Aiding and Abetting: The Legal Realities of Animals in the Service of People

Thursday, November 9, 2017
9 a.m.–Noon

2.75 General CLE or Access to Justice credits
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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

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SCHEDULE

Presented by Geordie Duckler, *The Animal Law Practice, Tigard*

8:30  Registration

9:00  The Issues: What’s at Stake?
    ♦  Terms: “Disability” and “Assistance” and “Service” and “Reasonable Accommodation”
    ♦  General principles and public policies
    ♦  The competing interests at stake

The Law: Assistance Animals in Public and the Workplace
    ♦  Federal statutes: the ADA and FHA
    ♦  State statutes
    ♦  Local regulations, preemption and overlap

The Real World: Cases, Examples, and Solutions
    ♦  Abuses by the animal owner
    ♦  Abuses by those affected
    ♦  Striking balance among competing interests

What’s Next?

Noon  Adjourn

*(One 15-minute break will be taken during the program.)*

FACULTY

Geordie Duckler, *The Animal Law Practice, Tigard*. Mr. Duckler’s clients are companion, domestic, commercial, farm, and exotic animal owners, and his main practice focus is on the resolution, litigation, and trial of animal-related disputes and harms in cases at both the state and federal levels. Mr. Duckler represents plaintiffs and defendants in several hundred cases each year on issues ranging from relatively minor animal control violations to significant product defect, human injury, and veterinary malpractice suits and injury cases. His practice is the only one of its kind on the West Coast and one of a small handful in the entire nation.
I. OVERALL ISSUES

1. Philosophical theme is equal opportunity and equal access to services.

2. Equal opportunity is the principle that access to educational, employment and other important societal benefits should not be based on an individual's immutable traits, on stereotypes, or on irrelevant characteristics.

3. Devices such as canes and wheelchairs are considered part of a person, and are primarily deemed "irrelevant characteristics" which would not support a valid basis on which to deny equal access. Since assistance animals are functionally similar to those devices, the same reasoning therefore applies.

4. Terms to consider:
   "Assistance"
   "Service"
   "Working"
   "Aid"
   "Psychiatric service"
   "Comfort"
   "Therapy"
   "Emotional support"
   "Guide"
   "Seeing Eye"
   "Dog"
   "Animal"

5. Generally guide, hearing and service dogs are permitted to accompany their disabled owner everywhere members of the public are allowed, but there are a few exceptions. For example, a member of the public would be permitted in the dining area of a restaurant, but not in the kitchen. Therefore, a guide dog would be permitted to accompany his disabled owner in the dining area of a restaurant.

6. It is also an important distinction to note that it is the handler who has access rights and not the dog. A guide dog without his blind handler has no particular access rights of his own and neither does a hearing dog or other service dog without his disabled handler.

7. "Under the Americans with Disabilities Act (ADA), businesses and organizations that serve the public must allow people with disabilities to bring their service animals into all areas of the facility where customers are normally allowed to go. This federal law applies to all businesses open to the public, including restaurants, hotels, taxis and shuttles, grocery and department stores, hospitals and medical offices, theaters, health clubs, parks, and zoos." -- U.S Department of Justice.

8. In the U.S., according to the Department of Justice's Business Brief concerning Service Animals, business owners/managers can ask 2 specific questions. 1) Is this a service dog required because of a disability? and 2) What task(s) is the dog trained to perform? If these questions are not appropriately answered, the business may exclude the animal, but not the person.

9. Though service animals of all kinds can legally accompany their disabled handler almost anywhere the handler goes, they can be excluded from areas where their presence would
constitute either a fundamental alteration of goods and services available for all or a direct threat to safety. Examples where a service animal might be excluded include:
- Sterile rooms, such as operating rooms, some areas of emergency rooms/departments, some ICU rooms, some ambulances, some delivery rooms (on a case-by-case basis)
- Clean rooms where microchips are manufactured
- Places where food is prepared (though they cannot generally be excluded from dining areas where food is present) (by order of most health departments)
- Open air zoological exhibits, such as open air aviaries (at the zoo's discretion)
- Churches (at the church's discretion)
- Native American Tribal Council Chambers (at the council's discretion)
- Federal Courts (at the judge's discretion)
- Jail or prison cells (at the discretion of the facility director)
- Private clubs (at the club's discretion)
- Private homes (at the home owner's discretion)

10. Businesses are permitted to ask whether an animal is a service animal, and what tasks the animal is trained to perform that the human handler cannot do for themselves. The business is not, however, permitted to ask for information about the specific nature of the person's disability or other invasive questions. If an animal is not trained to perform tasks to mitigate the handler's disability, then it isn't a service animal under the ADA.

11. Guide dogs usually wear a special leather harness that helps them to guide their owner. In addition to the harness, the owner will also use a leash for controlling and directing the dog. Most other types of service animal wear some sort of marking such as a vest or cape, or special gear, like a harness. However, not all service dogs will wear special markings. Under the ADA, they aren't required to be marked. Unfortunately, the presence or absence of a cape or gear alone doesn't make it clear whether or not an animal is really a service animal.

12. A service animal can be removed from a business when its presence constitutes a fundamental alteration of the goods or services offered by the business. For example, a service dog that howls during a concert interferes with the performance of the concert and can be excluded. A service animal that misbehaves and makes unwanted contact with other patrons or is otherwise disruptive due to poor behavior can be removed. If a service animal is removed, the business must still offer their goods and services to the owner of the service animal, even if the animal itself must remain outside. Service animals can also be removed if they pose a direct threat to the safety of others by barking, lunging, growling, snarling, or lunging at others.

13. The Americans with Disabilities Act generally requires businesses, including food establishments, to modify policies to permit service animals to accompany their disabled handler wherever the general public are allowed. The general rule of thumb where food is involved is that where special clothing is not required a service animal must be permitted. Where special clothing is required, such as food preparation areas, a service animal may be excluded and in fact must be excluded if necessary to comply with health statutes or ordinances.

14. Since a typical patron of a restaurant isn't asked to don a hairnet, latex gloves and an apron while in the dining area of the establishment, a service animal (including a guide dog) should be permitted to accompany a disabled handler there.

15. A service dog may generally accompany his disabled handler anywhere in a public accommodation where the public are permitted with certain exceptions. The service animal may
be excluded if it poses a direct threat or fundamental alteration of the services offered by the public accommodation.

16. For example, on a case-by-case basis a ambulance crew may decide not to permit a service animal in the treatment area of an ambulance if lack of space means the dog would interfere with the necessary movement of personnel providing emergency care. That might be a "fundamental alteration" if the presence of the dog prevents the emergency workers from performing their jobs.

17. A service animal might be excluded from an area that requires special clothing, such as a hospital ICU (Intensive Care Unit), or a computer "clean room," where the tiniest particle can ruin the manufacture of computer chips. A service animal might be excluded from an area where zoo exhibits can come in direct contact with human visitors, such as an aviary. On a case-by-case basis, a service animal might be removed if its presence is frightening a zoo exhibit to the point of harming the exhibit.

18. The exceptions are few, but they do exist. The keys in evaluating whether a service animal should be permitted in a given area are:

1. Would the presence of this specific animal pose a direct (known and not just hypothesized) threat in this specific instance, not based on past experiences with other service animals or dogs in general?
2. Would the presence of this specific animal fundamentally alter the goods or services provided by the public accommodation?
3. Is there some reasonable accommodation possible? Reasonable accommodation is the art of compromise. Is there a readily achievable solution which permits the person with a disability to access goods and services, and which does not constitute an undue hardship on the business?

19. Can people be required under the ADA to provide proof they are disabled or proof their dog is a service dog? Yes, while businesses are generally permitted only to ask whether the dog is a service animal required because of disability and what the animal has been trained to do, there are instances when more extensive proof can be required.

20. Medical records from any medical providers treating you for your disability or for aspects of your disability.

   SSDI determination.
   SD certification from a recognized/accredited program.
   Training logs if owner-trained.
   Independent evaluation of your dog's training by a qualified trainer.
   Certificates attesting to training and temperament, such as a training class completion certificates, an obedience title or certificate, a CGC certificate, etc.
   Video demonstrations of the dog's training.
   In person demonstrations of the dog's training.

II. FEDERAL STATUTES

A. 29 U.S.C. Section 701 et seq. (Rehabilitation Act of 1973)

Section 504 states (in part):

“No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his
disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”

B. 42 U.S.C. Section 3604 et seq. (Fair Housing Act)

“...It shall be unlawful:

(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap...

