



NEW YORK
CITY BAR

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**COMMITTEE ON CIVIL RIGHTS
COMMITTEE ON LEGAL ISSUES AFFECTING PEOPLE WITH DISABILITIES
COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS**

**PROPOSED AMENDMENTS TO STATE LAW DEFINITIONS OF
GUIDE, HEARING AND SERVICE DOGS**

The New York City Bar Association, through its Committees on Civil Rights, Legal Issues Affecting People with Disabilities, and Legal Issues Pertaining to Animals, urges revisions in several New York State laws to be consistent with the definition of “service animal” under the Americans with Disabilities Act (ADA) that, as discussed below, is applicable throughout New York State.¹

AMERICANS WITH DISABILITIES ACT

Under the ADA, all that is required is that a “service animal” be “individually trained to do work or perform tasks for the benefit of an individual with a disability”. 28 C.F.R. § 35.104 and § 36.104.² A “private entity ... may not insist on proof of State certification before permitting the entry of a service animal to a place of public accommodation.” Department of Justice Technical Assistance Manual for Title III of the ADA, III-4.2300. Justice Department regulations effective March 15, 2011, make clear:

Inquiries. A public accommodation shall not ask about the nature or extent of a person’s disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an

¹ This comprehensive approach to this issue is consistent with a July 2010 report by these committees that focused only on the New York State Human Rights Law.

² See the Justice Department’s revised regulations under ADA Titles II and III, effective March 15, 2011, including the same wording in the definition of “service animal”, available at http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html and http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html.

animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).³

Thus, an inquiry that might appear to be authorized by inconsistent State law would be in violation of the ADA.⁴

The intent underlying the federal provisions is:

that public accommodations take the necessary steps to accommodate service animals and to ensure that individuals with disabilities are not separated from their service animals. It is intended that the broadest feasible access be provided to service animals in all places of public accommodation, including movie theaters, restaurants, hotels, retail stores, hospitals, and nursing homes⁵

Similarly, federal law requires an employer to permit people with disabilities to use service animals at their workplaces.⁶ Federal law also prohibits housing discrimination against a person with a disability for use of a service animal.⁷

Notably, both the Bush and Obama Justice Departments explicitly have rejected calls for formal training and certification requirements for service animals. In its "Section-by-Section Analysis and Response to Public Comments" regarding the amendments to its ADA regulations that will be effective March 15, 2011, the Justice Department states:

Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability.

³ 28 C.F.R. § 36.302 (c) (6), available at http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html. See, for public entities, § 35.136 (f), available at http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html.

⁴ Compliance with "state or local laws" that would limit use of service animals otherwise permitted by the ADA is a violation of the ADA. "The ADA provides greater protection for individuals with disabilities and so it takes priority over local or state laws or regulations." "Commonly Asked Questions about Service Animals in Places of Business", and accompanying letter from United States Department of Justice, Civil Rights Division, and National Association of Attorneys General (including New York's), available at <http://www.ada.gov/archive/animal.htm>.

⁵ 28 C.F.R. Pt. 36, App. B (Section-by-Section Analysis); see 28 C.F.R. §36.302(c), 42 U.S.C. §12182(b)(2)(A)(ii); Disability Rights Section, U.S. Dep't of Justice, The ADA and City Governments: Common Problems, available at <http://www.usdoj.gov/crt/ada/comprob.htm>.

⁶ See 29 C.F.R. § 1630.16, Appendix to Part 1630--Interpretive Guidance on Title I of the Americans with Disabilities Act, Section 1630.2(o) Reasonable accommodation, available at <http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi>.

⁷ See 24 C.F.R. § 100.204 Reasonable accommodations, available at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=da0cb62eed900f3249edbb81af304f1a&rqn=div5&view=text&node=24:1.2.1.1.1&idno=24>.

A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.⁸

NEW YORK CITY HUMAN RIGHTS LAW

The New York City Human Rights Law (title 8 of the New York City Administrative Code; CHRL) is at least as inclusive as the ADA.

"Reasonable accommodation" requires places of public accommodation to recognize the unitary nature of a handicapped individual and the means s/he chooses to adapt to such handicap. Whenever possible, the place of public accommodation must make any and all such accommodations so as to allow the handicapped individual to function normally, unless the accommodation causes an undue burden or economic hardship.... Especially where, as here, the means employed by the handicapped individual to overcome his/her handicap is commonly utilized and almost universally accepted [guide dog], it is not the prerogative of one who operates a place of public accommodation to substitute a means by which a handicapped person will compensate for his/her impairment....

At times, the assistance of wheelchairs, canes and artificial limbs are not required by their owners. In the same way, guide dogs may occasionally be of little use. However, when such means of accommodation are necessary to overcome the handicap, it would be both unlawful and absurd to withhold such form of assistance from the individual person who wishes and needs to rely on it.⁹

Thus, for example, under the ADA throughout New York State, and the CHRL within New York City, an individual with a disability may not be barred from a restaurant because that individual is accompanied by a guide, hearing, or service dog, regardless of who trained the dog. Indeed, it would be a violation of the ADA or of the CHRL for the proprietor or an employee of the restaurant to require State certification of the dog.

