. <u>General Overview of the Rehab Act</u>. Like the ADA, the Rehab Act is a civil rights law that protects individuals with disabilities from discrimination.

a. *Purpose*. The Rehab Act is the federal law that authorizes the formula grant programs for vocational rehabilitation, supported employment, independent living, and client assistance. It also includes a variety of provisions focused on rights, advocacy and protections for individuals with disabilities.

b. *"Individual with a Disability."* The Rehab Act defines an "individual with a disability" as anyone who "has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and can benefit in terms of an employment outcome from vocational rehabilitation services . . . ." 29 U.S.C. §705(20); 29 U.S.C. §794(a).

c. *Coverage*. The Rehab Act applies to the following groups:

- The federal government and federal agencies;
- Federal contractors; and
- Recipients of federal funding, including private businesses or organizations. *Barnes*, 536 U.S. at 185.

Note that the Rehab Act's coverage may overlap with that of the ADA and an entity or program may be covered by both laws. For instance, state and local government entities that receive federal funding could be covered under both the Rehab Act and Title II of the ADA. Likewise, a private university that receives federal funding could be a covered entity under both the Rehab Act and Title III.[24]

d. *Employment Discrimination*. The standards for determining employment discrimination under the Rehab Act—against employers or federal contractors—are the same as those used in Title I of the ADA.

e. *Remedies*. As discussed above, the remedies available for disability discrimination under the Rehab Act, 29 U.S.C. §794a, are the same as those available under Title II of the ADA. *Barnes,* 536 U.S. at 184-185. These remedies include:

- Injunctive relief.
- Reasonable attorneys' fees to the prevailing party. 29 U.S.C. §794a(b).
- Compensatory damages. Private individuals may recover compensatory damages under Section 504 of the Rehab Act, but only in cases of intentional discrimination. *Liese,* 701 F.3d at 346. A plaintiff may establish discriminatory intent by showing deliberate indifference. *Id*. at 347-348.
- Punitive damages are NOT available. *Barnes,* 536 U.S. at 189.

f. *Enforcement and Administrative Requirements*. The U.S. Department of Justice Office of Civil Rights ("OCR") enforces Sections 504 and 508. An aggrieved person under Section 504 or 508 may file a formal complaint through the OCR or, alternatively, file a private lawsuit in federal district court.

2. Section 504 of the Rehabilitation Act, 29 U.S.C. §794. Section 504 of the Rehab Act was the first civil rights legislation designed to protect individuals with disabilities from discrimination based on their disability status.

[24] *See, e.g., Argenyi v. Creighton University,* 703 F.3d 441 (8th Cir. 2013) (medical student with a hearing disability brought suit under Title III and Section 504 of the Rehab Act, alleging school failed to reasonably accommodate his need for lectures to be transcribed).

a. *Prohibits Disability Discrimination.* Section 504 provides that no individual with a disability "shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794(a). Businesses, organizations, or agencies that receive federal funds must make their programs and activities accessible to individuals with disabilities.

b. *Parallels to Title II of the ADA.* Section 504 and Title II of the ADA provide the same remedies. Title II applies the same requirements to state and local government entities that Section 504 applies to federal government entities and those receive federal funding. Between the two laws, all government-funded programs are covered; and there are many programs and entities that are covered by both laws at the same time.

VIII. TITLE I OF THE AMERICANS WITH DISABILITIES ACT ("TITLE I")

A. General Overview of Title I of the ADA.

1. Employers. Applies to private employers with 15 or more employees, and state and local government employers regardless of size.

2. Purpose and Requirements. Designed to help people with disabilities have the same employment opportunities and benefits available to people without disabilities. Prohibits disability discrimination in employment, and requires employers to provide reasonable accommodations to qualified applicants or employees, unless doing so would cause the employer undue hardship.

3. Qualified. The term "qualified", with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.

4. Essential Functions. The term "essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position. A job function may be considered essential for any of several reasons, including but not limited to the following:

   - The function may be essential because the reason the position exists is to perform that function;

   - The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

- The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
  Evidence of whether a particular function is essential includes, but is not limited to:

  - The employer's judgment as to which functions are essential;

  - Written job descriptions prepared before advertising or interviewing applicants for the job;

  - The amount of time spent on the job performing the function;

  - The consequences of not requiring the incumbent to perform the function;

  - The terms of a collective bargaining agreement;

  - The work experience of past incumbents in the job; and/or

  - The current work experience of incumbents in similar jobs.

5. Substantially Limited in Working. To be considered disabled, an individual must show that he or she is limited in a major life activity. To be considered substantially limited in working (only one of numerous potential "major life activities"), an individual must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes compared to the average person having similar training and skills, rather than the inability to perform a single, particular job. *Pritchard v. Southern Co. Services,* 92 F.3d 1130, 1133 (11th Cir. 1996).

6. Liability under the ADA. "An employer is liable for failing to make reasonable accommodations if: '1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'" *Capps v. Mondelez Glob. LLC,* 147 F. Supp. 3d 327, 340 (E.D. Pa. 2015) (quoting *Colwell v. Rite Aid Corp.,* 602 F.3d 495, 504 (3d Cir. 2010).

7. Remedies.

   - Injunctive relief.

   - Employer may be compelled to hire, reinstate, or provide a reasonable accommodation to the prevailing plaintiff.

- Compensatory damages. Compensatory damages may be awarded for actual monetary losses (back pay) and for future monetary losses (front pay), mental anguish, and inconvenience.

- Punitive damages. Punitive damages may be available as well, if an employer acts with malice or reckless indifference.

- Reasonable attorneys' fees.

IX. FLORIDA CIVIL RIGHTS ACT ("FCRA")

A. General Overview of the FCRA.

1. Coverage. Florida law covers all employers with 15 or more employees for each working day for 20 or more weeks, and prohibits discrimination on the basis of race, color, religion, gender, national origin, handicap, age and marital status.

