SERVICE DOGS

IN

CALIFORNIA

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INTRODUCTION

This research paper intends to inform California business owners about statutory law regarding service dogs under the federal Americans with Disabilities Act (ADA) and California Disabled Persons Act (DPA), including discussions of case opinions interpreting the laws. Both statutes require places open to the public ("covered places") to modify their policies in order to accommodate disabled persons accompanied by a service dog or miniature horse. This paper will analyze each element of a hypothetical legal claim under the DPA, and a thorough analysis of exceptions to the general rule requiring accommodation.

Articles and blogs about service animals frequently contain inaccuracies. For example, a NOLO article states that the ADA protects the rights of people who use emotional support animals. "California Laws on Psychiatric Service Dogs and Emotional Support Animals in Public Places," available at: https://www.nolo.com/legal-encyclopedia/california-laws-psychiatric-service-dogs-emotional-support-animals-public-places.html (last visited, November 29, 2019). No ADA provision grants any right to a person with an emotional support animal. The internet contains countless examples of inaccurate statements about service dogs.

Confusion surrounding service dog laws is exacerbated by the fact that people unconsciously and interchangeably use labels (service animal, service dog, guide dog, signal dog, assistance dog, emotional support animal, psychiatric service animal) that have substantially different definitions under the ADA, DPA, federal Fair Housing Act, California Fair Employment & Housing Act, and Air Carrier Access Act (ACAA).

For example, the ADA definition of "service animal" is limited to dogs, but a "service animal" under the ACAA can be one of many different animal species. This paper will explain the legal definition of each of these terms, the statutes that use them, and relevant case law.

This paper will explain: what "disability" means, which types of places (covered places) must accommodate service dogs, which work or tasks service dogs may perform, and the required qualifications for dog trainers. In California, dogs in training are entitled to the same access as fully trained service, signal, and guide dogs. This topic is discussed extensively.

In conclusion, this paper recommends changes to current California law.

I. Americans With Disabilities Act (ADA)

The ADA was enacted to eliminate discrimination against persons with disabilities. 42 U.S.C. § 12101(b). The ADA intends to provide "clear, strong, consistent, enforceable standards" that the Federal Government may enforce to prevent routine, day-to-day discrimination against disabled people. *Id.*

In 2008, Congress amended the ADA due in part to court decisions that improperly "narrowed the broad scope of protection intended to be afforded by the Act." ADA Amendments Act of 2008, 110 P.L. 325 Sec. 2(a)(7); discussing *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002) 534 U.S. 184. Congress criticized the Supreme Court's holding in *Toyota* that "substantially" and "major" should be strictly interpreted to create a high bar for an individual to qualify as disabled. *Id.* The current version of the ADA, which states that an "episodic" impairment is a "disability," also overrules *Toyota*'s holding that in order for an impairment to qualify as a disability, the impairment must impact the person permanently or over a long period of time. *Id.* at 198; *Mancini v. City of Providence* (1st Cir. 2018) 909 F.3d 32, 40; 28 U.S.C. § 12102(4)(D). Congress also criticized *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471, which

was discussed and relied on in *Toyota*. 534 U.S. at 199-200; ADA Amendments Act of 2008, 110 P.L. 325 Sec. 2(a)(4). The ADA mandates courts to interpret "disability" in a manner that provides 'broad coverage to the maximum extent' allowed. 28 U.S.C. § 12102(4)(A).

Plaintiffs alleging discrimination may not recover money damages for violations of the ADA unless the Attorney General is involved; only injunctive relief and attorney fees may be recovered. *Mayberry v. Von Valtier* (E.D. Mich. 1994) 843 F.Supp 1160, 1167. For a plaintiff to have standing in litigation seeking injunctive relief, the plaintiff ordinarily must show a "likelihood of future discrimination." *Stan v. Wal-Mart Stores, Inc.* (N.D.N.Y. 2000) 111 F.Supp.2d 119, 125. California law permits injunctive and monetary relief for ADA violations.

II. California Disabled Persons Act & Unruh Civil Rights Act

Both the California Disabled Persons Act, *Cal. Civ. Code* § 54 *et. seq.*, and Unruh Civil Rights Act, *Cal. Civ. Code* § 51 *et. seq.*, incorporate the ADA by reference; thus, these statutes are violated by any conduct that violates the ADA. *Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 223; *Civ. Code* §§ 51(f), 54(c).

Unlike the ADA, the California Disabled Persons Act (DPA) and Unruh Civil Rights Act (UCRA) permit a disabled plaintiff to recover money damages for discriminatory conduct. Three distinctions between the Acts are: (1) the minimum amount of damages recoverable under the UCRA are more than the minimum damages under the DPA; (2) the DPA forbids discrimination against a person accompanied by a service dog in training, whereas the UCRA and ADA do not. *Miller*, *15* Cal.App.5th at 224-25; *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 675, n.4; *Civ. Code* §§ 52, 54.2(b), 54.3; and (3) the DPA allows a "potentially aggrieved" person, one who has not yet been discriminated against, to obtain an injunction to prevent a future violation of section 54 or 54.1. *Civ. Code* § 55; *Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 943-44. To

discourage meritless litigation seeking to enjoin future conduct, the "prevailing party" in an action under section 55 is entitled to payment of attorney fees. *Id.*

Under the DPA, a disabled plaintiff whose service animal is denied access to a place of public accommodation may recover attorney's fees and up to three times the amount of actual damages, but in no case less than $1000, for each violation. *Antoninetti v. Chipotle Mexican Grill, Inc.* (9th Cir. 2010) 643 F.3d 1165, 1176-77; *Peters v. CJK Assocs.*, No. S-03-1388 LKK/KJM, 2003 Lexis 26988 (E.D. Cal. Oct. 29, 2003); *Civ. Code* § 54.3. Under the UCRA, a similarly situated plaintiff may recover up to "three times the amount of actual damage" but in no case less than $4000, plus injunctive relief and attorney's fees. *Flowers*, 238 Cal.App.4th at 938. The defendant may not recover attorney's fees. *Id.* Double recovery under the UCRA and DPA is not permitted, since the Legislature intended the statutes to have substantial overlap. *Munson*, 46 Cal.4th at 675. Both are strict liability statutes; therefore, liability may be predicated on unintentional conduct. *Id.* at 678.

The UCRA applies to a broad range of discriminatory conduct and contains no specific provisions regarding service animals (though it incorporates all provisions of the ADA concerning service animals). *Id.* The DPA, on the other hand, expressly grants disabled persons the right to be accompanied by "a guide dog, signal dog, or service dog," and defines these terms. *Civ. Code* §§ 54.2, 54.1 (definitions). While all three statutes prohibit discrimination against disabled people accompanied by service dogs, the California legislature intended the UCRA and DPA to provide broader protection than the ADA. *Stevens v. Optimum Health Inst.* (S.D. Cal. 2011) 810 F.Supp.2d 1074, 1097. Because California law also permits a plaintiff to recover money damages, "state law claims have become the tails that wag the dog of federal ADA litigation in California." *Gunther v. Lin* (2006) 144 Cal.App.4th 223, 256.

III. What Must a Plaintiff Prove to Prevail in a Lawsuit Against a Business That Denies Access to a Person and Their Service Animal?

Unless a California court recognizes an exception under 28 C.F.R. § 36.302(a) or (c), a defendant is liable to a person under the DPA if:

(1) the person has a disability as defined by *Cal. Gov. Code* §§ 12926, 12926.1 or 42 U.S.C. § 12102, and

(2) Defendant denied a disabled person and their service dog access to any place encompassed by *Civ. Code* §§ 54(a), 54.1(a), 51.5(a) (any "business establishment of any kind whatsoever"), 42 U.S.C. § 12181(7) (private entities that are considered "public accommodations"), or 26 C.F.R. § 36.104; *or* Defendant interfered with a guide dog, signal dog, or service dog's function of assisting a disabled person. *See Civ. Code* § 54.3(a) (outlining prohibition against and monetary remedy for any person, firm, or corporation that "interferes" with a disabled person's access to a place designated by *Civ. Code* §§ 54 or 54.1, whereby "interference" includes, but is not limited to, "preventing or causing the prevention of any guide dog, signal dog, or service dog" from assisting a disabled person.), and

(3) the person's animal is any one or more of the following:

   a. a "service dog" or "guide dog" or "signal dog" as defined by *Civ. Code* § 54.1(b)(6)(C)

   b. a "service animal" as defined by 28 C.F.R. § 36.104

   c. a "miniature horse (that) has been individually trained to do work or perform tasks for the benefit of the individual with a disability." 28 C.F.R. § 36.302(c)(9)(i)

Unless one of the exceptions discussed below applies, a disabled person's request that a covered place modify its policies, procedures, or practices (to accommodate the disabled person and their accompanying service animal) is reasonable as a matter of law. *Berardelli v. Allied Servs. Inst. Of Rehab. Med.* (3rd Cir. 2018) 900 F.3d 104, 120; cf. *Lentini v. Cal. Ctr. for the Arts* (2004) 370 F.3d 837, 844; quoting *Crowder v. Kitagawa* (9th Cir. 1996) 81 F.3d 1480, 1486 ("The determination of what constitutes reasonable modification is highly fact-specific, requiring case-by case inquiry.").