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap...

(3) Discrimination includes:

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises...

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling...”

C. 42 U.S.C. Section 12111 et seq. (Americans with Disabilities Act)

1. Under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101, a privately owned business that serves the public such as a restaurant is prohibited from discriminating against individuals with disabilities. The ADA requires such businesses to allow people with disabilities to bring their service animals onto business premises in whatever areas customers are generally allowed. The ADA defines a service animal as any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability. If they meet this definition, animals are considered service animals under the ADA regardless of whether they have been licensed or certified by a state or local government.

2. Service animals are any animal which performs some of the functions and tasks that the individual with a disability cannot perform for him or herself. While guide dogs are one type of service animal, used by some individuals who are blind and the type of service animal with which most people are familiar, many other types exist as well. Some, but not all, service animals wear special collars and harnesses. Some, but not all, are licensed or certified and have identification papers. If the restaurant owner is not certain that an animal is a service animal, he may ask the person who has the animal if it is a service animal required because of a disability. However, an individual who is going to a restaurant is not likely to be carrying documentation of his or her medical condition or disability. Therefore, such documentation generally may not be required as a condition for providing service to an individual accompanied by a service animal. Although a number of states have programs to certify service animals, the restaurant owner may not insist on proof of state certification before permitting the service animal to accompany the person with a disability.

3. The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go. An individual with a service animal may not be segregated from other customers. Even if the restaurant has a clearly posted "no pets" sign or policy, a service animal is not a pet and the ADA requires the restaurant owner to modify any "no pets" policy to allow the use of a service animal by a person...
with a disability. This does not mean the restaurant owner must abandon a "no pets" policy altogether, but simply must make an exception for service animals.

4. Even if a county health department has informed the restaurant that only a guide dog may be admitted, the business is still violating the ADA if it refuses to admit any other type of service animal on the basis of local health department regulations or other state or local laws. The ADA provides greater protection for individuals with disabilities and so it takes priority over the local or state laws or regulations. The restaurant cannot charge a maintenance or cleaning fee for customers who bring service animals into the restaurant. Neither a deposit nor a surcharge may be imposed on an individual with a disability as a condition to allowing a service animal to accompany the individual with a disability, even if deposits are routinely required for pets. However, a public accommodation may charge its customers with disabilities if a service animal causes damage so long as it is the regular practice of the entity to charge non-disabled customers for the same types of damages.

5. The care or supervision of a service animal is solely the responsibility of his or her owner. The restaurant owner is not required to provide care or food or a special location for the animal, and may exclude any animal, including a service animal, from the restaurant when that animal's behavior poses a direct threat to the health or safety of others. For example, any service animal that displays vicious behavior towards other guests or customers may be excluded. The restaurant owner may not make assumptions, however, about how a particular animal is likely to behave based on past experience with other animals. Each situation must be considered individually. Although the restaurant owner may exclude any service animal that is out of control, he should give the individual with a disability who uses the service animal the option of continuing to enjoy its goods and services without having the service animal on the premises.

6. ADA [42 U.S.C. 12101]

DEFINITION OF DISABILITY
SEC. 12102. [Section 3]
“(1) Disability. - The term “disability” means, with respect to an individual-
(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment (as described in paragraph (3)).
(2) Major life activities
A) In general
For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
(B) Major bodily functions
For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
(3) Regarded as having such an impairment
For purposes of paragraph (1)(C):
(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of “disability” in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.”

SUBCHAPTER I [TITLE I] - EMPLOYMENT DEFINITIONS
SEC. 12111. [Section 101]
“(9) Reasonable accommodation. - The term “reasonable accommodation” may include-

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship. -

(A) In general. - The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. - In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-
(i) the nature and cost of the accommodation needed under this chapter;
(ii) the overall financial resources of the facility or facilities 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 accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size
of the business of a covered entity with respect to the number of its employees;
the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including
the composition, structure, and functions of the workforce of such entity; the
geographic separateness, administrative, or fiscal relationship of the facility or
facilities in question to the covered entity.”

DISCRIMINATION
SEC. 12112. [Section 102]
“(a) General rule. - No covered entity shall discriminate against a
qualified individual on the basis of disability in regard to job application
procedures, the hiring, advancement, or discharge of employees, employee
compensation, job training, and other terms, conditions, and privileges of
employment.
(b) Construction. - As used in subsection (a) of this section, the term
“discriminate against a qualified individual on the basis of disability” includes-
(1) limiting, segregating, or classifying a job applicant or employee in a
way that adversely affects the opportunities or status of such applicant or
employee because of the disability of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that
has the effect of subjecting a covered entity’s qualified applicant or employee
with a disability to the discrimination prohibited by this subchapter (such
relationship includes a relationship with an employment or referral agency, labor
union, an organization providing fringe benefits to an employee of the covered
entity, or an organization providing training and apprenticeship programs);
(3) utilizing standards, criteria, or methods of administration-
(A) that have the effect of discrimination on the basis of disability; or
(B) that perpetuate the discrimination of others who are subject to
common administrative control;
(4) excluding or otherwise denying equal jobs or benefits to a qualified
individual because of the known disability of an individual with whom the
qualified individual is known to have a relationship or association;
(5) (A) not making reasonable accommodations to the known physical or
mental limitations of an otherwise qualified individual with a disability who is an
applicant or employee, unless such covered entity can demonstrate that the
accommodation would impose an undue hardship on the operation of the
business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee
who is an otherwise qualified individual with a disability, if such denial is based
on the need of such covered entity to make reasonable accommodation to the
physical or mental impairments of the employee or applicant;
(6) using qualification standards, employment tests or other selection
criteria that screen out or tend to screen out an individual with a disability or a
class of individuals with disabilities unless the standard, test or other selection
criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).”

SEC. 304. PROHIBITION OF DISCRIMINATION IN SPECIFIED PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

“(a) General Rule.--No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.”

III. STATE STATUTES

A. ORS 346.620 says that a person who is blind has the right to have a dog guide with the person, and a trainer has the right to have a dog guide or dog guide trainee with the trainer, in any place of public accommodation so long as the person or trainer controls the behavior of the dog. A trainer or a person who is blind is not required to pay an additional fee or admission charge for the dog guide, and a trainer or a person who is blind is liable for any damages done to a place of public accommodation.

B. ORS 346.650 says that a person who is deaf has the right to have a hearing ear dog with the person, and a trainer of a hearing ear dog has the right to have the hearing ear dog or hearing ear dog trainee with the trainer, in any place of public accommodation so long as the person or trainer controls the behavior of the dog. A trainer of a hearing ear dog or a person who is deaf is not required to pay an additional fee or admission charge for the hearing ear dog, and a trainer of a hearing ear dog or a person who is deaf is liable for any damages done to a place of public accommodation.

C. ORS 346.680 defines an “assistance animal” as any animal trained to assist a person with a physical impairment in one or more daily life activities, including but not limited to:

(a) Dog guides, as defined in ORS 346.610;
(b) Hearing ear dogs, as defined in ORS 346.640;
(c) An animal trained to pull a wheelchair;
(d) An animal trained to fetch dropped items; and
(e) An animal trained to perform balance work.

The statute also defines “person with a physical impairment” as any person who has a permanent physical impairment, whose physical impairment limits one or more of daily life activities and who has a record of impairment and is regarded by health care practitioners as having such an impairment, requiring the use of an assistance animal including but not limited to blindness, deafness and complete or partial paralysis.
D. Under ORS 346.685, a person with a physical impairment has the right to have an assistance animal with the person, and a trainer has the right to have an assistance animal or assistance animal trainee with the trainer, in any place of public accommodation so long as the person or trainer controls the behavior of the animal. A trainer or a person with a physical impairment is not required to pay an additional fee or admission charge for the assistance animal, and a trainer or a person with a physical impairment is liable for any damages done to a place of public accommodation.

E. Assistance Dogs for Persons Who Are Blind or Deaf

ORS 346.610:
(1) “Dog guide” means a dog that is wearing a dog guide harness and is trained to lead or guide a person who is blind.
(2) “Dog guide trainee” means a dog undergoing training to lead or guide a person who is blind.
(3) “Mode of transportation” means any mode of public transportation operating within this state except for parlor, lounge, or club car of a common carrier by railroad.
(4) “Person who is blind” means a person who has vision of 20/200 or less with the best correction or has a visual field of 20 degrees or less.
(5) “Public accommodation” means a place of public accommodation as defined in ORS 659A.400.
(6) “Trainer” means a person who trains dogs to lead or guide persons who are blind.

