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At Your Service!

Assistance Animals and the Law in Michigan

By Virginia C. Thomas

Depending on when you went to law school, you might be familiar with Professor Edward Henry Warren's oft-repeated (and paraphrased) address to the 1924 Harvard Law School entering class: "Look well to the right of you, look well to the left of you, for one of you three won't be here next year. Ours is the policy of the Open Door."¹ With an increasing number of requests made of businesses, airlines, property owners, and educational institutions to accommodate assistance animals, today's welcome could suggest instead that "one of you three might be a . . . *nonhuman*." The open-door policy would still apply—only differently.

And it seems like everybody's talking about it. A basic Google News search retrieves an expansive list of news articles and blog posts highlighting the proliferation of requests to permit access for assistance animals.² Likewise, the same search in Google Scholar results in almost 160,000 articles, studies, and book chapters discussing the effect of animal-assisted interventions on our physical and psychological well-being.³ Clearly, much ink has been spilled on this topic.

Need for clarity

There is an ongoing need to distinguish among the different types of assistance animals because legal requirements and rights differ among them. Service animals, therapy animals, and emotional support animals are included under the umbrella term "assistance animals."⁴ Their specific legal definitions derive from federal and state statutes and corresponding regulations.⁵ It should be simple to tell them apart in everyday life, right? Well, perhaps not.



A recent study links the rapid increase in the use of assistance animals with common misconceptions about the tasks they perform, required training or certifications, and the laws governing their access to public spaces.⁶ For example, there are legal distinctions between a trained psychiatric service dog whose job is assisting a person suffering from depression and an emotional support dog that may provide a therapeutic benefit to a person suffering from the same psychological disability. However, many of us would welcome help articulating those differences.⁷

Pushing the envelope

Some have suggested that our current legal framework is open to manipulation by individuals who would like the benefit of their pets' companionship wherever they go.⁸ A growing number of people reportedly misrepresent their pets⁹ as emotional support animals by equipping them with vests, collars, tags, and ID cards identifying them as "service" or "therapy" animals.¹⁰

They also may list their pets in so-called "official" registries that claim to certify them as such.

Change in the air?

Controversy often signals the need for change. The U.S. airline industry, for one, claims to be overwhelmed by a system some say lends itself to these types of abuse. Airlines and consumer advocacy groups have lobbied Congress to enact stricter standards regarding assistance animals,¹¹ and Congress is responding to their concerns. H.R. 4 would require the secretary of transportation to consider implementing reasonable measures to ensure that assistance animals carried in aircraft cabins meet minimum standards and to promote the safety of all passengers.¹² A more narrowly focused bill, S. 2738, would mandate training standards for service animals that accompany air passengers, and provide criminal sanctions for those who intentionally falsify statements while seeking a "service animal" accommodation from an air carrier.¹³

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Others argue that the scope of the Americans with Disabilities Act (ADA) is too limited. They believe that the ADA's definition of service animals should encompass emotional support animals because the latter also perform specific work—namely, they provide emotional support.¹⁴ The corresponding rights and protections should apply to these animals as well.

The measures discussed above seek to align the ADA with the Fair Housing Act and the Air Carrier Access Act (ACAA) in terms of their reach. Certifications would apply in their respective contexts, as would legal sanctions for those who abuse the system. The goal should be to accommodate the legitimate needs of people with disabilities—not create additional barriers for them.¹⁵

Two bills currently pending in Congress would update the ACAA to facilitate access to air transportation for assistance animals. S. 1318 and H.R. 5004 would authorize heightening standards for aircraft, equipment, and facilities. Both bills protect the travelers' rights to have emotional support animals with them during flight. Moreover, the bills would eliminate the requirement for additional documentation for psychiatric service animals and prohibit air carriers from requesting medical documentation. These bills also propose a higher standard of care with respect to passengers with disabilities or their mobility aids, allowing treble damages for each violation.¹⁶

In May 2018, the secretary of transportation issued an Advanced Notice of Proposed Rulemaking (ANPRM) in response to thousands of consumer complaints received by airlines in addition to requests for rulemaking by advocacy groups on both sides of the debate.¹⁷ The agency is still in the process of soliciting public comments before finalizing the text of its proposed rule. However, the ANPRM discusses the need to limit

the types of species recognized as service animals as well as the number of service animals any one airline passenger would be allowed to carry on board. The agency is also considering the benefits of harmonizing its regulation of psychiatric service animals and emotional support animals. This is no simple matter. It would require the agency to reconcile conflicting standards for training, documentation, and control established by the ADA and the ACAA. Nonetheless, the airline industry is anticipating change. In recent months, several airlines have issued more restrictive policies for air carrier passengers who wish to travel with these types of assistance animals.¹⁸

Michigan's response

Michigan law does not directly parallel federal law on this subject. Bills pending in the current legislature show that the Michigan House and Senate recognize the need for reform.