IV. Denial of Access to a Disabled Person and Service Dog Might be Excused Under 42 U.S.C. § 12182(b)(2)(A)(ii) if Permitting Their Access Would "Fundamentally Alter" Defendant's Goods or Services, or Result in "Undue Burden."

Under federal law, a defendant is not liable for denying access to a disabled person and their service animal (by refusing to modify polices, practices, or procedures) if the defendant "can demonstrate that making such modifications would fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations" or result in "undue burden." *Lentini*, 370 F.3d at 843-44; 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a). The Supreme Court considered three factors to determine whether a defendant's refusal to modify its policies (to accommodate a disabled person and accompanying service animal) complies with the ADA: whether the disabled person's requested modification to the defendant's policies, practices, or procedures is reasonable, whether the disabled person necessitates the modification, and whether the modification would "fundamentally alter the nature" of the facility or services. *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, 683, n.38; 28 C.F.R. §36.302(a).

A. When modification would fundamentally alter goods or services

In *Martin*, 204 F.3d at 999, the Court concluded that the PGA Tour's allowance of plaintiff to use a motorized golf cart, a modification of its policy that professional golfers must walk the golf course, was reasonable and necessary because Martin was unable to walk the

course due to his physical disability. The rule modification would not fundamentally alter the PGA event; thus, Martin's motion for summary judgment on his ADA discrimination cause of action was granted. *Id.* at 996-97.

Lentini involved a quadriplegic plaintiff, Kathleeen Lentini, and her service dog, Jazz, trained to provide non-violent protection and retrieve small, dropped items. 370 F.3d at 839. Kathleen and Jazz attended roughly twelve concerts at defendant's establishment, California Center for the Arts. *Id.* at 840. On each visit, staff notified Kathleeen that animals are not permitted, but after she explained that Jazz is a service dog, they were admitted. *Id.* During October 1998, Jazz yipped (barked) at another patron during intermission. *Id.* Later that same month, also during intermission of a different concert, Jazz yipped at nearby patrons. *Id.* Although nobody complained about Jazz barking, the Center thereafter refused admission to Kathleen and Jazz. *Id.* at 840, 844.

Kathleen sued the Center for discrimination under the ADA, UCRA, and DPA. The district court determined that Jazz made these noises (barks) in order to alert Kathleen of a "possibly dangerous situation." *Id.* at 842. The court found that defendant maintained an unwritten policy of excluding service animals from the concert hall that made noises at prior events, regardless of the noise level and whether the noise was made for the purpose of ameliorating a disability (i.e. alerting owner to a dangerous condition). *Id.* However, the Center did not maintain an analogous policy for humans that made noises during intermission. *Id.*

The district court ordered the Center to modify its policies to accommodate Kathleen and Jazz, and awarded plaintiff $5000 in damages. *Id.* at 849. The Center appealed, alleging that modification of its policies is unreasonable, unnecessary, and "will fundamentally alter" its services and facilities. *Id.* at 843; *See PGA Tour, Inc.*, 532 U.S. at 683, n.38 (three factors to be

considered for determining whether policy modifications are required by ADA). The appellate court affirmed the lower court's conclusion that the Center may not exclude a service dog on the basis that the dog makes noise if the Center would tolerate similar noise made by humans. *Lentini*, *370* F.3d at 844. The fact that no patron complained about Jazz yipping on two occasions confirmed that Jazz's noise did not disrupt the concert. *Id.* The appellate court affirmed the district court's finding that the "intent" of a service dog can be sufficiently determined by circumstantial evidence. *Id.* at 845. The court inferred that Jazz's intent in barking was to alert Kathleen of a potentially dangerous situation. *Id.*

B. When "undue burden" would result from modifying policies

The "undue burden" exception in 42 U.S.C. § 12182(b)(2)(A)(ii) is recognized by federal courts when significant financial expense would result from a policy modification.

In *Rawdin v. Am. Bd. Of Pediatrics* (E.D. Pa. 2014) 985 F.Supp.2d 636, 639, plaintiff was a licensed pediatrician who had difficulty passing defendant's board certification exam. The court concluded that even if Dr. Rawdin had an ADA disability, his requested accommodation for an open book exam would: (1) result in an unduly burdensome financial expense, because defendant would have to develop new questions and a new format, and (2) fundamentally alter and lower board certification standards. *Id.* at 657. Injunctive relief was therefore denied. *Id.*

In *Roberts by & Through Rodenberg-Roberts v. KinderCare Learning Ctrs.* (8th Cir. 1996) 86 F.3d 844, 847, the court ruled that defendant child-care center was excused from providing one-on-one care to a child when the child was not accompanied by his personal care attendant. Because the monetary cost of providing one-on-one care to the child was unduly burdensome, the exception in 42 U.S.C. § 12182(b)(2)(A)(ii) was applicable. *Id.* In finding that the increased cost was unduly burdensome on defendant, the court stated that plaintiff's

requested accommodation was unreasonable. *Id.* The three-factor (reasonable, necessary, fundamental alteration to service) approach used by *PGA Tour, Inc. v. Martin*, discussed *supra*, effectively considers whether or not a policy modification is unduly burdensome.

V. Exceptions Under 28 C.F.R. §§ 36.301(b) and 36.208

A place of public accommodation may deny access to a disabled person and service dog in order to uphold safety requirements, 28 C.F.R. § 36.301(b), or when the person and dog pose "a direct threat to the health and safety of others." 28 C.F.R. § 36.208. A safety requirement under 28 C.F.R. § 36.301(b) must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities." A place of public accommodation (that denies access to a disabled person and service dog) under 28 C.F.R. § 36.208 must make a reasonable, subjective decision based on medical knowledge or objective evidence, assessing the probability and severity of the risk, and how any risk may be mitigated.

A. Safety risk exception under 28 C.F.R. § 36.301(b)

In *Matheis*, defendant, a plasma donation center, banned all plasma donors who use a service animal for anxiety, due to its concern that "donors with severe anxiety may be unable to follow directions…putting staff at risk of getting stuck with the needle and other donors at risk of getting blood on them." 936 F.3d at 174, 181. The court rejected defendant's argument, because it was entirely speculative, broadly concluded that all people who use psychiatric service dogs have "severe anxiety," and lacked any scientific basis. *Id.* at 181.

B. Direct threat to health & safety exception under 28 C.F.R. § 36.208

When presented with a potential threat to the health and safety of other persons, a place of public accommodation may make a one-time reasonable decision to deny access to a disabled person and service dog, after making an individualized assessment of the competing interests.

Lockett v. Catalina Chnnel Express, Inc. (9th Cir. 2007) 496 F.3d 1061, 1063; 28 C.F.R. § 36.208. In *Lockett*, plaintiff, who is legally blind, and her guide dog were denied access to the Commodore Lounge area of defendant's ferry boat. 496 F.3d at 1063. Defendant did not permit any animals to access the Commodore Lounge, located on the upper deck of the ferry boat, because one of defendant's regular passengers was allergic to animals, and the Lounge was the only place on the boat where he could be insulated from contact with animals. *Id.* The court held that defendant exercised "reasonable judgment" in determining that plaintiff and her guide dog posed a potential threat to the health and safety of other passengers. *Id.* at 1068.

In *Pool v. Riverside Health Servs.*, No. 94-1430-PFK, 1995 Lexis 12724 (Kansas Dist. Ct. Aug. 25, 1995), defendant hospital successfully invoked 28 C.F.R. § 36.301(b) in defense of its refusal to permit a plaintiff and her service dog entry into its emergency room. The court was persuaded by a physician's uncontroverted testimony that animals posed a safety risk of infection, allergic reactions, and unpredictable behavior of the patient and service dog. The court granted defendant's motion for summary judgment, because its policy of denying access to service dogs legitimately intended to protect the health and safety of hospital patients.