ORS 346.620:
(1) A person who is blind has the right to have a dog guide with the person, and a trainer has the right to have a dog guide or dog guide trainee with the trainer, in any place of public accommodation or on any mode of transportation so long as the person or trainer controls the behavior of the dog.
(2) A trainer or a person who is blind is not required to pay an additional fee or admission charge for the dog guide.
(3) A trainer or a person who is blind is liable for any damages done to a place of public accommodation or to any mode of transportation by the dog guide.

ORS 346.630
[Prohibition against discriminating in renting housing because of dog guide; remedy]
(1) A landlord, as defined in ORS 90.100, may not refuse to rent a dwelling unit, as defined in ORS 90.100, to a person who is blind on the basis of the person’s use or possession of a dog guide.
(2) A person who is blind has a cause of action to recover compensatory damages or $200, whichever is greater, from any landlord, as defined in ORS 90.100, who refuses to rent a dwelling unit, or who charges additional rent, on the basis of the person’s use or possession of a dog guide. The court may award reasonable attorney fees to the prevailing party in an action under this section.
(3) A person who is blind is not required to pay an additional nonrefundable fee or an excessive deposit for the dog guide.
(4) A person who is blind is liable for any damages done to the dwelling unit by the dog guide.
ORS 346.640:
(1) “Person who is deaf” means a person whose hearing disability precludes successful processing of linguistic information through audition with or without a hearing aid.
(2) “Hearing ear dog” means a dog that is on an orange leash and that is trained to assist a person who is deaf.
(3) “Hearing ear dog trainee” means a dog undergoing training to assist a person who is deaf.
(4) “Mode of transportation” means any mode of public transportation operating within this state except for parlor, lounge, or club car of a common carrier by railroad.
(5) “Public accommodation” means a place of public accommodation as defined in ORS 659A.400.

ORS 346.650
[Hearing ear dog in place of public accommodation or on public transportation for person who is deaf; liability]
(1) A person who is deaf has the right to have a hearing ear dog with the person, and a trainer of a hearing ear dog has the right to have the hearing ear dog or hearing ear dog trainee with the trainer, in any place of public accommodation or on any mode of transportation so long as the person or trainer controls the behavior of the dog.
(2) A trainer of a hearing ear dog or a person who is deaf is not required to pay an additional fee or admission charge for the hearing ear dog.
(3) A trainer of a hearing ear dog or a person who is deaf is liable for any damages done to a place of public accommodation or to any mode of transportation by the hearing ear dog.

ORS 346.660
[Prohibition against discriminating in renting housing because of hearing ear dog]
(1) A landlord, as defined in ORS 90.100, may not refuse to rent a dwelling unit, as defined in ORS 90.100, to a person who is deaf on the basis of the use or possession of a hearing ear dog.
(2) A person who is deaf is not required to pay an additional nonrefundable fee for the hearing ear dog.
(3) A person who is deaf is liable for any damages done to the dwelling unit by the hearing ear dog.

F. Assistance Animals for Persons with Physical Impairment

ORS 346.680:
(1) “Assistance animal” means any animal trained to assist a person with a physical impairment in one or more daily life activities, including but not limited to:
(a) Dog guides, as defined in ORS 346.610;
(b) Hearing ear dogs, as defined in ORS 346.640;
(c) An animal trained to pull a wheelchair;
(d) An animal trained to fetch dropped items; and
(e) An animal trained to perform balance work.
(2) “Assistance animal trainee” means any animal undergoing training to assist a person with a physical impairment.

(3) “Daily life activity” includes but is not limited to:
(a) Self-care;
(b) Ambulation;
(c) Communication; or
(d) Transportation.

(4) “Mode of transportation” means any mode of transportation operating within this state.

(5) “Person with a physical impairment” means any person who has a permanent physical impairment, whose physical impairment limits one or more of daily life activities and who has a record of impairment and is regarded by health care practitioners as having such an impairment, requiring the use of an assistance animal including but not limited to blindness, deafness and complete or partial paralysis.

(6) “Public accommodation” means a place of public accommodation as defined in ORS 659A.400 including but not limited to educational institutions, airlines and restaurants. The exception stated in ORS 659A.400 (2) is not an exception under ORS 90.390 and 346.680 to 346.690.

ORS 346.685

[Rights of person with physical impairment and trainer; prohibition on admission charge for animal; access to transportation; liability for damage by animal]

(1) A person with a physical impairment has the right to have an assistance animal with the person, and a trainer has the right to have an assistance animal or assistance animal trainee with the trainer, in any place of public accommodation or on any mode of transportation so long as the person or trainer controls the behavior of the animal.

(2) A trainer or a person with a physical impairment is not required to pay an additional fee or admission charge for the assistance animal.

(3) The assistance animal shall be allowed to accompany its owner in an ambulance or other mode of transportation in the event of a medical emergency. If the owner is unconscious, the assistance animal shall be placed in an emergency veterinary clinic until the person regains consciousness and can make arrangements for the animal, or a relative responsible for the injured person is contacted and can make arrangements for the animal, or until the injured person dies, in which case the authorities will attempt to contact the school, where the animal was trained, for further action.

(4) A trainer or a person with a physical impairment is liable for any damages done to a place of public accommodation or to any mode of transportation by the assistance animal.

ORS 346.687

[Damages recoverable for harm or theft of assistance animal]

(1) In addition to and not in lieu of any other penalty provided by state law, a person with a physical impairment who uses an assistance animal or the owner of an assistance animal may bring an action for economic and noneconomic damages against any person who steals or, without provocation, attacks the assistance animal. The person with a physical impairment or owner may also bring an action for such damages against the owner of any animal that,
without provocation, attacks an assistance animal. The action authorized by this subsection may be brought by the person with a physical impairment or owner even if the assistance animal was in the custody or under the supervision of another person when the theft or attack occurred.

(2) If the theft of or unprovoked attack on an assistance animal described in subsection (1) of this section results in the death of the animal or the animal is not returned or if injuries sustained in the theft or attack prevent the animal from returning to service as an assistance animal, the measure of economic damages shall include, but need not be limited to, the replacement value of an equally trained assistance animal, without any differentiation for the age or the experience of the animal. In addition, the person with a physical impairment or owner may recover any other costs and expenses, including, but not limited to, costs of temporary replacement assistance services, whether provided by another assistance animal or a person, incurred as a result of the theft of or injury to the animal.

(3) If the theft of or unprovoked attack on an assistance animal described in subsection (1) of this section results in injuries from which the animal recovers and returns to service, or if the animal is stolen but is recovered and returns to service, the measure of economic damages shall include, but need not be limited to, the veterinary medical expenses, costs of temporary replacement assistance services, whether provided by another assistance animal or a person, and any other costs and expenses incurred by the person with a physical impairment or owner as a result of the theft of or injury to the animal.

(4) A cause of action does not arise under this section if the person with a physical impairment, owner or the person having custody or supervision of the assistance animal was committing a criminal or civil trespass at the time of the theft of or attack on the assistance animal.

(5) The court shall award reasonable attorney fees to the prevailing plaintiff in an action under this section. The court may award reasonable attorney fees and expert witness fees incurred by a defendant who prevails in the action if the court determines that the plaintiff had no objectively reasonable basis for asserting a claim or no objectively reasonable basis for appealing an adverse decision of a trial court.

ORS 346.690
[Prohibition against discrimination in renting housing because of assistance animal]

(1) A landlord, as defined in ORS 90.100, may not refuse to rent a dwelling unit, as defined in ORS 90.100, to a person with a physical impairment on the basis of the person’s use or possession of an assistance animal.

(2) A person with a physical impairment has a cause of action to recover compensatory damages or $200, whichever is greater, from any landlord who refuses to rent a dwelling unit, or who charges additional rent, on the basis of the person’s use or possession of an assistance animal. The court shall award reasonable attorney fees to the prevailing plaintiff in an action under this section. The court may award reasonable attorney fees and expert witness fees incurred by a defendant who prevails in the action if the court determines that the plaintiff had no objectively reasonable basis for asserting a claim or no objectively reasonable basis for appealing an adverse decision of a trial court.

(3) A person with a physical impairment is not required to pay an additional nonrefundable fee or an excessive deposit for the assistance animal.
A person with a physical impairment is liable for any damages done to the dwelling unit by the assistance animal.