NEW YORK STATE LAWS

Several New York State laws currently contain provisions inconsistent with the controlling federal ADA and should be amended as discussed below.

Proposed Amendments to State Human Rights Law

There should be two amendments to the State Human Rights Law (SHRL).

⁸ http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html and http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html. The Bush Administration used similar language. Notice of Proposed Rulemaking to amend 28 CFR Part 36: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities. 73 F.R. 34473 (June 17, 2008).

⁹ *Tartaglia v. Jack LaLanne Fitness Ctrs., Inc.*, N.Y.C. Comm'n on Human Rights, Complaint No. 04153182-PA, Decision and Order (June 12, 1986) 18-22 (citations omitted).

(1) The New York State Human Rights Law (article 15 of the Executive Law; SHRL) § 292 (31), (32) and (33) should be replaced with a new subdivision (31), as follows:

31. The term "service animal" means any animal, including, but not limited to, any guide, hearing, or service dog, individually trained to do work or to perform tasks for the benefit of an individual with a disability.

The provisions to be replaced, added by Chapter 133 of the Laws of 2007, define guide, hearing, and service dogs in terms that are both impossible to achieve and in conflict with applicable federal and local law. The sections in question state:

31. The term "guide dog" means any dog that is trained to aid a person who is blind by a recognized guide dog training center or professional guide dog trainer, and is actually used for such purpose.

32. The term "hearing dog" means any dog that is trained to aid a person with a hearing impairment by a recognized hearing dog training center or professional hearing dog trainer, and is actually used for such purpose.

33. The term "service dog" means any dog that is trained to work or perform specific tasks for the benefit of a person with a disability by a recognized service dog training center or professional service dog trainer, and is actually used for such purpose.

New York State does not "recognize" any such "training centers" (even presuming "recognition" is to be by the State, rather than by one who might be accused of discriminatory conduct), nor does the State license "professionals" in such categories. Moreover, even were New York State to accord such "recognition" and/or "professional" licensure, it would make the provisions to be repealed no more worth enforcing since, in virtually all instances, the ADA and the CHRL prohibit discrimination against people with disabilities using service animals. Under the current SHRL, the proprietor or employee of a restaurant, store or other place of public accommodation, or a public employee, might be misled to believe an inquiry as to training or certification is permissible – resulting in a violation of the rights of the person with a disability and a valid complaint under the ADA and/or CHRL against the restaurant or other entity.

The SHRL definitions have other problematic practical implications. For example, the State's "pooper scooper" law (Public Health Law § 1310) exempts from its requirements "a guide dog, hearing dog or service dog accompanying a person with a disability, as defined in subdivision twenty-one of section two hundred ninety-two of the executive law." Goshen's Municipal Code, Art. II, § 6-41(d), contains a similar exclusion, referencing the SHRL definition of "disability". These exemptions, neither of which relate to any other definition of guide, hearing or service dogs, were enacted before the SHRL dog definitions; since the exemptions each incorporate by reference part of the definitional section of the SHRL, it may be argued they should be construed in light of the 2007 dog definitions, thus effectively eliminating the exemptions.

The SHRL definitions at issue are particularly unfortunate, since discrimination against people with disabilities using service animals in places of public accommodation is one of the most widely reported instances of disability discrimination. Freedom on Four Legs: Service

Animals, Individuals with Disabilities, and the Law.¹⁰ That report relates to Article 4-B of the New York State Civil Rights Law (SCRL), discussed below.

(2) As noted above, § 292 (31), (32) and (33) were added by Chapter 133 of the Laws of 2007. The primary purpose of that law had been to remove from § 296 (14) a requirement for a technical measurement of hearing impairment in connection with use of a hearing dog. However, the language remaining in § 296 (14) may be read to indicate that sight and hearing impairments are not disabilities. Accordingly, § 296 (14) should be amended to read as follows (deletion in brackets, addition underscored):

14. It shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate against a blind person, a hearing impaired person or a person with [a] another disability on the basis of his or her use of a guide dog, hearing dog or service dog.