VI. Are Federal Exceptions Applicable to a Claim Based Purely on the UCRA or DPA?

The *Lentini* court analyzed whether an affirmative defense under 42 U.S.C. § 12182(b)(2)(A)(ii) was applicable to plaintiff's ADA, UCRA and DPA claims. *370* F.3d at 841. No California court has confronted whether a federal exception may apply to a pure state law claim under the UCRA or DPA. In *Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1440, 1446, a case involving an ADA claim removed from federal court, the opinion mentions but does not apply a federal exception.

In *Martinez v. California Pizza Kitchen* (2018) 30 Cal.App.5th Supp. 14, 17, 19, plaintiff alleged only a UCRA violation premised on a violation of the ADA, and the opinion mentions (but does not rely on) a federal exception. The California Legislature could have carved out exceptions similar to the federal exceptions, but it chose not to. *Cal. Pen. Code* § 365.5 makes it a misdemeanor crime, punishable by a maximum fine of $2500, for a covered place to deny access to a disabled person and their guide, signal, or service dog. The absence of any exception in this criminal statute evidences that the Legislature intended not to incorporate the federal exceptions into California law. Instead, state law imposes liability on a person (dog trainer or disabled person) for "damage done to the premises or facilities by his or her dog." *Pen. Code* § 365.5(i); *Civ. Code* §§ 54.1(c), 54.2(b).

Although California law has no statutory exception analogous to 42 U.S.C. § 12182(b)(2)(A)(ii), discriminatory conduct may be excusable if, due to the nature of the business, public policy strongly favors such discrimination. *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 30-31. Children may be excluded from bars and adult bookstores; and retirement communities may refuse admission to non-elderly individuals. *See Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 741-42. In *Stevens*, 810 F.Supp.2d at 1092, plaintiff and his service dog were denied entry to defendant Optimum Health Institute's premises, because some of defendant's guests had a phobia of animals, defendant believed that animals are not sacred, and presence of animals prevented defendant from maintaining "a safe and sacred environment necessary for healing." The court denied plaintiff's motion for summary judgment, finding that defendant's testimony created a triable issue of fact regarding whether defendant's exclusion of plaintiff and his service dog was a "reasonable restriction rationally related to [OHI's] business and the services it offers." *Id.*; quoting *Hankins v. El Torito Rests.* (1998) 63 Cal.App.4th 510,

519-20 (restaurant's alleged basis for refusing to permit handicapped customer from using its only first floor employee restroom, because customers would be tempted to touch food in prep area, was "an unsubstantiated and totally speculative concern").

VII. Under Federal Law, Though Not Under California Law, a Place of Public Accommodation May Ask a Disabled Person to Remove a Service Dog From Its Premises if the Dog is Not Housebroken, or if the Dog is Out of Control and the Dog Handler Does Not Bring the Dog Under Control.

Under 28 C.F.R. § 36.302(c), a place of public accommodation may ask a disabled person to remove her service dog from the premises if the dog is not housebroken, or if the dog is out of control and the dog's handler does not bring the dog under control. *Matheis*, 936 F.3d at 179. Section 36.302(c) requires the use of a "harness, leash, or other tether" unless this use would interfere with the service dog's performance. A California business should not rely on these provisions, since no California court has acknowledged that this federal exception may be invoked as an affirmative defense to a UCRA or DPA claim premised purely on state law.

VIII. What is a "Disability" Under California Law?

With respect to disabled persons accompanied by a service dog, *Civ. Code* § 54(b)(1) defines a "disability" as any mental or physical disability under *Gov. Code* § 12926. California's definition of disability is broader than the definition used in the ADA, in part because under the federal statute, a condition must "substantially limit" a major life function, whereas *Gov. Code* §§ 12926(j)(1)(A) and 12926(m)(1)(B)(i) only require that the condition "limit" a major life activity. *Gov. Code* §12926.1(c) confirms that "substantially" was omitted from the California definition for the purpose of broadening the definition of "disability." *Gov. Code* § 12926.1(c) provides specific examples of physical and mental disabilities, whereas 42 U.S.C. § 12102 generally defines "disability" without providing any examples of a disability.

"Disability" includes any condition "that requires special education or related services," including conditions that a person previously had which may resurface. *Gov. Code* §§ 12926(j)(2), 12926(m)(2). A person has a "disability" when she is regarded or treated as (presently or currently) having any mental or physical condition "that makes achievement of a major life activity difficult." *Gov. Code* §§ 12926(j)(4), 12926(m)(4). A "disability" also includes a "future disability" which has not yet manifested. *Goldman v. Standard Ins. Co.* (9th Cir. 2003) 341 F.3d 1023, 1028; *Gov. Code* §§ 12926(j)(5), 12926(m)(5).

Disabilities do not include "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance abuse disorders resulting from the current unlawful use of controlled substances or other drugs." *Id.*

A. What is a "mental disability" under California law?

A "mental disability" includes, but is not limited to, "any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity." *Gov. Code* §12926(j)(1). Mental disabilities include PTSD, clinical depression, anxiety, and bipolar disorder. *Gov. Code* § 12926.1(c); *Auburn Woods I. Homeowners' Ass'n v. FEHA* (2004) 121 Cal.App.4th 1578, 1592-93 (depression); *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 258-59 (PTSD); *Fair Hous. Of the Dakotas, Inc. v. Goldmark Prop. Mgmt.* (2011) 778 F.Supp.2d 1028, 1036 (anxiety); *U.S. v. Dental Dreams, LLC* (2018) 307 F.Supp.3d 1224, 1236 (PTSD, Generalized Anxiety Disorder). "Mental disability" is broadly defined to include any chronic or episodic condition that "limits a major life activity." *Gov. Code* § 12926.1(c); *Jadwin v. County of Kern* (2009) 610 F.Supp.2d 1129, 1176 (plaintiff had episodic depression).

B. What is a "physical disability" under California law?

A "physical disability" under *Gov. Code* § 12926(m) includes, but is not limited to: Any "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

1. affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine," and
2. "limits a major life activity"

Physical disabilities include HIV/AIDS, hepatitis, diabetes, heart disease, multiple sclerosis, seizure disorder, and epilepsy. *Gov. Code* § 12926.1(c).

C. When does a condition "limit a major life activity"?

"Major life activity" is broadly defined and includes any mental, physical, or social activity, including working. *Gov. Code* § 12926.1(c). The federal definition of "major life activity" includes, but is not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and the operation of a major bodily function." *Davis v. Ma* (2013) 848 F.Supp.2d 1105, 1113; quoting 28 C.F.R. § 1630.2(i)(1).

A person is "limited" in performing a major life activity if the disabling condition makes achievement of the activity "difficult." *Auburn Woods*, *121* Cal.App.4th at 1592; *Gov. Code* §§ 12926(j)(1)(B) and 12926(m)(1)(B)(iii). In *Davis*, plaintiff created an issue of material fact regarding whether he had a disability by: (1) declaring that he has back problems that makes

walking and sleeping difficult, (2) furnishing a doctor's note stating Davis "suffers from a severe back disability" and a prescription note indicating that he has "severe back pain / disc degeneration." 848 F.Supp.2d at 1114 (defendant's MSJ granted on other grounds). Davis could have established a "disability" by showing that his condition merely made sleeping (a "major life activity") difficult. *Id.* at 1114, n.14; *Gov. Code* § 12926(m)(1)(B). In order to be considered a "disability," the condition need not impair more than one major life activity. *Id.*

IX. Which Places Must Accommodate a Disabled Person and Their Service Dog?

Because ADA violations are also DPA and UCRA violations, every "business establishment" and place of "public accommodation" must modify its policies, practices, and procedures in order to accommodate a disabled person and their service dog, unless an exception discussed above applies. 28 C.F.R. § 36.102(c); *Civ. Code* § 51.5(a). Non-profits and charitable organizations that are generally accessible to the public and have some "businesslike attributes" are similarly required to modify their policies. *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72, 82-83; *See Lentini*, 370 F.3d 837 (nonprofit theater). Every California business should modify its policies to accommodate disabled persons and their service dog, or risk the possibility of litigation. A disabled person or dog trainer is liable for any damage to the premises caused by their dog. *Civ. Code* §§ 54.2(a)-(b).