2. Remedies:

- Punitive: Plaintiffs can recover punitive damages not to exceed $100,000.

- Compensatory: No caps on compensatory damages.

- Attorneys' fees: Prevailing party may recover.

- Injunctive Relief.

3. Administrative Procedures Pursuant to the FCRA:

- Plaintiff must exhaust certain administrative remedies. This requires the filing of a charge with the Florida Commission on Human Relations within 365 days from the date of violation.

X. FLORIDA SERVICE ANIMAL ACT ("FSAA")

A. General Overview of Title I of the FSAA (Chapter 413):

1. Coverage. Public Employment, Public Accommodations, and Housing.

2. Employers. Employment with the state, political subdivisions, public school, or other employment supported in whole or part by public funds.

3. Requirements:

a. *Definition of Service Animal*. "Service animal" means an animal that is trained to do work or perform tasks for an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.

b. *Tasks*. Tasks are similar to ADA, including helping an individual with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors, reminding an individual with mental illness to take prescribed medications, calming an individual with Post-Traumatic Stress Disorder during an anxiety attack, or doing other specific work or performing other special tasks. The crime-deterrent effect of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition.

   - A service animal is not a pet.

   - For public accommodation, a "service animal" is limited to a dog or miniature horse, as in the ADA.

c. *Inquiry (Public Accommodation)*. Same two-question inquiry as the ADA: if an animal is a service animal required because of a disability and what work or tasks the animal has been trained to perform.

   - No inquiry permitted about the nature or extent of the disability.

d. *Other Requirements*:

   - As with the ADA, the animal must be under control of the handler at all times. Must use a harness, leash, or tether or be under voice control, signals, or other effective means.

   - Cannot require documentation of training or deposit or surcharge.

   - Individual responsible for damage if required pursuant to a neutral policy.

   - Allergies and fear of animals are not valid reasons for denying access or refusing service to an individual with a service animal.

   - May remove or exclude the service animal if:

     - The animal is out of control and the handler does not take effective action to control it;

     - The animal is not housebroken;

     - The animal's behavior causes a direct threat to the health or safety of others.

- If the animal is excluded, must still provide access to the individual without the animal.

- Handler is responsible for care and supervision.

    - Entity is not required to provide a special location for the service animal or assist with the removal of excrement.

e. *Training*. A difference between Florida law and the Federal law pertains to Service animals-in-training. Florida Statute §413.08(8) specifically states: "Any trainer of a service animal, while engaged in the training of such an animal, has the same rights and privileges with respect to access to public facilities and the same liability for damage as is provided for those persons described in subsection (3) accompanied by service animals."

4. Remedies. Amended in 2015 to state that a person who misrepresents having a service animal commits a misdemeanor of the second degree, any business or merchant that fails to provide service to someone with a service dog will also be charged with a second degree misdemeanor, and any public employer who discriminates against an individual with a disability in employment, unless it is shown that the particular disability prevents the satisfactory performance of the work involved, commits a misdemeanor of the second degree.

    - Applies to the entity as well as any person or agent of a person, firm, or corporation who denies or interferes with right of an individual to access a public accommodation with a service animal.

    - Thus, employees may be prosecuted under this statute.

    - No private right of action under §413.08. *Alejandro v. Palm Beach State Coll.,* 843 F. Supp. 2d 1263, 1272 (S.D. Fla. 2011)

    Proposed Amendments to Address Emotional Support Animals. HB 721 sponsored by Representative Sam Killebrew (R-Polk County). Available at https://www.flsenate.gov/Session/Bill/2019/721.

XI. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 ("USERRA")

A. **General Overview**. USERRA prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. It also protects the reemployment rights of individuals who leave their civilian jobs (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state, District of Columbia, and territory (e.g., Guam) National Guards.

1. Coverage. USERRA applies to all employers, regardless of size.

2. Requirements. While the ADA requires employers to make certain adjustments for veterans with disabilities called "reasonable accommodations," USERRA requires employers to go further than the ADA by making reasonable efforts to assist a veteran who is returning to employment. First, if the veteran has a disability incurred in, or aggravated during, his or her service, the employer must make reasonable efforts to accommodate the disability and return the veteran to the position in which he or she would have been employed if the veteran had not performed military service. If the veteran is not qualified for that position due to disability, USERRA requires the employer to make reasonable efforts to help qualify the veteran for a job of equivalent seniority, status, and pay, the duties of which he or she is qualified to perform or could become qualified to perform.

3. Enforcement. USERRA is enforced by the U. S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ), or aggrieved employees can choose to pursue private civil litigation. There is no exhaustion requirement.

4. Remedies:

   - Injunctive Relief.
   - Compensatory.
   - Liquidated damages – if willful violation.
   - Attorneys' fees: Prevailing plaintiff may recover. No fees or court costs may be charged or taxed against an individual claiming rights under USERRA. 20 C.F.R. §1002.310.

XII. AIR CARRIER ACCESS ACT: AIR CARRIERS

A. Generally. See Department of Transportation Guidance on Service Animals and Emotional Support Animals for a helpful overview of the guidelines on animal accommodation rules for air carriers.[25] Animals covered include:

- Service animals.
- Emotional support animals, except for unusual animals (*e.g.,* snakes, other reptiles, ferrets, rodents, and spiders).

XIII. INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA")

A. Generally. The IDEA governs how states and public agencies provide early intervention,

[25] Available at https://www.transportation.gov/individuals/aviation-consumer-protection/service-animalsincluding-emotional-support-animals.

special education, and related services to eligible infants, toddlers, children, and youth with disabilities and ensures special education and related services to those children.

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