ORS 30.822

[Action for theft of or injury to search and rescue animal or therapy animal]

(1) In addition to and not in lieu of any other penalty provided by state law, the owner of a search and rescue animal or a therapy animal, as defined in ORS 167.352, may bring an action for economic and noneconomic damages against any person who steals or, without provocation, attacks the search and rescue animal or therapy animal. The owner may also bring an action for such damages against the owner of any animal that, without provocation, attacks a search and rescue animal or therapy animal. The action authorized by this subsection may be brought by the owner even if the search and rescue or therapy animal was in the custody or under the supervision of another person when the theft or attack occurred.

(2) If the theft of or unprovoked attack on a search and rescue animal or therapy animal described in subsection (1) of this section results in the death of the animal or the animal is not returned or if injuries sustained in the theft or attack prevent the animal from returning to service as a search and rescue animal or therapy animal, the measure of economic damages shall include, but need not be limited to, the replacement value of an equally trained animal, without any differentiation for the age or the experience of the animal.

(3) If the theft of or unprovoked attack on a search and rescue animal or therapy animal described in subsection (1) of this section results in injuries from which the animal recovers and returns to service, or if the animal is stolen and is recovered and returns to service, the measure of economic damages shall include, but need not be limited to, the costs of temporary replacement services, veterinary medical expenses and any other costs and expenses incurred by the owner as a result of the theft of or injury to the animal.

(4) No cause of action arises under this section if the owner or the person having custody or supervision of the search and rescue animal or therapy animal was committing a criminal or civil trespass at the time of the attack on the animal.

(5) The court may award reasonable attorney fees to the prevailing party in an action under this section.

ORS 167.352

[Interfering with assistance, search and rescue or therapy animal]

(1) A person commits the crime of interfering with an assistance, a search and rescue or a therapy animal if the person intentionally or knowingly:

(a) Injures or attempts to injure an animal the person knows or reasonably should know is an assistance animal, a search and rescue animal or a therapy animal;

(b) Interferes with an assistance animal while the assistance animal is being used to provide assistance to a person with a physical impairment; or

(c) Interferes with a search and rescue animal or a therapy animal while the animal is being used for search and rescue or therapy purposes.

(2) As used in this section, “assistance animal” and “person with a physical impairment” have the meanings given those terms in ORS 346.680.

(3) As used in this section and ORS 30.822:
(a) “Search and rescue animal” means that the animal has been professionally trained for, and is actively used for, search and rescue purposes.
(b) “Therapy animal” means that the animal has been professionally trained for, and is actively used for, therapy purposes.

(4) Interfering with an assistance, a search and rescue or a therapy animal is a Class A misdemeanor.

ORS 401.977 Animal emergency operations plan. (1) As used in this section:
(b) “Service animal” means an animal that assists or performs tasks for a person with a sensory, emotional, mental or physical disability.

(2) The Office of Emergency Management, in cooperation with the State Department of Agriculture and local governments, shall prepare a written animal emergency operations plan that provides for the evacuation, transport and temporary sheltering of companion animals and service animals during a major disaster or an emergency.

(3) The office, in developing the plan, shall emphasize the protection of human life and shall consider:
(a) Allowing owners of service animals to be evacuated, transported and sheltered with their service animals;
(b) Establishing a sufficient number of evacuation shelters equipped to temporarily shelter companion animals and service animals in close proximity to a human sheltering facility;
(c) Allowing owners and their companion animals to be evacuated together whenever possible;
(d) Establishing an identification system to ensure that owners who are separated from their companion animals or service animals during an evacuation are provided with all information necessary to locate and reclaim their animals;
(e) Transporting companion animals or service animals, in cages or carriers that safely and securely confine the animals, in an impending major disaster or emergency;
(f) Recommending that animal shelters, humane societies, veterinary offices, boarding kennels, breeders, grooming facilities, animal testing facilities and any other entity that normally houses companion animals or service animals create evacuation plans for the animals housed at their facilities;
(g) Establishing recommended minimum holding periods for companion animals or service animals that are sheltered during a major disaster or an emergency; and
(h) Creating and promoting an educational campaign for owners of companion animals or service animals that will:
(A) Encourage owners to plan for and incorporate their animals in the owners’ personal plans in the event of a major disaster or an emergency; and
(B) Inform owners of companion animals or service animals about the animal emergency operations plan prepared under this section.

IV. LOCAL EXAMPLE

City of Portland Code section 23.01.070, entitled “Discrimination in Places of Public Accommodation Prohibited”, says that it shall be unlawful to discriminate in public accommodations on the basis of an individual’s race, religion, color, sex, national origin, marital status, age if the individual is 18 years of age or older, or disability, by committing any of the acts made unlawful under the provisions of ORS 659.037, 659.425, or ORS 30.670 to 30.685.
V. CASES

**General principles**

ADA regulations do not create a blanket right of universal access for all service animals. An animal that simply provides comfort or reassurance is equivalent to a household pet and does not qualify as a “service animal” under the ADA. There must be some evidence of individual training to set service animal apart from ordinary pet.

There are no requirements as to the amount or type of training that a “service animal” must undergo to qualify under ADA, nor the type of work or assistance that it must provide, but it must at least be trained to perform tasks or do work for the benefit of a disabled individual.


Modification of concert hall's policies to allow quadriplegic patron to attend performances with service animal that may have made disruptive noises at past performances, if such behavior would have been acceptable if engaged in by humans, was necessary and reasonable accommodation under ADA; modification struck well-reasoned and carefully-crafted balance between patron's needs and concert hall's interests by generally allowing access for service animals, but providing that they could be excluded under certain circumstances. *Lentini v. Cal. Center for the Arts*, 370 F.3d 837 (9th Cir. Cal. 2004)

Hospital did not violate the ADA by its treatment of disabled patient who used service animal and insisted that it remain in her room 24 hours a day; hospital did not deny admission to patient and her St. Bernard, but merely tried to accommodate all of its patients in its attempts to limit effects of dog's extremely offensive odor which permeated entire floor of hospital by closing patient's door, installing air filter in her room, and re-assigning staff who had allergic reactions, respiratory problems and skin rashes from the dog. *Roe v. Providence Health System-Oregon*, 655 F.Supp.2d 1164 (D. Or. 2009)

Reasonable accommodations allowed for quarantining animals. *Crowder v. Kitagawa*, 81 F.3d. 1480 (9th Cir. Hawaii 1996)

"No animals" policy that fundamentally alters nature of public accommodation must be modified. *Johnson v. Gambrinus Co.*, 116 F.3d 1052 (5th Cir. Texas 1997)


Store policy where employees inquire into what “task or function” it is that animal serves disabled person is legitimate under state law. *Grill v. Costco*, 312 F.Supp. 2d 1349 (W.D. Wash. 2004); see also, *Dilorenzo v. Costco*, 515 F.Supp.2d 1187 (W.D. Wash. 2007)

Defendant didn't show she had a substantial limitation in ability to walk or move such that she needed a service animal to assist her, and thus was not entitled to ADA protections. *Satterwhite v. City of Auburn*, 945 So. 2d 1076 (Ala. Cri. App. 2006)
The Fair Housing Act encompasses all types of assistance animals regardless of training, including those that ameliorate a physical disability and those that ameliorate a mental disability such as "emotional support animals"


Landlord did not violate FHA when it delayed making a decision on a request for several months, requested tenant's school and medical records, and filed suit for declaratory judgment since it was entitled to seek additional information on tenant's disability, since initial application contained no diagnosis and it did not began eviction proceedings or remove tenant during litigation


It was reasonable for landlord to require that recognized training facility or person certify that service animal has degree of training and temperament which would enable it to ameliorate effects of its owner's disability and to require opinion of doctor about the disability and manner in which the animal helped

**In re Kenna Co-op Homes, Corp., 557 S.E. 2d 787 (W. Va. 2001)**

Accommodation requested by disabled employee with service dog that employer provide nonskid floor covering so that dog could maintain traction on tile flooring was required accommodation; use of service animal as assistive device was no different than use of wheelchair, scooter or walker

**McDonald v. DEQ, 214 P.3d 749 (Mont. 2009)**

Utah expanded its definition of what is a “service animal” by adding both "signal dogs" as well as “any other animal individually trained to do work or perform tasks for the benefit of a person with a disability”, a definition which itself includes "emotional support animals" and "psychiatric therapy animals".