A. Place of "Public Accommodations" under 42 U.S.C. § 12181(7)

Federal law defines "public accommodations" in specific and general terms in 42 U.S.C. § 12181(7). The following private entities are considered "public accommodations" for purposes of the ADA:

- an inn, motel, hotel, or other lodging place, except a building that contains five or fewer rooms for rent that is occupied by a resident owner of the building

- restaurant, bar, or other place that serves food or drink
- theater, motion picture house, stadium, concert hall, or other place of exhibition or entertainment
- auditorium, lecture hall, convention center, or other place of public gathering
- bakery, clothing store, grocery store, hardware store, shopping center, or other sales or rental establishment
- laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment
- terminal, depot, or other station used for specific public transportation
- museum, library, gallery, or other place of public display or collection
- park, zoo, amusement park, or other place of recreation
- nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education
- day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment
- gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation

42 U.S.C. § 12181(7).

1. Is a plasma donation center a "service establishment" under § 12181(7)(F)?

42 U.S.C. § 12181(7)(F) lists the following places of public accommodation:

> "laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an

> accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or *other service establishment*." (emphasis added)

In *Matheis*, 936 F.3d at 174, the court addressed whether a plasma donation center is a "service establishment" under 42 U.S.C. § 12181(7)(F). Resolving a circuit split on this question, the 3rd Circuit followed the 10th Circuit by giving "service" and "establishment" their ordinary dictionary meanings. *Id.* at 176-77. "Service" means "conduct or service that benefits someone or something." *Id.* "Establishment" means "a place of business." *Id.* The court rejected the 5th Circuit's position that a plasma center is not a "service establishment" because (1) plasma donors do not benefit from donating plasma, and (2) each entity listed in section 12181(7)(F) provides a service to the public in exchange for money. *Id.* at 177. Regarding the first contention, the court noted that plasma donors do benefit by donating plasma, because the donor receives money. *Id.* Next, a plasma center is similar to a bank (one of the entities listed in the statute) because money deposited to the bank, like plasma donated to a plasma center, is subsequently reinvested with third parties. *Id.*

2. Is a private boat marina a "rental establishment" under § 12181(7)(E)?

Under 42 U.S.C. § 12181(7)(E), places of public accommodation include "a bakery, grocery store, clothing store, hardware store, shopping center, or *other sales or rental establishment*." (emphasis added) A broad range of sales and rental establishments are included in this category, including car rental businesses, videotape renting services, pet stores, and jewelry stores. *Nicholls v. Holiday Panay Marina, L.P.* (2009) 173 Cal.App.4th 971, 966.

In *Nicholls*, plaintiff was a quadriplegic confined to a wheelchair who rented a boat slip located in a private marina in Marina Del Rey, CA. *Id.* at 968-69. Nicholls sued defendant for violating the ADA, because parts of the marina were inaccessible to him. *Id.* at 969. The trial

court, while properly noting that the ADA does not apply to houses, apartments, and condominiums, erroneously concluded that the ADA is inapplicable to the marina. *Id.*

The appellate court reversed. The ADA must be liberally construed in to effectuate its purpose of allowing disabled people to have equal access to establishments frequented by non-disabled persons. *Id.* at 970. To decide whether the boat slip is included in the category of "other rental establishments," 42 U.S.C. § 12181(7)(F), the court asked whether including the boat slip in this category would further the ADA's purpose of allowing disabled people the same access to places frequented by non-disabled people. *Id.* The court answered this question in the affirmative, because a person confined to a wheelchair ought to be able to enjoy boating to the greatest extent possible, consistent with his disability. *Id.* at 971. The court likened defendant's marina (where boats park in boat slips) to an automobile parking lot that is inaccessible to disabled people. *Id.*

The court rejected defendant's argument that its marina is not a "public accommodation" because access is restricted; it is a private marina. *Id.* at 972. The statutory definition of places of "public accommodation" enumerates many private places with restricted access (private schools, day care centers, gymnasiums, health spas, golf courses); thus, a place of public accommodation may have restricted access. *Id.*; 42 U.S.C. §§ 12181(7)(J)-(L).

B. Under *Civ. Code* §§ 51(b) and 54.1(a), which places must permit full and equal access to a disabled person accompanied by a service dog?

The DPA, *Civ. Code* § 54.2(a), states that a disabled person has a right to be accompanied by a guide dog, signal dog, or service dog that is trained to assist the disabled person in any place specified by *Civ. Code* § 54.1. The UCRA, *Civ. Code* § 51(b), requires "all business establishments of every kind whatsoever" to provide full, equal access to disabled persons. The DPA, sections 54 and 54.1(a), lists places (adoption agency, public transportation, private

schools, hotels, lodging places, amusement park, hospital) also listed in 42 U.S.C. § 12181(7). The DPA includes language ("places of public accommodation") identical to section 12181(7), and further extends to "other places to which the general public is invited." *Civ. Code* § 54.1(a). The DPA guarantees a disabled person and service dog equal rights to use "streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places." *Civ. Code* § 54(a).

With the exception of commercial aircraft (discussed in Part XIX), every conceivable mode of transportation is included in section 54.1(a), "whether private, public, franchised, licensed, contracted, or otherwise provided." The DPA may apply to a broader range of places than the UCRA. *See Del Taco, Inc.*, 46 Cal.4th at 675; *Stevens*, 810 F.Supp.2d at 1097-99 (ADA exempts religious organizations under 42 U.S.C. § 12187, but neither the UCRA nor DPA exempt religious organizations); *Pines v. Tomson* (1984) 160 Cal.App.3d 370 (holding that nonprofit religious corporation is a "business establishment" under UCRA).

C. Are public and private schools "business establishments" under the UCRA?

California schools, public and private, must accommodate a disabled person and service dog by modifying their policies, practices, and procedures. *K.T. v. Pittsburg Unified Sch. Dist.* (N.D. Cal. 2016) 219 F.Supp.3d 970, 983 (public schools); 42 U.S.C. § 12181(7)(J) (private schools). In *Pittsburg Unified Sch. Dist.*, 219 F.Supp.3d at 983, the court held that public schools are "business establishments" under the UCRA, *Civ. Code* § 51(a). The statute's plain language ("all business establishments of every kind whatsoever") confirms that "business establishment" should be construed "in the broadest sense possible." *Id.*; quoting *Isbister*, 40 Cal.3d at 78. In *Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal 1990) 731 F.Supp.947, 953, the court similarly held that the DPA applies to a public high school district. The court rejected

defendant's argument that the DPA does not apply to a public high school on the basis that it has restricted access. *Id.*; *See Nicholls*, supra, 173 Cal.App.4th at 972 (rejecting defendant's argument that boat marina is excluded from ADA due to restricted access).

Conversely, the ADA does not apply to public entities, including public schools and local governments. *Falchenberg v. New York State Dept. of Educ.* (S.D.N.Y. 2008) 642 F.Supp.2d 156, 165; 42 U.S.C. § 12181(7). Thus, all California schools must accommodate service dogs.

X. What is a "Service Animal" Under the ADA?

The ADA defines a "service animal" as any dog that (1) is individually trained to perform some work or task directly related to the person's disability, and (2) provides some benefit to the disabled person. *Green v. Housing Auth.* (D. Ore. 1998) 994 F.Supp. 1253, 1256; 28 C.F.R. § 36.104. Service animals are limited to dogs under the ADA, *Id.*, though 28 CFR § 36.302(c)(9) provides that a miniature horse shall receive the same legal protection as a service animal. A dog that merely provides emotional support, well-being, comfort, companionship, or a watchdog function is not a "service animal." *Cordoves v. Miami-Dade Cnty.* (S.D. Fla. 2015) 92 F.Supp.3d 1221, 1230. Though not expressly stated in the statute, the definition of service animal includes guide dogs, signal dogs, and service dogs. This implication is explained in part XII.

The original ADA definition of "service animal" broadly included any animal species. Americans with Disabilities Act; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56266 (September 15, 2010) (to be codified at 28 C.F.R. 36); e.g. *Rose v. Springfield* (W.D. Mo. 2009) 668 F.Supp.2d 1206, 1210 (plaintiff claimed that her monkey was trained to alleviate her anxiety disorder); *Pruett v. Arizona* (D. Ariz. 2009) 606 F.Supp.2d 1065 (chimpanzee). In order to: increase public trust, enable places of public accommodation to accurately determine when a person presents with a

service animal, and improve access for disabled persons, the amended definition of "service animal" is limited to dogs. 75 Fed. Reg. 56267; 28 C.F.R. § 36.104.