Proposed Amendments to State Civil Rights Law

As mentioned above, Freedom on Four Legs related to Article 4-B of the SCRL. SCRL § 47-b(4) defines guide, hearing, and service dogs in a manner somewhat more compatible with the ADA and New York City law, stating: “The term ‘guide dog’, ‘hearing dog’ or ‘service dog’ shall mean a dog which is properly harnessed and has been or is being trained by a qualified person, to aid and guide a person with a disability.” The Civil Rights Law does not require any particular “qualification”¹¹, nor does it indicate what “harness” might be “proper”¹². Although SCRL § 47-b(6) states: "Any law, rule, or regulation conflicting with any provision of this article is, to the extent of said conflict only, deemed to be superseded by the provisions of this article", SCRL § 47-b(5) incorporates by reference the definition of "disability" in SHRL § 292 and, since the Legislature would be presumed to have been aware of SCRL § 47-b while enacting the definitions of guide, hearing and service dogs in SHRL §§ 292 (31), (32) and (33), courts are likely to harmonize the undefined phrase "trained by a qualified person" in SCRL § 47-b(4) with the SHRL definitions, thus eviscerating the SCRL provisions. This problem would be alleviated in part by the proposed amendment to the SHRL. However, to avoid confusion, two amendments should be made to SCRL § 47-b. Subdivision (3) should have the following underscored addition:

¹⁰ Report of the Civil Rights Division, Office of New York State Attorney General, June 2002, p. 3, available at http://www.oag.state.ny.us/bureaus/civil_rights/pdfs/service_animal_report.pdf.

¹¹ Recall that the Justice Department, in its Section-by-Section Analysis of its new regulations, recognizes that persons with disabilities can and have trained their own service animals.

¹² The new ADA regulations provide:

Animal under handler's control. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

28 C.F.R. § 35.136 (d) and § 36.302 (c)(4), available at http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html and http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html.

3. Persons qualified to train dogs to aid and guide persons with a disability, while engaged in such training activities, shall have the same rights and privileges set forth for persons with a disability in this article. Such a qualified person may include, but is not limited to, a person with a disability for whom the dog is being trained.

Subdivision (4) should be amended as follows (deletions in brackets, additions underscored):

4. The term "guide dog", "hearing dog" or "service dog" shall mean a dog [which] that is [properly harnessed] under the control of the person using or training it and has been or is being trained [by a qualified person,] to aid and guide a person with a disability.

Proposed Amendments to State Agriculture and Markets Law

The State Agriculture and Markets Law (SAML) also contains definitions of guide, hearing and service dogs. For the reasons discussed above, SAML § 108 should be amended as follows (deletions in brackets):

9. "Guide dog" means any dog that is trained to aid a person who is blind and is actually used for such purpose, or any dog [owned by a recognized guide dog training center located within the state] during the period such dog is being trained or bred for such purpose.

21. "Hearing dog" means any dog that is trained to aid a person with a hearing impairment and is actually used for such purpose, or any dog [owned by a recognized training center located within the state] during the period such dog is being trained or bred for such purpose.

22. "Service dog" means any dog that has been or is being individually trained to do work or perform tasks for the benefit of a person with a disability[, provided that the dog is or will be owned by such person or that person's parent, guardian or other legal representative].

Although therapy dogs are not service animals and those using them do not have the same rights as those using guide, hearing or service dogs, the subdivision of this section defining "therapy dog" should be amended in recognition of the absence of "recognized training centers", as follows (deletion in brackets):

26. "Therapy dog" means any dog that is trained to aid the emotional and physical health of patients in hospitals, nursing homes, retirement homes and other settings and is actually used for such purpose, or any dog [owned by a recognized training center located within the state] during the period such dog is being trained or bred for such purpose.

Proposed Amendment to State Transportation Law

For the reasons set forth above relating to the SHRL and SCRL, State Transportation Law § 147 should be amended as follows (deletions in brackets, additions underscored):

147. Dogs accompanying persons with a disability. Subject to such rules and regulations as the commissioner may prescribe, all common and contract carriers of passengers by motor vehicle shall permit a guide dog, hearing dog or service dog [properly harnessed,] under the control of [accompanying] a person with a disability, as defined in subdivision twenty-one of section two hundred ninety-two of the executive law, to accompany, aid and guide such person, to ride on all vehicles operated for transportation and no charge shall be made for the transportation of such dog.

Proposed Amendment to State Public Housing Law

As mentioned above, the primary purpose for Chapter 133 of the Laws of 2007 was to remove a requirement from SHRL § 296 (14) pertaining to a technical standard for hearing impairment when use of a hearing dog is involved. A similar requirement remains in State Public Housing Law and should be removed, as follows (deletions in brackets, additions underscored):

§ 223-b. Discrimination against a person with a hearing [impaired persons] impairment who [have] has a hearing dog[s]. No [hearing impaired] person who has a hearing impairment [manifested by a speech discrimination score of forty percent or less in the better ear with appropriate correction as certified by a licensed audiologist or otorhinolaryngologist as defined in section seven hundred eighty-one of the general business law, or a physician who has examined such person pursuant to the provisions of section seven hundred eighty-four of such law,] shall be denied occupancy in a dwelling in any project or be subjected to eviction from any such dwelling on the sole ground that such person owns a hearing dog, provided, however, that if after occupancy a health hazard results on account of such dog, the public health officer having jurisdiction may take such corrective measures as may be appropriate.

Accordingly, the Association urges the Governor and the State Legislature to make the foregoing amendments to avoid inconsistencies with controlling federal law recognizing the rights of people with disabilities.

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