Opossum as assistance animal

**LaFore v. Housing Authority of Portland, Not Reported in F.Supp.2d, 1999 WL 1058992 (D.Or. 1999).**

Horse as an assistance animal


Monkey as an assistance animal


Birds and cats as assistance animals

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

Trainer not required to have professional credentials to be considered as sufficient trainer for assistance animal

**Bronk v. Ineichen, 54 F.3d 425 (7th Cir. Wis.1995).**
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Aiding and Abetting: The Legal Realities of Animals in the Service of People

Keeping things in perspective

“Assistance”
(tool use)
1.85 mya

“Animal”
(domestication)
@30,000 ya

“Laws”
@1200 ya
Philosophical theme:

Equal opportunity is the principle that access to educational, employment and other important societal benefits should not be based on an individual's immutable traits, on stereotypes, or on irrelevant characteristics.

Devices such as canes and wheelchairs are considered part of a person, and are primarily deemed "irrelevant characteristics" which would not support a valid basis on which to deny equal access.

Since assistance animals are functionally similar to those devices, the same reasoning therefore applies.

The Phrase

<table>
<thead>
<tr>
<th>Adjective</th>
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<tr>
<td>&quot;Assistance&quot;</td>
<td>“animal” (dog)</td>
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<td>&quot;Working&quot;</td>
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<td>&quot;Aid&quot;</td>
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<td>&quot;Psychiatric assistant&quot;</td>
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<td>“Helper”</td>
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<td>&quot;Comfort&quot;</td>
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<td>&quot;Therapy&quot;</td>
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<td>&quot;Emotional support&quot; (ESA)</td>
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<tr>
<td>&quot;Guide&quot;</td>
<td>“animal” (dog)</td>
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<tr>
<td>&quot;Seeing Eye&quot;</td>
<td>“animal” (dog)</td>
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<tr>
<td>“Hearing Ear”</td>
<td>“animal” (dog)</td>
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N.B. It is “individual with a disability”, not “disabled person”
Two Big Questions

1. Who's getting help with something that they really need help with?

2. Who's getting away with something they really shouldn't be getting away with?

Hidden (and not-so-hidden) Issues

["Public" version]

Secret concern #1: Are you really disabled?  
Suspicion: (You are actually healthy.)

Secret concern #2: Does the animal really assist you?  
Suspicion: (It is simply your pet.)

Secret concern #3: Will the animal cause trouble?  
Suspicion: (It will wreck something or hurt someone.)

Overall secret concern: Do I need to treat you differently?  
Overall suspicion: You demand special treatment that you don't actually deserve.
Hidden (and not-so-hidden) Issues

["Disabled" version]

Secret concern #1: Are you trying to deny me access?
Suspicion: (I am being targeted or stonewalled.)

Secret concern #2: Are you accusing me of fraud?
Suspicion: (You don't believe that I am disabled.)

Secret concern #3: Do I not qualify for assistance?
Suspicion: (I have not followed some rule correctly.)

Overall secret concern: Does he/she need to treat me differently?

Overall suspicion: I deserve special treatment that I haven't correctly requested or demanded.
The core aspects of legal protection

**Category 1: The Disabled**

* Guiding people with impaired vision
* Alerting people with impaired hearing
* Aiding people with impaired physical or mental functions

**Category 2: The Public**

* Maintaining public safety and health
* Preserving competing legal rights
* Preventing excessive or fundamental burdens

Setting parameters and determining criteria

**Focus:** Detailing out the specific rules of the game and leveling the playing field by preventing undue hardship on other players and bystanders

Determining violations and setting penalties

**Focus:** Imparting a real value to playing by the rules, by enforcing equal opportunities and by effectively punishing those who don't follow them
Some general principles

Broad definitions and broad protections:

Any animal as long as:
* individually trained
* trained to perform specific tasks
* the task relates directly to the disability

Any disability as long as:
* medically supported
* requires assistance of some type

Reasonable accommodations required as long as not:
* unsafe or unhealthy
* fundamental alteration of a business
* undue burden to use by others
* violative of other protected rights

Federal Statutes

42 U.S.C. Section 12111 et. seq. (Americans with Disabilities Act)

29 U.S.C. Section 701 et. seq. (Rehabilitation Act of 1973)

42 U.S.C. Section 3604 et. seq. (Fair Housing Act)

(no private right of action)
Some general ADA rules
[Pre-2011]

* ADA regulations do not create a blanket right of universal access for all service animals

* An animal that simply provides comfort or reassurance is equivalent to a household pet and does not qualify as a “service animal” under the ADA

* There must be some evidence of individual training to set service animal apart from ordinary pet

* There are no requirements as to the amount or type of training that a “service animal” must undergo to qualify under ADA, nor the type of work or assistance that it must provide, but it must at least be trained to perform tasks or do work for the benefit of a disabled individual.

Rose v. Springfield-Green County Health Dept.
668 F.Supp. 2d 1206 (W.D. Mo. 2009)

ADA:

Applies to any state or local government, or its instrumentalities, regardless of federal financial assistance. This would include local housing agencies, such as the public housing authority

42 U.S.C. Section 12182(a):

“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.”
Discrimination includes:

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

ADA [Post-2011]

1. As of March 15, 2011, only dogs are recognized as "service animals" under ADA Titles II and III.

2. Disability includes "a physical, sensory, psychiatric, intellectual, or other mental disability".

3. Policies must be modified to permit miniature horses where reasonable. Four assessment factors are used:
   (1) whether the miniature horse is housebroken;
   (2) whether the miniature horse is under the owner’s control;
   (3) whether the facility can accommodate the miniature horse’s type, size, and weight; and
   (4) whether the miniature horse’s presence will not compromise legitimate safety requirements necessary for safe operation of the facility.

4. New regulations do not affect "reasonable accommodation" requests under the FHA and Section 504.
Fair Housing Act

Applies to virtually all forms of housing, whether for sale or rent. The exceptions include (a) buildings with four or fewer units where the landlord lives in one of the units, and (b) private owners who do not own more than three single family houses, do not use real estate brokers or agents, and do not use discriminatory advertisements.

Contrast with ADA: “Emotional support” type animals are allowed
42 U.S.C. Section 3604

It shall be unlawful:

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap...
(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap...
(3) Discrimination includes:
(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises...
(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling...
Fair Housing Act: Landlord concerns

If the requested accommodation does not constitute an undue financial or administrative burden for the landlord, or fundamentally alter the nature of the housing, the landlord must provide it. An exception to a "no pets" policy qualifies as a reasonable accommodation.

Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995) (balanced against landlord's economic or aesthetic concerns as expressed in a no-pets policy, deaf tenant's need for accommodation of hearing dog is per se reasonable)

Fulciniti v. Village of Shadyside Condominium Association, No. 96-1825 (W.D. Pa. Nov. 20, 1998) (no evidence suggested that tenant's assistive animal created a threat or disturbance, so landlord violated FHA by failing to provide a reasonable accommodation)

Fair Housing Act: Landlord concerns

In assessing tenant requests for an assistance animal as a reasonable accommodation, landlords are entitled to consider administrative, financial, or programmatic repercussions of allowing it on the premises, including the potential disturbance to other tenants. It is difficult for landlords to establish that any particular animal constitutes a fundamental alteration or undue burden. HUD regulations governing federally assisted housing state that allowing an assistance animal does not constitute an undue burden.

If the animal is particularly disruptive, or the tenant fails to ensure that it does not bother other tenants, however, the landlord may be justified in denying the accommodation. Woodside Village v. Hertzmark, FH-FL Rptr. ¶ 18,129 (Conn. Sup. Ct. 1993) (holding that federally assisted housing complex did not violate the FHA by evicting resident with mental illness for failure to walk his dog in designated areas and to use a pooper-scooper.)
In August 2005, a tenant at an apartment complex complained that Assenberg and Kearney were violating the landlord’s pet policy by keeping snakes in their unit. Because AHA’s policy prohibits snakes, it issued a Notice to Comply or Vacate and Notice of Intent to Evict to Assenberg and Kearney. In response, Assenberg claimed that the snakes, a five year old red-tailed boa and a twenty-one year old gopher snake, were service animals. He provided a letter from his treating physician stating that he suffered from depression and the snakes were his “therapy pets” and that they served as “magnets for heat” that assisted in pain management. AHA agreed to let Assenberg keep the snakes if (1) he provided a declaration from a professional that the snakes were necessary, that they were not poisonous or otherwise a danger to others’ safety; (2) he kept the snakes in a cage when staff was present or when the snakes were being transported; and (3) he agreed to indemnify, defend, and hold AHA harmless for any injury that might result from the snakes. Assenberg refused to comply with the conditions.