XI. What is a "Service Dog" Under the DPA?

"Service dog" is defined by *Civ. Code* § 54.1(b)(6(C)(iii) as "a dog individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items." Federal and California courts use the terms "service animal" and "service dog" interchangeably. Whether a dog is a "service dog" usually hinges on whether it is individually trained to perform some work or task that assists a disabled person.

XII. Which Work or Tasks Must a Service Dog be Trained to Perform?

The work or tasks performed by a service animal must directly relate to the disability. *Anderson v. City of Blue Ash* (6th Cir. 2005) 798 F.3d 338, 354. Examples of such work or tasks include: providing navigation assistance to blind or visually impaired people, alerting deaf or hearing impaired individuals to sounds or the presence of other people, providing rescue work or non-violent protection, pulling a wheelchair, providing assistance during a seizure, alerting a person to the presence of allergens, "retrieving items such as medicine or the telephone," assisting a person with a mobility disability in stability or balance, assisting people with neurological and psychiatric disabilities by "preventing or interrupting impulsive or destructive behaviors." 28 C.F.R. § 36.104. By virtue of this description, it is clear that the federal definition of "service animal" includes guide dogs, signal dogs, and service dogs. *Civ. Code* § 54.1(b)(6(C)(iii), supra, adds an additional example of a task: "fetching dropped items."

No statute specifies the amount or type of assistance that the dog must provide. *Green* 994 F.Supp. at 1256; *Access Now, Inc. v. Town of Jasper* (E.D. Tenn 2003) 268 F.Supp.2d 973,

980. A service animal may assist a disabled person in only one activity (e.g. sleeping or walking); the disabled person may not even need the animal away from home. *Anderson*, 798 F.3d at 354. A service dog must be trained to recognize a symptom and respond in some way. 75 Fed. Reg. 56267. While a dog may be trained to recognize that a person is distressed, the dog's trained ability to respond distinguishes a service dog from a pet. *Id.*

In *Anderson*, the court stated that plaintiff's seizure-response dog who only assists plaintiff while she is sleeping "indisputably qualifies as a service animal." *Anderson*, 798 F.3d at 354. In *Lentini*, 370 F.3d at 839, a Shih Tzu Poodle dog named "Jazz" was trained to provide minimal protection and pick up small dropped items for plaintiff, a quadriplegic who used a wheelchair. In *Davis*, evidence that plaintiff's puppy received only "basic obedience" training was insufficient to defeat Burger King's motion for summary judgment on plaintiff's ADA claim. 848 F.Supp.2d at 1111, 1115.

A dog that "has been trained to sense that an anxiety attack is about to happen and take a specific action to help or avoid the attack or lessen its impact" is a service animal. United States Department of Justice, "FAQ about Service Animals and the ADA," (July 2015), available at: https://www.ada.gov/regs2010/service_animal_qa.html (last visited November 15, 2019). In *Arndt v. Ford Motor Co.* (E.D. Mich. 2007) 247 F.Supp.3d 832, 839, plaintiff's service dog was trained to refocus plaintiff when he felt anxiety, and wake him up during nightmares. In *Dental Dreams,* 307 F.Supp.3d at 1236, 1248, plaintiff survived summary judgment on his claim that defendant failed to reasonably accommodate his service dog, Boscoe, a large Saint Bernard. Plaintiff testified that Boscoe was trained to detect when plaintiff was experiencing a panic attack and cue plaintiff, if Boscoe was in plaintiff's sight. *Id.* at 1250. Plaintiff's testimony that Boscoe performed this task (which minimized or alleviated plaintiff's panic attacks) was

sufficient evidence from which a jury could find that Boscoe was sufficiently trained to do work that would alleviate plaintiff's PTSD and General Anxiety Disorder. *Id.*

A service dog could be trained to alert a PTSD disabled individual by "nudging or pawing" the individual prior to the onset of an anxiety episode, thereby "removing the individual from the anxiety-provoking environment." Americans with Disabilities Act; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56266 (September 15, 2010) (to be codified at 28 C.F.R. 36).

Type I diabetic children have a particular need for diabetic alert dogs (service dogs) that can sense when a diabetic's blood sugar level drops dangerously low (below 80 mg/dL) or elevates to a dangerously high level (above 120 mg/dL). Whereas an adult can generally sense on their own when their blood sugar level is rising (i.e. vision may become blurred, dry mouth, extreme thirst, numbness or tingling in fingers, increased heart rate, cold sweats, headaches, dizziness, mental confusion), a less experienced child is much less likely to associate these symptoms with a dangerously low or high blood sugar level that may induce coma. Child and adult diabetics may require a diabetic service dog to alert when the diabetic experiences a dangerous fluctuation in blood sugar level while sleeping. A service dog may similarly be trained to alert the parents of a sleeping child when the child's glucose level reaches a dangerous level. Adult diabetics frequently train dogs that are later paired with diabetic children.

XIII. Which Qualifications Must a Service Dog Trainer Have?

There is no federal or California requirement that a service dog be trained by a certified trainer or even a highly skilled individual. *Green*, 994 F.Supp. at 1256; *Miller*, 15 Cal.App.5th at 226. The DPA, *Civ. Code* § 54.1(b)(6)(C), does not define who is authorized to train guide, signal, and service dogs. (California no longer issues guide dog trainer licenses, as explained in

part XIV.) At best, a lack of certification may create a triable issue of fact as to whether an animal was adequately trained. *See Anderson*, 798 F.3d 338, 354. Courts may use "industry standards" to assess whether a person is adequately qualified to train a service animal. *Davis*, 848 F.Supp.2d at 1110, 1111, n.7. A person is "authorized to train service dogs" under *Civ. Code* § 54.2(b) by virtue of their "education or experience" as a trainer of service animals. *Miller*, 15 Cal.App.5th at 226, 228. A service dog may be trained at home by the disabled person. *Cordoves*, 104 F.Supp.3d at 1230; *Green*, 994 F.Supp. at 1256; *Dental Dreams,* 307 F.Supp.3d at 1249-50.

To defeat a motion for summary judgment on the issue of whether or not a dog is trained to be a service animal, plaintiff must present evidence sufficient to create a triable issue of fact that the dog was trained to ameliorate plaintiff's disability. *Davis*, 848 F.Supp.2d at 1114. At the summary judgment stage, courts have not required a plaintiff to provide documentation that a service dog is trained. *Dental Dreams*, 307 F.Supp.3d at 1249-50; citing *Cordoves*, 104 F.Supp.3d at 1230 (at summary judgment stage, establishing a dog's status as a "service animal" is a low bar). However, a dog trained by a person who lacks "any education or experience as a trainer of service animals" is not a "service dog." *Miller*, 15 Cal.App.5th at 228. In *Miller*, defendant's motion for summary judgment on plaintiff's DPA claim was granted, whereby no evidence showed that Scribner's dog training methods were comparable with those "accepted within the service-dog training industry or community." *Id.*; *See Davis*, supra, 848 F.Supp.2d at 1111, n.7 (dog training methods consistent with "industry standards" are sufficient).

XIV. "Guide Dog" and "Signal Dog" Under the DPA

The DPA guarantees disabled persons the right to be accompanied by a guide dog or signal dog to the same extent as a service dog. *Civ. Code* § 54.2(a). The DPA defines signal and guide dogs in *Civ. Code* §§ 54.1(b)(6)(C)(i)-(ii). A "signal dog" is "trained to alert an individual

who is deaf or hard of hearing to intruders or sounds," while a "guide dog" is trained to assist a person who is visually impaired or blind, such that the person would be "safe under various traffic conditions." *Id.*; *Bus. & Prof. Code* § 7200 (describing guide dog work).

Since January 1, 2018, California no longer issues licenses for guide dog trainers. *Civ. Code* § 54.1(b)(6)(C)(i) implies that guide dog trainers must be "licensed" under *Bus & Prof. Code* § 7200 *et seq.* Licenses were formerly issued by a State Board of Guide Dogs for the Blind, a seven-member board appointed by the Governor authorized to issue guide dog trainer licenses, 2017 Cal AB 1705, but the former statute authorizing the Board to issue licenses, *Bus. & Prof. Code* § 7200.5, was repealed effective January 1, 2018.

