

Emotional Support Animals and Access to Public Facilities



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07/25/2022

Imagine you are in charge of a facility that is open to the public—perhaps a church, a restaurant, a hardware store, or an apartment building. A woman enters with a dog on a leash. She says the dog is a service dog or emotional support animal, and she asks that the dog be allowed to accompany her in your facility. What do you do? Are you required to accommodate the request? Are you prohibited from accommodating the request? Are you allowed to ask questions to determine whether the woman has a bona fide basis for making the request? Does it make any difference if the dog is wearing a special vest or harness?

Our starting point is that in the absence of a specifically applicable statute or regulation, the proprietor of a privately owned establishment in Arkansas has no legal obligation either to accommodate or refuse to accommodate a person seeking to enter a public premises with an emotional support animal. The trick is that there are specifically applicable statutes and regulations, the most important ones being the Americans with Disabilities Act (“ADA”), The Fair Housing Act (“FHA”), The Air Carrier Act, and the Arkansas Department of Health Regulations for Food Service Establishments.

The Americans with Disabilities Act

The ADA requires places of public accommodation to make “reasonable modifications” to accommodate those with a disability.¹ Such modifications include permitting “the use of a service animal by an individual with a disability.”² Thus, it is important to understand the difference between service animals and emotional support animals.

First, the ADA limits “service animals” to dogs and miniature horses.³ Second, the animal must be “individually trained to do work or perform tasks for the benefit of an individual with a disability.”⁴ Examples of such tasks include guide dogs for the visually impaired and dogs trained to alert a person with diabetes when his blood sugar is low or to detect the onset of a seizure.

But, service animals are not limited to physical disabilities and can also be used to benefit those with psychiatric, mental, or intellectual disabilities.⁵ For example, an animal may be trained to sense an anxiety attack and take a specific action to help lessen its impact. Such a definition to potentially creates confusion regarding whether emotional support animals qualify as service animals. Thus, the ADA expressly precludes emotional support animals by stating that “emotional support, wellbeing, comfort, or companionship do not constitute work or tasks.”⁶

What questions can you ask an owner about her service dog?

Since it is often difficult to spot the difference between an emotional support animal and a service animal, business owners may wonder what questions, if any, they can ask the owner of the animal. A business

owner or her staff may only ask whether a dog is a service dog if it is not obvious that the dog is trained to perform a task for an individual with a disability.⁷ If this is not obvious, staff may only ask: “(1) is the dog a service animal required because of a disability?” and “(2) what work or task has the dog been trained to perform?”⁸ However, staff should not ask for documentation, require the dog to demonstrate the task, or inquire about the disability.⁹ Although a covered entity may not require documentation to show that the animal has been certified, service animals are not exempt from general laws and public health requirements, such as vaccination requirements.¹⁰

The Fair Housing Act and the Air Carrier Act

The ADA is not the end of the analysis for all businesses. Some businesses such as apartment complexes and airlines may have to consider additional laws to clearly determine whether an emotional support animal is a reasonable accommodation. Although the ADA excludes emotional support animals, the FHA has a more expansive definition for animals that qualify as reasonable accommodations. Specifically, the FHA explains that an assistance animal includes an animal “that provides emotional support that alleviates one or more identified effects of a person’s disability.”¹¹ Thus, entities that are subject to the FHA must accommodate emotional support animals. For example, in *Castillo Condo. Ass’n v. U.S. Dep’t of Hous. & Urban Dev.*, HUD filed a charge of discrimination against a condominium association when it refused to allow a resident who suffered from anxiety and depression to keep his emotional support animal, and the First Circuit held that there was substantial evidence that these actions were unlawful.¹² Further, assistance animals may extend to animals other than dogs.

At one time the Air Carrier Access Act also required airlines to accommodate emotional support animals, but that is no longer the case. Instead, the Act now more closely aligns with the ADA, requiring airlines to only accommodate service animals. Interestingly, the Department of Transportation announced that this change was partly due to the fact that a majority of reported airline incidents with animals involved emotional support animals.¹³

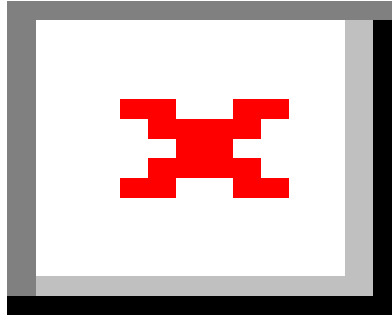
Food Service Establishments

What about restaurants or public dining halls? The Arkansas Health Department Regulations Pertaining to Food Establishments generally prohibit any live animals being allowed on the premises of a retail food establishment.¹⁴ But the regulations make three relevant exceptions. First, a patrol animal accompanying a police or security officer is allowed in a food establishment’s offices, dining, sales, and storage areas. Second, service animals controlled and utilized by a disabled employee or customer are allowed in areas not used for food preparation which are usually open to customers, such as dining and sales areas. Third, pets are allowed in common dining areas of institutional care facilities such as nursing homes at times other than during meals if the area is separated from food preparation and storage areas and all surface areas are cleaned before the next meal service. In addition to the three exceptions in its regulations, the Health Department also allows a food establishment to apply for a “Dog Friendly Patio” waiver which, if granted, authorizes the business to permit its customers to bring leashed dogs onto outdoor dining areas.

Conclusion

In summary, individuals with disabilities are generally allowed to take their service animals into virtually any public space. Emotional support animals, on the other hand, are entitled to special accommodation only in the context of tenants in FHA regulated housing. The biggest difficulty lies in determining whether an animal is genuinely a service animal, or merely an emotional support animal. Most people are not well equipped to identify the line between a service animal that is supporting an individual with a genuine emotional disability and an emotional support animal that is providing genuine comfort and support to an individual who is not disabled. Making that determination is complicated by the fact that the ADA limits the questions one may ask in determining the bona fides of the request for access and by the fact that there is no commonly recognized certification or registry that would help

identify qualified service dogs. Thus, this question cannot be resolved by looking for a special vest or asking for documentation. Instead, proprietors and staff must rely on a thoughtful, limited inquiry into the tasks performed by the animal that an individual wants to bring into a public facility.



This article was originally published in Vol. 57 No. 2/Spring 2022 issue of *The Arkansas Lawyer* and is republished with permission.

1. 28 C.F.R. § 36.302(a).
2. 28 C.F.R. § 36.302(c)(1).
3. 28 C.F.R. §§ 36.104, 36.302(c)(9).
4. 28 C.F.R. § 36.104.
5. 28 C.F.R. § 36.104.
6. 28 C.F.R. § 36.104.
7. 28 C.F.R. § 36.302(c)(6).
8. https://www.ada.gov/regs2010/service_animal_qa.html.
9. 28 C.F.R. § 36.302(c)(6); https://www.ada.gov/regs2010/service_animal_qa.html.
10. https://www.ada.gov/regs2010/service_animal_qa.html.
11. https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals.
12. 821 F.3d 92, 98 (1st Cir. 2016).
13. <https://www.transportation.gov/sites/dot.gov/files/2020-12/Service%20Animal%20Final%20Rule%20FAQs.pdf>.
14. Arkansas Department of Health Rules & Regulations Pertaining to Food Establishments § 6-501.115(A), accessible at: https://www.healthy.arkansas.gov/images/uploads/pdf/Food_Establishments_Rules_and_Regulations.pdf.