**Rehabilitation Act of 1973**

Applies to any program that receives federal assistance, such as public or subsidized housing

Section 504 states (in part):

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

"Emotional support" animals allowed
Air Carrier Access Act

Applies to persons with disabilities on aircraft either with a service animal or with an emotional support animal. Airports themselves are generally covered under the Americans with Disabilities Act.

49 U.S.C. Section 41705

(a) In General.— In providing air transportation, an air carrier, including (subject to section 40105 (b)) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds:
(1) the individual has a physical or mental impairment that substantially limits one or more major life activities.
(2) the individual has a record of such an impairment.
(3) the individual is regarded as having such an impairment.

14 C.F.R. Section 382.117

(a) Carriers must permit a service animal to accompany a passenger with a disability, may not deny transportation to a service animal on the basis that it may offend or annoy others on the aircraft, but on long flights may require passenger to provide documentation that the animal can relieve itself in a way that does not create a health or sanitation issue.

(b) Carrier must permit the animal to accompany the passenger at any seat unless the animal obstructs an aisle or emergency area.

(d) As evidence that animal is a service animal, carrier must accept identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability using the animal.

(e) If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, passenger must provide current documentation on the letterhead of a licensed mental health professional stating the following:

   (1) The passenger has a mental or emotional disability recognized in DSM IV;

   (2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger’s destination;

   (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and

   (4) The date and type of the mental health professional’s license and the state or other jurisdiction in which it was issued.

(f) Carrier is not required to accommodate unusual service animals, but must determine whether any factors preclude their traveling in the cabin. If no factors preclude the animal from traveling, it must be permitted.
Reasonable Accommodation Clue

Tasks:
1. Pushing open doors
2. Calming anxiety
3. Retrieving objects
4. Alerting to dangers
5. Signaling to start/stop activity
6. Guiding to safety

Locations:
1. Movie theater
2. Airport
3. Restaurant
4. Hotel
5. Shopping mall
6. Nightclub

Animals:
1. Hamster
2. Rabbit
3. Monkey
4. Guinea pig
5. Opossum
6. Parrot

Evidence was sufficient to establish in contested case hearing that former employee of Department of Environmental Quality (DEQ), who had a disabled left leg and suffered from dissociative identity disorder and used a service dog for bracing support and tactile stimulation in the event of a dissociative episode, “needed” an accommodation under the Montana Human Rights Act (MHRA) in the form of nonskid floor coverings so that the service dog could maintain traction on DEQ’s tile flooring; though DEQ was pleased with employee’s performance when employee had to leave service dog at home due to injuries dog received as a result of slip and falls, there was evidence that without her dog employee had to perform her job duties under limitations to which similarly situated employees were not subjected, such as recurring dissociative episodes, difficulty walking and the risk of falling without the dog’s assistance.

State Statutes
ORS 346.610, 346.620, 346.630
Assistance dogs for blind persons

(1) “Dog guide”: a dog wearing a dog guide harness and trained to lead or guide a blind person.
(2) “Dog guide trainee”: a dog undergoing training to lead or guide a blind person.
(3) “Mode of transportation”: any public transportation except for railroad lounge car.
(5) “Public accommodation”: place of public accommodation as defined in ORS 659A.400.
(6) “Trainer”: person who trains dogs to lead or guide blind persons.

ORS 346.620(1) A person who is blind has the right to have a dog guide with the person, and a trainer has the right to have a dog guide or dog guide trainee with the trainer, in any place of public accommodation or on any mode of transportation so long as the person or trainer controls the behavior of the dog.

ORS 346.630:

(1) A landlord may not refuse to rent a dwelling unit to a person who is blind on the basis of the person’s use or possession of a dog guide.

(2) A person who is blind has a cause of action to recover compensatory damages or $200, whichever is greater, from any landlord who refuses to rent a dwelling unit, or who charges additional rent, on the basis of the person's use or possession of a dog guide. The court may award reasonable attorney fees to the prevailing party.

(3) A person who is blind may not be required to pay a fee or deposit for a dog guide.

(4) A person who is blind is liable for any damages done to the dwelling unit by the dog guide.
State Statutes
ORS 346.640, 346.650, 346.660
Assistance dogs for deaf persons

(1) “Hearing ear dog” means a dog that is on an orange leash and that is trained to assist a person who is deaf.
(2) “Hearing ear dog trainee” means a dog undergoing training to assist a person who is deaf.
(3) “Mode of transportation” means any mode of public transportation operating within this state except for a railroad lounge car.
(4) “Person who is deaf” means a person whose hearing disability precludes successful processing of linguistic information through audition with or without a hearing aid.
(5) “Public accommodation” means a place of public accommodation as defined in ORS 659A.400.

346.650 Hearing ear dog in place of public accommodation or on public transportation for person who is deaf; liability. (1) A person who is deaf has the right to have a hearing ear dog with the person, and a trainer of a hearing ear dog has the right to have the hearing ear dog or hearing ear dog trainee with the trainer, in any place of public accommodation or on any mode of transportation so long as the person or trainer controls the behavior of the dog. (2) A trainer of a hearing ear dog or a person who is deaf is not required to pay an additional fee or admission charge for the hearing ear dog. (3) A trainer of a hearing ear dog or a person who is deaf is liable for any damages done to a place of public accommodation or to any mode of transportation by the hearing ear dog.

346.660 Prohibition against discriminating in renting housing because of hearing ear dog; liability. (1) A landlord, as defined in ORS 90.100, may not refuse to rent a dwelling unit, as defined in ORS 90.100, to a person who is deaf on the basis of the use or possession of a hearing ear dog. (2) A person who is deaf may not be required to pay a fee or deposit for a hearing ear dog. (3) A person who is deaf is liable for any damages done to the dwelling unit by the hearing ear dog.

ORS 346.660 raises possible preemption issue: Which statutory scheme trumps?

Oregon state law requirement that hearing ear dog be kept on orange leash may be preempted by Americans with Disabilities Act since there was comprehensive federal regulatory network governing handicapped persons that did not allow for state’s imposition of additional restrictions.

(court rejected proposed substitute accommodation of flashing smoke alarm and doorbell for a hearing assistance dog, finding that the dog could alert the tenant to phone calls, cars in the driveway, visitors, and smoke alarms no matter where he was in the house, and that landlord's devices were less effective in ameliorating the effects of the tenant's hearing impairment)
State Statutes
ORS 346.680 et. seq.
Assistance animals for those with physical impairments

1. “Assistance animal”: any animal trained to assist a person with a physical impairment in one or more daily life activities, including but not limited to:
   a. Dog guides, as defined in ORS 346.610;
   b. Hearing ear dogs, as defined in ORS 346.640;
   c. An animal trained to pull a wheelchair;
   d. An animal trained to fetch dropped items; and
   e. An animal trained to perform balance work.
2. “Assistance animal trainee”: any animal undergoing training to assist a person with a physical impairment.
3. “Daily life activity” includes but is not limited to:
   a. Self-care;
   b. Ambulation;
   c. Communication; or
   d. Transportation.
4. “Mode of transportation”: any mode of transportation operating within this state.
5. “Person with a physical impairment”: any person who has a permanent physical impairment, whose physical impairment limits one or more of daily life activities and who has a record of impairment and is regarded by health care practitioners as having such an impairment, requiring the use of an assistance animal including but not limited to blindness, deafness and complete or partial paralysis.
6. “Public accommodation” means a place of public accommodation including but not limited to educational institutions, airlines and restaurants.

State Statutes
ORS 346.680: Some specifics

*“animal, not dog”
*daily life activity’
*controls the behavior of’

*private right of action, not for being denied access, but for “attack”, theft or destruction of the animal itself

* more protective of the animal than the disabled person?
State Statutes
ORS 346.685 and 346.687: Liability

(1) A person with a physical impairment has the right to have an assistance animal with the person, and a trainer has the right to have an assistance animal or assistance animal trainee with the trainer, in any place of public accommodation or on any mode of transportation so long as the person or trainer controls the behavior of the animal.

(2) A trainer or a person with a physical impairment is not required to pay an additional fee or admission charge for the assistance animal.