Simultaneously, the Legislature enacted *Bus & Prof. Code* § 7200 which subjects any person who falsely claims to be a guide dog trainer to a fine or civil penalty. Additionally, *Pen. Code* § 365.7 makes it a misdemeanor, punishable by a maximum penalty of a $1000 fine and six months imprisonment, to "knowingly and fraudulently" represent oneself as the owner or trainer of "any canine licensed as, to be qualified as, or identified as a guide, signal, or service dog" as defined by *Pen. Code* §§ 365.5(e)-(f) and *Civ. Code* § 54.1(b)(6(C).

XV. Which Laws Apply to Assistance Dogs in Training?

Dogs being trained as service, signal, or guide dogs enjoy the same rights as fully trained dogs. *Civ. Code* § 54.2(b). Dogs in training may be taken into a covered place either by a disabled person or trainer, but must be leashed and wear an "assistance dog identification tag" obtainable from the "county clerk, animal control department, or other agency." *Id.*; *Civ. Code* § 54.1(c); *Pen. Code* § 365.5(i); *Food & Agr. Code* § 30850. The term "assistance dog" impliedly means a service, guide, or signal dog in training. *See Munson*, 46 Cal.4th at 675, n.10 (denial of

access to "assistance dog trainers" violates DPA, but not UCRA); *Miller*, 15 Cal.App.5th at 223-25 (DPA protects dogs in training, whereas UCRA and ADA do not).

In *Miller*, the court granted summary adjudication on plaintiff's DPA claim because neither Miller nor his stepfather, Scribner, were "capable or authorized" to train a service dog, because they each had insufficient "education and experience." 15 Cal.App.5th at 218, 227. Miller's dog, Roxy, was not fully trained, but she was in the process of being trained. *Id.* at 224. The court recognized in dicta that had Roxy been accompanied by an authorized or capable trainer, then Seafood City would have had to accommodate plaintiff and Roxy, despite the fact that Roxy was a dog in training (i.e. not a fully trained service dog). *Id.* at 226.

Service dog applications from a few local California jurisdictions (Los Angeles, Santa Monica, Oxnard) will be discussed below. The assertions and questions on these applications imply that dogs in training do not have the same right of access to section 54.1 places as fully trained service dogs – but this is not the law. The plain language of *Civ. Code* §§ 54.2(a), 54.2(b), and 54.1(c) gives dogs in training (accompanied by either a disabled person or authorized trainer) the very same right of access as fully trained service dogs. Because untrained dogs may be less controllable, they must wear a leash, whereas section 54.1(a) does not require trained dogs to wear a leash. *Civ. Code* §§ 54.1(c), 54.2(b) (dogs in training must be leashed).

Under federal law, dogs in training receive no protection whatsoever.

A. Does an assistance dog trainer have standing under the DPA?

No case law, published or unpublished, discusses a DPA claim filed by an assistance dog trainer who was denied access, a violation of *Civ. Code* § 54.2(b). Because § 54.3 permits "any person denied any of the rights" guaranteed by § 54.2 to obtain actual or statutory damages and attorney fees, an assistance dog trainer (who is not disabled) has standing to sue under the DPA.

Civ. Code §§ 54.3(a)-(b) specifically refer to disabled people ("individual with a disability" and "disabled person") as well as a broader category of people ("any person") that are not disabled. "Any person" includes dog trainers, since disabled persons and dog trainers are the only persons protected by §§ 54, 54.1, and 54.2. Therefore, dog trainers have standing to sue under the DPA.

B. Los Angeles Municipal Code provisions on service animals

The definition of "service animal" in Los Angeles Municipal Code section 10.08.216 includes miniature horses, but is otherwise nearly identical to the definition of "service dog" under *Civ. Code* § 54.1(b)(6(C)(iii). L.A.M.C. section 10.20.090 requires service animal (dog or miniature horse) owners and persons with custody of the animal to obtain a license, while § 10.20.180 requires the animal to wear the license. *See Davis v. Patel* (9th Cir. 2013) 506 Fed.Appx. 677, 678 (plaintiff failed to show that dog was properly licensed). No California law or city ordinance imposes a monetary fine or penalty for failure to display an identification tag. This ordinance does not apply to dogs in training (that are not fully trained), because it states that the license shall not issue unless proof is presented that the dog is "successfully trained."

California law is silent on whether a covered place may request to see or require (as a condition for making an accommodation) a service dog license (Los Angeles) or assistance dog identification tag (California). Presumably, any request or requirement in this regard would exceed the scope of inquiry permitted by 28 C.F.R. § 36.302, as explained in Part XVI below.

C. Are Los Angeles, Santa Monica, and Ventura County "assistance dog" identification tag applications consistent with *Civ. Code* § 54.2?

Civ. Code § 54.2(b) allows a disabled person or authorized trainer to take "dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs" into covered places, and requires the dog to be "tagged as a guide dog, signal dog, or service dog." The identification tag is issued by local animal control departments. Based on a reading of the law, it appears that this

"identification tag" is not the same as the "license and tag" required by L.A.M.C. 10.20.090, because Food & Agr. Code § 30850 mentions a "tag" but not a "license." The Los Angeles Department of Animal Services' (LADAS) "Service Dog Identification Tag Application and Affidavit" states that the dog must already have a "license" before the tag may issue.

LADAS' application requires the applicant to certify that he is either: (1) disabled under state or federal law, or (2) a trainer of service animals for disabled persons as defined by state or federal law. The applicant must identify "Specific Service(s) Provided by Dog." This section implies that the dog already performs work or tasks. Though less likely, it may also imply that the service(s) listed are those that the trainer is training the dog to provide.

The "Assistance Dog" application obtainable at Santa Monica Animal Control Division states under the heading "Assistance Dog Qualifications": "The dog must be individually trained to do work or perform tasks which serve to mitigate a disabling condition (Seventh Circuit decision, Federal Court of Appeals, Bronk v. Iniechen)." It is unclear why the application loosely cites to this case, misspelling a party name, Ineichen. The requirement that the assistance dog must already be "trained" is at odds with *Civ. Code* § 54.2 which allows "dogs" access to covered places "for the *purpose of training* them…" (emphasis added).

Santa Monica's assistance dog application asks which specific tasks the service dog is trained to perform, names of schools that the dog attended, and specific identification of the task the service dog performs most reliably and consistently. The application, based on its questions, implies that Santa Monica would not be willing to issue an identification tag under § 30850 for a guide dog, signal dog, or any other dog that is in the process of being trained. See *Civ. Code* § 54.2(b) (trainer may take "dog" into covered place "for the purpose of training them"). The

application does not acknowledge that "service dog" is but a subset of a broader category of assistance dogs that includes signal dogs, guide dogs, and service dogs.

Similar to Los Angeles and Santa Monica, Ventura County's assistance dog application also presumes that the dog is already trained. It asks: "Which work or task has the dog been trained to perform?" The application contains a heading "Definition of Assistance Dog" followed by the ADA definition of "service animal" under 28 C.F.R. § 36.104. These two categories of dogs, assistance dogs (dogs in training under California law) and service animals (excludes dogs in training under federal law), are frequently conflated.

XVI. Which Questions May a Business Ask to Determine If a Dog Accompanying a Person is Actually a Service Dog?

When a person accompanied by a service dog seeks entry to a business (covered place), only two questions may be asked: (1) Is the animal required because of a disability? and (2) What work or task has the animal been trained to perform? 28 C.F.R. § 36.302; *Cordoves*, 104 F.Supp.3d at 1356. In general, these questions may not be asked when circumstances (e.g. dog is pulling a wheelchair, person with mobile disability is relying on animal for balance or stability, dog is guiding visually impaired person) indicate that the animal is trained to ameliorate disability. *Id.* A business may not inquire about the nature or extent of a disability, nor shall it require any documentation that the dog is trained, certified, or licensed as a service dog. *Id.*

The extremely limited amount of permissible questioning makes it impossible for a business to determine, as a matter of law, that the dog is in fact a service dog. *Cordoves*, 104 F.Supp.3d at 1356. This reality is problematic for California businesses, because they must choose between: (a) denying access to the person and their dog, or (b) accepting the truth of a person's assertion that a dog is a service dog trained to perform some work or task to assist a disabled person. The former choice may prompt litigation premised on discrimination under the

ADA, UCRA, and/or DPA. If a business asks questions (in addition to the two questions permitted by the ADA) about the person's disability or dog, the business may be sued. *DeLeon v. Vornado* (D.P.R. 2016) 166 F.Supp.3d 171, 176 (exceeding scope of permissible inquiry regarding status of dog as a service animal constitutes ADA discrimination).