S.B. 663 addresses concerns about persons who falsely represent companion animals as service animals in a public place.¹⁹ It distinguishes among an "emotional support animal," a "service animal," and a "service animal in training," and requires a licensed healthcare provider to certify annually that the animal is accommodating a disability-related need. The bill further outlines requirements for healthcare providers who certify emotional support animals.²⁰ If enacted, it would carry misdemeanor penalties and possibly result in housing evictions for individuals who knowingly misrepresent an animal's status.

H.B. 5281 provides rigorous standards for training assistance animals and qualifications for trainers.²¹ Like S.B. 663, this bill defines essential terms including "emotional support animal" and "therapy animal" to

distinguish them from "service animal." It outlines a certification program and public registry for obedience training instructors to be administered by the Michigan Department of Agriculture and Rural Development. The bill also prescribes legal sanctions and penalties for violations.

The focus of H.B. 5356 and H.B. 5357 is licensing and identification for service, therapy, and emotional support animals.²² The former bill requires adding the appropriate status designation to a dog license, while the latter specifies eligibility requirements for an identification patch to be issued at the request of the animal's owner. Misdemeanor penalties attach to these bills as well.

Finally, H.B. 5645 speaks to providing assistance animals to aid children and adult witnesses who testify at trial. In addition to outlining the logistics for providing this type of assistance, the bill would add yet another new term to the MCL lexicon: "courtroom support dog."²³ Coincidentally, the timing of this legislation segues with the June 7, 2018, opinion of the Michigan Court of Appeals in *People v Shorter*.²⁴ The Court found procedural error sufficient to overturn a third-degree sexual assault conviction. The error? The Court permitted the nondisabled adult plaintiff to testify accompanied by an emotional support dog and its handler. Writing for the majority, Judge Shapiro stated: "Indeed, were we to rule that that (sic) a fully abled adult may be accompanied by a support dog or person simply because they will be 'more comfortable,' unlocks a door that we have great hesitation about opening. At minimum, this unprecedented change, if adopted, should be made by legislation, court rule, or a decision of our Supreme Court."²⁵ H.B. 5645 awaits its third reading in the Senate. Perhaps the legislature is listening. ■



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(Continued on the following page.)