(3) The assistance animal shall be allowed to accompany its owner in an ambulance or other mode of transportation in the event of a medical emergency. If the owner is unconscious, the assistance animal shall be placed in an emergency veterinary clinic until the person regains consciousness and can make arrangements for the animal, or a relative responsible for the injured person is contacted and can make arrangements for the animal, or until the injured person dies, in which case the authorities will attempt to contact the school, where the animal was trained, for further action.

(4) A trainer or a person with a physical impairment is liable for any damages done to a place of public accommodation or to any mode of transportation by the assistance animal.

State Statutes
ORS 346.687: Damages and penalties

(1) A person with a physical impairment who uses an assistance animal or the owner of an assistance animal may bring an action for economic and noneconomic damages against any person who steals or, without provocation, attacks the assistance animal. The person with a physical impairment or owner may also bring an action for such damages against the owner of any animal that, without provocation, attacks an assistance animal. The action authorized by this subsection may be brought by the person with a physical impairment or owner even if the assistance animal was in the custody or under the supervision of another person when the theft or attack occurred.

(2) If the theft of or unprovoked attack on an assistance animal described in subsection (1) of this section results in the death of the animal or the animal is not returned or if injuries sustained in the theft or attack prevent the animal from returning to service as an assistance animal, the measure of economic damages shall include, but need not be limited to, the replacement value of an equally trained assistance animal, without any differentiation for the age or the experience of the animal. In addition, the person with a physical impairment or owner may recover any other costs and expenses, including, but not limited to, costs of temporary replacement assistance services, whether provided by another assistance animal or a person, incurred as a result of the theft of or injury to the animal.

(3) If the theft of or unprovoked attack on an assistance animal described in subsection (1) of this section results in injuries from which the animal recovers and returns to service, or if the animal is stolen but is recovered and returns to service, the measure of economic damages shall include, but need not be limited to, the veterinary medical expenses, costs of temporary replacement assistance services, whether provided by another assistance animal or a person, and any other costs and expenses incurred by the person with a physical impairment or owner as a result of the theft of or injury to the animal.

(4) A cause of action does not arise under this section if the person with a physical impairment, owner or the person having custody or supervision of the assistance animal was committing a criminal or civil trespass at the time of the theft of or attack on the assistance animal.
State Statutes
ORS 167.352: Criminalizing interference

167.352 Interfering with an assistance, a search and rescue or a therapy animal. (1) A person commits the crime of interfering with an assistance, a search and rescue or a therapy animal if the person intentionally or knowingly:
   (a) Injures or attempts to injure an animal the person knows or reasonably should know is an assistance animal, a search and rescue animal or a therapy animal;
   (b) Interferes with an assistance animal while the assistance animal is being used to provide assistance to a person with a physical impairment; or
   (c) Interferes with a search and rescue animal or a therapy animal while the animal is being used for search and rescue or therapy purposes.

   (2) As used in this section, “assistance animal” and “person with a physical impairment” have the meanings given those terms in ORS 346.680.

   (3) As used in this section and ORS 30.822:
      (a) “Search and rescue animal” means that the animal has been professionally trained for, and is actively used for, search and rescue purposes.
      (b) “Therapy animal” means that the animal has been professionally trained for, and is actively used for, therapy purposes.

   (4) Interfering with an assistance, a search and rescue or a therapy animal is a Class A misdemeanor.

State Statutes
ORS 167.352: Some specifics

*adds two new categories:
"therapy animal" and "search and rescue animal"

*but then adds restriction of either being "professionally trained"

*and seems inconsistent with ORS 401.977 (animal emergency operations plan):
"(1)(a) “Companion animal” means a domestic animal commonly kept as a household pet.
   (b) “Service animal” means an animal that assists or performs tasks for a person with a sensory, emotional, mental or physical disability.

(2) The Office of Emergency Management, in cooperation with the State Department of Agriculture and local governments, shall prepare a written animal emergency operations plan that provides for the evacuation, transport and temporary sheltering of companion animals and service animals during a major disaster or an emergency.
Case law

“Mrs. Meacham was 57 years of age and partially blind. She was accompanied by what is known as a ‘Seeing Eye’ dog or a guide dog. The case was tried to a jury which found that Mrs. Loving had previously stopped on Seventh Street for a red light to change before proceeding west thereafter on a green light immediately prior to the collision but failed to keep a proper lookout for pedestrians as she passed through the intersection and [collided with Mrs. Meacham].”

“[The right-of-way statute] concerns the rights of totally or partially blind people who cross the street without a guide dog or a white cane. Under such circumstances, such people are there given equal rights and privileges of normal people by reason by such statutory provisions. We know of no rules of law which accord blind people or partially blind people any more rights and privileges than are accorded normal people”.

Loving v. Meacham, 278 SW2d 466, 468 (Tex Civ App 1955), rev’d, 155 Tex 279 (1956)

Sense/Nonsense?

Modification of concert hall's policies to allow quadriplegic patron to attend performances with service animal that may have made disruptive noises at past performances, if such behavior would have been acceptable if engaged in by humans, was necessary and reasonable accommodation under ADA; modification struck well-reasoned and carefully-crafted balance between patron's needs and concert hall's interests by generally allowing access for service animals, but providing that they could be excluded under certain circumstances

Lentini v. Cal. Center for the Arts, 370 F.3d 837 (9th Cir. Cal. 2004)
Sense/Nonsense?

Hospital did not violate the ADA by its treatment of disabled patient who used service animal and insisted that it remain in her room 24 hours a day; hospital did not deny admission to patient and her St. Bernard, but merely tried to accommodate all of its patients in its attempts to limit effects of dog's extremely offensive odor which permeated entire floor of hospital by closing patient's door, installing air filter in her room, and re-assigning staff who had allergic reactions, respiratory problems and skin rashes from the dog.


Sense/Nonsense?

**Crowder v. Kitagawa**, 81 F.3d. 1480 (9th Cir. Hawaii 1996)
Reasonable accommodations allowed for quarantining animals

**Johnson v. Gambrinus Co.**, 116 F.3d 1052 (5th Cir. Texas 1997)
"No animals" policy that fundamentally alters nature of public accommodation must be modified

Miniature horse does not qualify as service animal where it did not assist and perform tasks for owner’s benefit

Store policy where employees inquire into what task or function animal serves disabled person is legitimate under state law (see also, **Dilorenzo v. Costco**, 515 F.Supp.2d 1187 (W.D. Wash. 2007))
Sense/Nonsense?

Defendant didn't show she had a substantial limitation in ability to walk or move such that she needed a service animal to assist her, and thus was not entitled to ADA protections.

_Satterwhite v. City of Auburn_, 945 So. 2d 1076 (Ala. Cri. App. 2006)

The Fair Housing Act encompasses all types of assistance animals regardless of training, including those that ameliorate a physical disability and those that ameliorate a mental disability such as "emotional support animals"

_Association of Apartment Owners v. Taylor_, 2012 WL 3800340 (D. Hawaii 2012)

Landlord didn't violate FHA when it delayed making a decision on a request for several months, requested tenant's school and medical records, and filed suit for declaratory judgment since it was entitled to seek additional information on tenant's disability, initial application contained no diagnosis and it did not start eviction proceedings or remove tenant during litigation


Sense/Nonsense?

It was reasonable for landlord to require that recognized training facility or person certify that service animal has degree of training and temperament which would enable it to ameliorate effects of its owner's disability and to require opinion of doctor about disability and manner in which the animal helped

_In re Kenna Co-op Homes, Corp.,_ 557 S.E. 2d 787 (W. Va. 2001)

Accommodation requested by disabled employee with service dog that employer provide nonskid floor covering so that dog could maintain traction on tile flooring was required accommodation; use of service animal as assistive device was no different than use of wheelchair, scooter or walker

_McDonald v. DEQ_, 214 P.3d 749 (Mont. 2009)
Atypical animals

Opossum as assistance animal
LaFore v. Housing Authority of Portland
1999 WL 1058992 (D.Or. 1999) (not allowed)

Horse as assistance animal
Access Now, Inc. v. Town of Jasper, Tennessee,
268 F.Supp. 2d 973 (E.D. Tenn. 2003) (allowed)

Monkey as assistance animal
Rose v. Springfield-Green County Health Dept.
668 F.Supp. 2d 1206 (W.D. Mo. 2009) (allowed)

Birds and cats as assistance animals
Janush v. Charities Housing Development Corp.
169 F.Supp.2d 1133 (N.D. Cal 2000) (not allowed)
Whittier Terrace Assoc. v. Hampshire