Lawsuits surrounding service dogs frequently lack merit, though defendant businesses are likely to incur costly attorney fees to defend such lawsuits through summary judgment. Even a claim that substantively lacks merit may survive summary judgment, because it is relatively easy for a plaintiff to create a triable issue of fact regarding each element of a DPA claim.

XVII. Examples of Meritless Lawsuits Involving Service Dogs

In *Anderson v. Tran*, No. B265260, 2017 Lexis 1945 (Ct. App. March 20, 2017), the court affirmed a jury verdict awarding over $400,000 plus attorney's fees and costs to plaintiff, a disabled person accompanied by a service dog who was denied entry to defendants' stores. While some service dog lawsuits such as *Anderson* and *Lentini* are well-founded, others have no basis in law. These two cases and the four case discussions below illustrate that California businesses may be faced with costly litigation if they refuse to accommodate a service dog.

A. *Lerma v. Cal. Exposition & State Fair Police*, No. 2:12-cv-1363 KJM GGH PS, LEXIS 285 (E.D. Cal. January 2, 2014).

Regina Lerma, a pro se plaintiff, attempted to bring Subway sandwiches and other prohibited food into Raging Waters amusement park. Lerma alleged to park staff that she is diabetic, her kids are anemic, and they need this food due to their dietary restrictions. She threatened to sue the park for violating the ADA if they disallowed her to bring these food items into the park. During her deposition, she testified that she brought this food into the park because she was unable to use her food stamps to purchase food inside the park.

One week later, Lerma returned to Raging Waters, this time with her children and a puppy that she claimed was a "service dog." When Officer Siegrist asked Lerma which tasks her dog is trained to perform, plaintiff responded "all I have to tell you is it's a service dog and I'm going to sue you." Siegrist denied her admission to the park, then wrote a crime report, charging Lerma with fraudulently representing herself as a service dog owner in violation of *Pen. Code* § 365.7. Lerma sued, alleging unlawful discrimination.

Lerma testified during her deposition that her dog was not individually trained to perform any task that would alleviate her alleged disability, rather she wanted her puppy to accompany her and her children to the park for the purpose of providing companionship to the children. Dogs that merely provide companionship are expressly excluded from the definition of "service animal" in 28 C.F.R. § 36.104. Because plaintiff's dog received only basic obedience training and was not trained to perform any task related to her alleged disability, defendant's motion for summary judgment was granted. Lerma did not even file an opposition to defendant's motion.

B. *Davis v. Ma* (C.D. Cal. 2013) 848 F.Supp.2d 1105, 1113.

This case was based on the same facts as a previous lawsuit, *Davis v. Ma*, 2003 Lexis 161168 (C.D. Cal. January 31, 2011). During the first lawsuit (*Davis* 1), which was eventually dismissed, plaintiff's attorney threatened to sue Mr. Ma and his Burger King employees if they refused to admit wrongdoing and settle the case for hundreds of thousands of dollars. *Roscoe BK Rest., Inc. v. Murphy*, 2016 Lexis 3497 (Ct. App. Cal. May 13, 2016). The attorney fulfilled his threat by filing *Davis 2* and *Clavon v. Roscoe BK Rest., Inc.* These lawsuits are discussed below.

On December 28, 2008, Al Davis, plaintiff, visited Burger King on Roscoe Blvd. in Van Nuys, CA., accompanied by his thirteen-week old Great Dane puppy. *Davis v. Ma* (C.D. Cal. 2013) 848 F.Supp.2d 1105, 1109-1110. Employees at Burger King asked Davis to leave the

restaurant because it did not allow dogs, but offered to give Davis a to-go order or serve him while his dog remained outside. *Id.* at 1109. Davis sued under the ADA and UCRA. *Id.* at 1107.

Although Davis established a triable issue of fact that he was disabled, the only evidence he offered to support the conclusion that his puppy is a "service dog" was a photo of the puppy's "service dog" tags obtained from the City of Rancho Cucamonga. *Id.* at 1114-15. The City issues service dog tags on the honor system, thus it took no measures to verify: (1) that the puppy was trained to perform any work or task, or (2) that Davis was qualified to train service dogs. *Id.* at 1115. Davis testified during his deposition that his puppy does not assist him in walking or balancing, then contradicted this statement in his declaration. *Id.* at 1115-16.

Because no evidence supported the conclusion that Davis' dog was a "service dog," his ADA and UCRA claims were both dismissed. *Id.* at 1115. Defendant had to pay its own costs.

C. *Davis v. Patel*, 2011 WL 1155553 (C.D. Cal. March 28, 2011).

The plaintiff in *Patel* was Norma Davis, mother of Al Davis, who was the plaintiff in both *Davis v. Ma* lawsuits. Like her son, Ms. Davis sued under the UCRA because she and her alleged service dog, Tux, were denied entry to a Super 8 motel owned by Patel. The only evidence offered by Norma to support her contention that Tux was a "service dog" were conclusory declarations made by Al Davis (Norma was denied entry "supposedly because she had a licensed service dog with her") and Brandt Stites (saw Norma enter the motel "with her service dog Tux"). These declarations lack facts to support the legal conclusion that Tux was a "service dog." Summary judgment was granted to defendants. The court stated: "Plaintiff fails to point to a single piece of evidence that creates even one triable factual issue with respect to even one claim." Patel incurred substantial attorney fees to defend this meritless lawsuit.

D. *Clavon v. Roscoe BK Rest., Inc.* (9th Cir. 2014) 572 Fed.Appx. 487.

In this case, Henry Clavon alleged that Burger King unlawfully discriminated against Clavon because he is African American and was accompanied by his service dog, "Knight." *Clavon v. Roscoe BK Rest., Inc.* (9th Cir. 2014) 572 Fed.Appx. 487, 489-90. The district court granted defendant's motion for summary judgment due to a lack of any evidence that: Clavon was disabled, Knight was trained to perform any work or task to ameliorate Clavon's alleged disability, and Burger King engaged in racial discrimination. *Id.* at 489.

Similar to the plaintiff in *Davis*, Clavon's declaration in support of his opposition to defendant's motion for summary judgment was inconsistent with his deposition testimony. *Id*. During his deposition, Clavon was "vague and evasive" in response to defense counsel's repeated inquiries regarding which tasks Knight performed to alleviate plaintiff's disability. *Id.* Clavon did not specify any such tasks during his deposition. *Id.* Subsequently, in order to create an issue of material fact as to whether Knight was a trained service dog, Clavon affirmed (in his opposition declaration) that "Knight was trained to pull Clavon's wheelchair…and Clavon could hold Knight's leash to help with balance." *Id.* at 489. Because of the material inconsistencies between Clavon's non-responsive deposition testimony and embellished declaration, the court invoked the "sham affidavit rule" and disregarded Clavon's declaration. *Id.*; cf. *Miller*, 15 Cal.App.5th at 220, n.2 (court overruled defendant's objection to plaintiff's inconsistent postdeposition declaration, but defendant's summary judgment motion was granted).

The district court listed nine lawsuits that Clavon's attorney filed on behalf of three plaintiffs, all of them African Americans allegedly discriminated against while accompanied by a service dog. *Clavon v. Roscoe Bk Rest., Inc.*, 2012 Lexis 196365 (C.D. Cal. 2012). The district court issued a pre-filing order (requiring the attorney to seek permission from the court prior to

filing another lawsuit against Ma or Burger King) on the basis that the attorney filed numerous frivolous ADA lawsuits and exhibited bad faith litigation tactics. *Id.* The appellate court affirmed the order in light of "serious evidence of vexatious conduct." *Id.* at 490.

XVIII. Emotional Support Animals Under the Federal Fair Housing Act and California Fair Employment & Housing Act and California Fair Employment & Housing Act

Whereas the ADA, UCRA, and DPA do not require accommodations to be made for disabled persons with emotional support animals, such accommodations are required under the federal Fair Housing Act (FHA), 42 U.S.C. § 3601 *et. seq.*, and California Fair Employment & Housing Act (FEHA), *Gov. Code* § 12900 *et. seq*. The FEHA provides broader protection than the federal FHA. *Gov. Code* § 12955.6. Of particular importance, the federal FHA exempts certain establishments from the requirement to make accommodations for disabled persons. 42 U.S.C. § 3603(b). These exemptions are meaningless to California businesses, because California's FHA broadly applies to all "business establishments" that the UCRA applies to. *Gov. Code* § 12955.8(b)(2); *Civ. Code* § 51(b). The scope of this term is discussed in Part IX.