ENDNOTES

1. Leach, *Look Well to the Right*, 58 Harv L Rev 1137, 1138 (1945).
2. The search “service emotional support therapy animals” retrieved, for example, Mattison, *Businesses are tightening policies on emotional support dogs*, KHON 2 (April 19, 2018) <<http://www.khon2.com/news/local-news/businesses-are-tightening-policies-on-emotional-support-dogs/1130795892>>; Brulliard, *WARM BUDDIES, Are psychiatric service dogs truly therapeutic, or just nice to have?* The Washington Post (May 8, 2018) <<http://www.heraldtribune.com/entertainmentlife/20180508/warm-buddies-are-psychiatric-service-dogs-truly-therapeutic-or-just-nice-to-have>>; Sweet, *Emotional support animals proliferate at Yale*, Yale News (April 26, 2018) <<https://yale.dailynews.com/blog/2018/04/26/emotional-support-animals-proliferate-at-yale/>>; Bradley, *Fewer pets on planes? New legislation seeks to tighten standards* WLOS 13 (April 26, 2018) <<http://wlos.com/news/local/fewer-pets-on-planes-new-legislation-seeks-to-tighten-standards>>. All websites accessed in this article were accessed June 8, 2018.
3. See Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 Barry L Rev 39 (2002); Geist, *Conceptual Framework for Animal Assisted Therapy*, 28 Adolescent Soc Work J 243 (June 2011) <https://www.researchgate.net/publication/226606745_Conceptual_Framework_for_Animal_Assisted_Therapy>; Kelley & Eller, *Introduction to Animal Therapy and its Related Tax Benefits*, 1 J Couns & Psychol Issue 2, Article 4 (2017) <<https://digitalcommons.gardner-webb.edu/jcp/vol1/iss2/4>>.
4. Sandoval, *Service, Therapy, and Emotional Support Animals*, 44 Colo Law 69 (July 2015).
5. For example, “service animal” as defined in 28 CFR 36.104 has been incorporated by reference in MCL 37.301 (Identification and Patch for Service Animal), MCL 287.291 (Leader Dogs for Blind Persons), MCL 750.50a (Michigan Penal Code), and MCL 752.61 (Collars, Harnesses, and Leashes on Dogs in Public Places).
6. Schoenfeld-Tacher, et al., *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 Int J Environ Res Pub Health 642 (June 2017) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5486328/>>.
7. A number of online FAQs provide helpful information in this regard. See US Dep’t of Justice, Civil Rights Div, Disabilities Rights Section, *Frequently Asked Questions about Service Animals and the ADA* (July 2015) <https://www.ada.gov/regs2010/service_animal_qa.pdf>; Mich Dep’t of Civil Rights, *Service Animal Frequently Asked Questions (FAQs)* (April 2016) <https://www.michigan.gov/documents/mdcr/FAQs-4-15-16-Final_521982_7.pdf>; American Veterinary Med Ass’n, *Service, Emotional Support and Therapy Animals* <<https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/Service-Emotional-Support-Therapy-Animals.aspx>>; American Psychological Ass’n, *Emotional Support Animal vs. Psychiatric Service Animal* (September 2016) <<http://www.apa.org/monitor/2016/09/pet-aid-sidebar.aspx>>.
8. Clay, *Is that a pet or a therapeutic aid?*, Monitor on Psychology 47(8), 38 (September 2016) <<http://www.apa.org/monitor/2016/09/pet-aid.aspx>>.
9. Emotional support animals that have been transported in airplane cabins include dogs, cats, pigs, kangaroos, ducks, parakeets, and monkeys. But United Airlines barred an emotional support peacock from a flight earlier this year. See DeSilva, *Emotional support peacock denied flight by United Airlines*, NBC News (January 30, 2018) <<https://www.nbcnews.com/storyline/airplane-mode/emotional-support-peacock-denied-flight-united-airlines-n842971>>.
10. Herzog, *Service Animal Scams: A Growing Problem*, The Animal Studies Repository: Psychology Today (July 11, 2014) <<https://animalstudiesrepository.org/aniubpos/47/>> and Benning, *Pets on a plane: Airlines turn to government for help in taming rise of emotional support animals*, Dallas News (April 15, 2018) <<https://www.dallasnews.com/business/airlines/2018/04/15/pets-plane-american-southwest-airlines-government-help-emotional-support-animals>>.
11. Gilmore, *Airlines Lobby Washington to Roll Back Red Tape*, NBC 5 DFW (February 14, 2018) <<https://www.nbcdfw.com/news/politics/Airlines-Lobby-Washington-to-Roll-Back-Red-Tape-474056113.html>>.
12. FAA Reauthorization Act of 2018, HR 4, 115th Cong (April 2018) <<https://www.govtrack.us/congress/bills/115/hr4/text>>.
13. S 2738, 115th Cong (April 2018) <<https://www.congress.gov/bill/115th-congress/senate-bill/2738>>.
14. Hernandez-Silk, *They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals*, 21 Richmond Pub Int L Rev 313 (2018) <<https://scholarship.richmond.edu/pilr/vol21/iss3/6>>.
15. Huss, *Why Context Matters: Defining Service Animals under Federal Law*, 37 Pepperdine L Rev 1163 at 1216 (2010) <<https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1054&context=plr>>.
16. Air Carrier Amendments Act of 2017, S 1318, 115th Congress (June 2017) <<https://www.congress.gov/bill/115th-congress/senate-bill/1318>> and Air Carrier Access Amendments Act of 2018, HR 5004, 115th Congress (February 2018) <<https://www.congress.gov/bill/115th-congress/house-bill/5004>>.
17. *Traveling by Air with Service Animals*, 83 Fed Reg 23832 at 23834 (May 23, 2018) <<https://www.gpo.gov/fdsys/pkg/FR-2018-05-23/pdf/2018-10815.pdf>>.
18. See, for example, Morris, *JetBlue: Leave the Emotional Support Hedgehogs at Home—But Miniature Horses Are Still Acceptable*, Fortune (June 6, 2018) <<http://fortune.com/2018/06/06/jetblue-emotional-support-animals/>> and Wood, *American Announces Changes to Emotional Support Animal Policy*, TravelPulse (May 14, 2018) <<https://www.travelpulse.com/news/airlines/american-announces-changes-to-emotional-support-animal-policy.html>>.
19. 2017 SB 663 <<https://www.legislature.mi.gov/documents/2017-2018/billintroduced/Senate/pdf/2017-SIB-0663.pdf>>. This bill would consolidate MCL 752.61, MCL 752.62, MCL 752.63, and MCL 752.64 into a single code section.
20. *Id.* at Section 2(2)(C). The proposed requirement that a healthcare provider “document that he or she has treated the person . . . for at least 6 months” may be at odds with the view of experts who believe that writing letters of certification could damage the physician-client relationship. See Clay, *Is that a pet or a therapeutic aid?*
21. 2016 HB 5281 <<http://www.legislature.mi.gov/documents/2015-2016/billengrossed/House/pdf/2016-HEBH-5281.pdf>>.
22. 2017 HB 5356 <<https://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-5356.pdf>> and 2017 HB 5357 <<https://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-5357.pdf>>. These bills were sponsored by Rep. Peter Lucido, who also sponsored HB 5281.
23. 2018 HB 5645 <<https://www.legislature.mi.gov/documents/2017-2018/billengrossed/House/pdf/2018-HEBH-5645.pdf>>.
24. *People v Shorter*, ___ Mich App ___, ___ NW2d ___ (2018) (Docket No. 338629).
25. *Id.* ___; slip op at 6.