Snake as assistance animal
Assenberg v. Anacortes Housing Authority,
2006 WL 1515603 (W.D. Wash. 2006) (not allowed)
ORS 609.345 Exceptions to permit requirement. (1) The requirements for a
permit in ORS 609.335 and 609.341 (regarding exotic animals) do not apply to the
following:

...  
(h) A person with a disability as defined in 42 U.S.C. 12102(2)(A) who
possesses a service monkey if:
(A) The person presents, at the request of the State Department of
Agriculture, written proof from a medical doctor that the person has a disability
and that the service monkey performs specific tasks for the benefit of the person
with the disability;
(B) The service monkey was obtained from, and trained at, a nonprofit
organization whose mission is to improve the quality of life of persons with
disabilities; and
(C) The person complies with any requirements of the Americans with
Disabilities Act relating to service animals.
(2) As used in subsection (1)(h) of this section, “service monkey” means a
nonhuman primate of the genus Cebus that is trained to perform specific tasks
for a person with a disability. [Formerly 609.315]

[Amended in 2017 Oregon Laws Ch. 409 (H.B. 3363)]

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Defenses

1. "Direct threat" defense:
   use of the animal involves a fundamental
   alteration to the use of the facility

2. "Reasonable accommodation" defense:
   reasonable use of the animal has been
   taken into account and nothing more
   need be done

3. "Unreasonable hazard" defense:
   use of the animal exposes others to significant
   harm or threat which outweighs the value of the use

4. "Fraud" defense:
   plaintiff does not meet stated criteria as to
   "disabled" or "assistance" or "task"
A reasonable accommodation for disabled Section 8 tenant under Fair Housing Act (FHA), in form of an emotional support animal, did not extend to her specific emotional support dog that was aggressive; dog regularly reared up on her back legs, lunged, or bared her teeth at people and other dogs when she was outside, tenant told residents that dog was a “guard dog” and “people and dog” aggressive and asked resident to walk her own dog at different times from tenant's, residents stayed indoors to avoid dog, and some residents were afraid of dog.


Unresolved tensions

"Emotional support" animals are/are not equivalent to “companion pets”

“Licensed trainers” (North Carolina) are better than/worse than “owner trainers” (New York)

Extensive interview-based inquiry into qualifications helps/hurts privacy and discrimination concerns
Some inherent problems

Restriction on locations?
"All areas of a facility where the public is normally allowed to go"

Acceptable "work" or "tasks"?
Alerting one to the presence of something harmful; interrupting impulsive or destructive behaviors

Sufficiency of control of the animal?
"use of a harness, restraint, lead, or tether" unless device restricts the assistance

Limits of inquiry/communication?
What can and what cannot be asked or established

Communication dynamics

What can be asked:

"Is that a trained service animal?"
"What is it trained to do/to assist you with?"
"Is it dangerous or unsafe?"
"Do you have medical documentation?"
(for landlords and employers only)

What cannot be asked:

"What type of disability do you have?"
"How was the animal trained?"
"Do you have proof of its certification?"
"Can you have it demonstrate its task?"

Is more information helpful or harmful?
Civil Action No. 1:09-cv-02582-MSK-MEH
UNITED STATES OF AMERICA,

Plaintiffs,

v.

PATRIC LEHOUILLIER, individually, and
d/b/a LEHOUILLIER & ASSOCIATES, P.C.,

Defendants.

U.S. District Court, District of Colorado
3/10/2010

Consent decree:

Defendants shall:
1. Pay $30,000 to plaintiff #1; pay $10,000 to plaintiff #2; pay $10,000 to the United States as a civil penalty;
2. Provide a copy of the Service Animal Policy to each employee and to newly hired/retained employees, obtain a signed acknowledgment of receipt from each, and maintain acknowledgments in Defendant’s records;
3. Post, maintain, and refresh a sign, printed in dark bold letters, in a font 26 points or larger in size, on a contrasting white background, stating “Service Animals Welcome”, and a copy of the Service Animal Policy both which shall be conspicuously located in Defendant’s law office;
4. Have all firm employees attend a two hour program of educational training regarding the Defendant’s obligations under title III of the ADA and its implementing regulation. Such training will include a question and answer period. Employees hired after the training session will attend a two hour educational training program within their first thirty days of work. All training will be at Defendant’s expense by an independent third party knowledgeable regarding the requirements of title III of the ADA and approved by the United States;
5. Immediately notify the United States of each allegation or complaint alleging that the Firm discriminated on the basis of disability against any individual(s) with a disability in violation of title III of the ADA or took any action in violation of the ADA;
6. Place, in all future advertising in newspapers and telephone directories and on websites, pamphlets, brochures, and other promotional literature regarding the Firm, in a conspicuous location, a statement that the Firm provides equal access to persons with disabilities as required by the Americans with Disabilities Act.
Complainant has visual impairment and a mental disability that substantially limit one or more major life activities and benefits from the use of a service animal to assist her mobility. Complainant had two service animals — a 12-year-old dog in the process of retiring as a service animal and an 18-month-old dog enrolled in service dog training. Both dogs are trained to assist with psychological and visual impairment and have service identification cards. Complainant, accompanied by the dogs, visited Respondent's store. When Respondent saw them entering the store, she asked them to leave. Complainant told Respondent that the dogs were service dogs. Respondent asked to see their service identification cards, then asked Complainant again to leave the store.

The ADA contains no accompanying definition of 'trained' to guide the forum in determining whether 'trained' should be given the limited definition sought by Respondent, i.e. a dog that has completed training and is not retired, or whether the term should be interpreted more expansively to include dogs with the 'training' status of both dogs. Since the word 'trained' is a word of common usage, the forum gives it the plain, natural and ordinary meaning contained in Webster's:

1. "having undergone a course of training". 2. formed, shaped, or disciplined by training: qualified or conditioned by training

In the context of this case, although the first definition implies that training must be complete for a dog to be 'trained,' the second definition is not so limiting. The legislative policy expressed in ORS 659A.103(1), printed in pertinent part below, assists the forum in choosing the correct definition: 'It is declared to be the public policy of Oregon to guarantee individuals the fullest possible participation in the social and economic life of the state * * * to use and enjoy places of public accommodation * * * without discrimination on the basis of disability.'

"Based on this policy statement and the ADA's failure to exclude dogs that (a) have been trained but are retired or retiring or (b) dogs that are undergoing training but are not yet fully trained from its detailed definition of 'service animal,' the forum adopts Webster's second definition. Both dogs fit within that definition. The forum also notes that a fully trained 'service animal,' also fits within Webster's first definition.

Aiding and Abetting: The Legal Realities of Animals in the Service of People

Twelve Core Rules [As Of November 9, 2017]

1. Any dog individually trained to provide assistance to an individual with a disability is a service animal. Service animals perform some task which an individual with a disability cannot perform for him or herself.

2. Some service animals wear special collars, harnesses, or vests. Some are licensed or “certified” and have identification papers. None of these things are required.

3. The business owner may ask if it is a service animal required because of a disability.

4. The business owner may not demand documentation of disability or of “certification” as a condition for providing services.

5. The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed.

6. An individual with a service animal may not be segregated from other customers.

7. The business owner must modify any “no pets” policy to allow the use of a service animal.

8. The business owner cannot charge maintenance or cleaning fees for service animals even if routinely required for pets.

9. The business owner may charge a customer with a disability if a service animal causes damage so long as it is the regular practice to charge non-disabled customers for the same types of damages.

10. The business owner is not required to provide care, food, or a special location for the service animal, and may exclude a service animal when its behavior poses a direct threat to the health or safety of others.

11. The business owner may not assume how a particular animal is likely to behave based on past experience with other animals, and each situation must be considered individually.

12. If the business owner excludes a service animal that is out of control, he must give the individual using the service animal the option of enjoying goods and services without the service animal on the premises.
UPDATED Wednesday, June 17, 2015—8:03 a.m.

BEAVER DAM, Wis. (AP) -- Officials have changed a southeastern Wisconsin city's rules on service animals after a woman took a baby kangaroo into a McDonald's restaurant.

The Beaver Dam Daily Citizen reports the city's Common Council voted 14-0 Monday night to define a service animal as a dog or miniature horse, but not a kangaroo. Police can cite people who try to use other animals.

Beaver Dam police say the woman wrapped the baby kangaroo in a blanket and tucked it in an infant car seat, then took it inside a McDonald's in February. The woman has said the kangaroo is a therapy animal to help her cope with emotional distress.

City Attorney Maryann Schacht says the changes comply with the Americans with Disabilities Act.

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