A landlord may require documentation (generally in the form of a letter from a physician) from the disabled person requesting an accommodation stating that the disabled person needs an emotional support animal. *Revcock v. Cowpet West Condominium Assn.* (3rd Cir. 2017) 853 F.3d 96, 100; *Auburn* Woods, 121 Cal.App.4th at 1589-90. An untrained emotional support animal is a reasonable accommodation for a person with a disability. *Overlook Mut. Homes, Inc. v. Spencer* (S.D. Ohio 2009) 666 F.Supp.2d 850, 861.

Emotional support animals are not limited to dogs; the category includes "all types of assistance animals, regardless of training" that alleviate a mental or physical disability. *Fair Hous. Of the Dakotas, Inc. v. Goldmark Prop. Mgmt.* (D.N.D. 2011) 778 F.Supp.2d 1028, 1036. Under California law, an animal necessary to reasonably accommodate a disabled individual

includes a dog "or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression." *Cal. Code Regs.*, tit. 2, § 11065(a)(1)(D). An emotional support animal can be almost any animal.

In sum, the principal differences between emotional support animals (ESAs) in the housing context – versus service animals under the ADA and service dogs under the DPA are: (1) ESAs can be almost any animal, whereas only dogs and miniature horses must be accommodated under the ADA and DPA; (2) ESAs do not need any training whatsoever, whereas service dogs and miniature horses must be individually trained to perform a task that ameliorates a disability; (3) a landlord may require documentation that an ESA is a necessary accommodation, whereas a covered place under the ADA or DPA may never require any documentation for any reason. Because ESAs require no training, an animal may more readily qualify as an ESA, provided that the tenant is able to obtain the required documentation.

XIX. Which Animals May a Disabled Person Take on an Aircraft?

The federal Air Carrier Access Act, 49 U.S.C. § 41705, prohibits air carriers (airlines) from discriminating against disabled persons. While traveling on aircraft, a person with a disability may be accompanied by a broad range of animals, as allowed by 14 C.F.R. § 382.117. The airline must transport the animal, even if it offends or annoys other passengers or airline personnel. *Id.* However, for flights lasting eight hours or more, the airline may require documentation affirming that the animal will: (1) not relieve itself on the aircraft, or (2) relieve itself without creating a "health or sanitation issue" during the flight. 14 C.F.R. § 382.117(a).

The statute does not specifically identify which species of animals may be "service animals," but it includes: "Any animal that is individually trained or able to provide assistance to

a qualified person with a disability; or any animal shown by documentation to be necessary for the emotional well-being of a passenger." Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24878 (May 9, 2003) (to be codified at 14 C.F.R. § 382). The statute covers two categories of animals: (1) service animals under 14 C.F.R. § 382.117(d), and (2) emotional support animals and psychiatric service animals under section 382.117(e).

Airlines may categorically refuse to transport "snakes, other reptiles, ferrets, rodents, and spiders," but with respect to other animals such as "miniature horses, pigs, and monkeys," the airlines must make a judgment call. 14 C.F.R. § 382.117(f). The airline must transport the animal, unless it: (1) poses a direct health or safety threat, (2) would significantly disrupt cabin services, (3) is too heavy or large for the cabin, or (4) would not be permitted to enter the destination country. Foreign carriers (international flights) may decline to transport animals other than dogs. *Id.* A disabled person may transport one emotional support animal and up to three service animals on a single flight. Guidance on Nondiscrimination on the Basis of Disability in Air Travel, 84 Fed. Reg. 43482 (August 21, 2019) (to be codified as 14 C.F.R. § 382).

A. Service animals under 14 C.F.R. § 382.117

Service animals under this section must assist a disabled person, but the animal need not be trained to do so (an anomalous situation). 68 Fed. Reg. 24875. Airline personnel must accept any of the following as evidence that an animal is a service animal: documentation, a service animal harness, tags, or "credible verbal assurances" from a disabled person. 14 C.F.R. § 382.117(d). Personnel may ask which task the animal performs and how the animal performs the task. 68 Fed. Reg. 24875. If the passenger does not provide credible verbal assurance or other evidence that the animal is a service animal, airline personnel may require the passenger to furnish documentation confirming that the passenger has a "disability-related need for the animal's accompaniment." *Id.* at 24876. Acceptable documentation includes a letter from a

licensed professional (e.g. doctor, vocational case manager, mental health professional) who is treating the disabled passenger. *Id.* Airlines may but are not required to transport service animals in training. *Id.*

B. Emotional support and psychiatric service animals on aircraft

An airline may require documentation when a disabled person presents an ESA or psychiatric service animal (PSA) for transport. 14 C.F.R. § 382.117(e). Neither the statute nor the legislative history clarifies the difference between a "service animal" that ameliorates a mental disability under section 382.117(d) and "psychiatric service animal" under section 382.117(e). In its final rule statement, the Department of Transportation stated "under the existing rule, a PSA is a service animal." 84 Fed. Reg. 43482. However, the statute treats service animals and PSAs differently. A passenger traveling with a service animal need only provide verbal assurance, whereas an airline may require documentation for a PSA.

Airlines may require a passenger traveling with a PSA or ESA to provide a letter from a licensed mental health professional (on its letterhead) stating: (1) the passenger is mentally or emotionally disabled under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, (2) the passenger requires the ESA or PSA for air travel and/or to engage in some activity after arriving at the flight's destination, (3) the passenger is under the care of the licensed mental health professional, and (4) the issuing state, date, and type of license held by the mental health professional. 14 C.F.R. § 382.117(e).

XX. CONCLUSION

Because businesses are prohibited by federal law from asking questions necessary to determine whether a dog is indeed a service dog, refusing to accommodate a person and their dog may result in a costly lawsuit. The 9th Circuit acknowledged that serial litigation may be

"necessary and desirable" to advance compliance with the ADA. *Molski v. Evergreen Dynasty Corp.* (9th Cir. 2007) 500 F.3d 1047, 1062. Attorney's fees and costs to litigate a case through summary judgment may easily be $100,000. Only thin evidence is required for a plaintiff to defeat summary judgment in a service dog lawsuit. If the defendant does not obtain summary judgment, the case must either be settled or go to trial, which can also be extremely expensive. For all of these reasons, businesses should make every effort to avoid service dog lawsuits.

Businesses should be cognizant that California law applies to dogs in training, guaranteeing them access to covered places to the same extent as fully trained service dogs, whereas federal law contains no such provisions. Miniature horses must be accommodated to the same extent as service dogs, except that miniature horses in training need not be accommodated.

Federal and California law differ with respect to religious organizations. Federal law exempts them, but California law does not. A covered place may never request or require documentation verifying that a person is disabled or that their dog is a service animal; only two questions may be asked: (1) Is this animal required because of a disability? and (2) Which work or task is the dog trained to perform? Businesses seeking to discourage patrons from falsely representing that they are a trainer or their dog is a service dog may choose to display a sign stating *Pen. Code* §§ 365.5, 365.7 which prohibit such misrepresentations.

Landlords must accommodate service animals and ESAs, which need not be trained and include an unspecified range of animal species in addition to dogs. A landlord may require verifying documentation that the tenant needs the animal. Federal law exempts certain dwelling types, but California law does not, thus every landlord in California must accommodate ESAs.

Airlines also must transport an unspecified range of animal species, whether the animal presents as a service animal, ESA, or PSA. Service animals must be transported based on either

credible verbal assurance from the passenger (that the animal is trained to ameliorate a disability) or the presence of other evidence such as an identification tag or service animal harness. If neither of these conditions exist, an airline may require documentation (from a licensed professional) stating that the passenger needs the animal due to a disability. Airlines may require a disabled person travelling with an ESA or PSA to furnish similar documentation.

The California Legislature should amend *Civ. Code* § 54.2 to clarify whether dogs in training must already be trained to perform some work or task in order to enjoy legal protection under this section. Simultaneously, *Food & Agr. Code* § 30850 should be amended to clarify that an "assistance dog identification tag" is only required for a dog in training. The inconsistencies among the assistance dog applications from various local counties (discussed in Part XV) evidence a lack of common understanding regarding what an "assistance dog" is. The Legislature should therefore define "assistance dog" in the California Civil Code.

The California Legislature should also clarify whether a covered place may require, as a condition for making accommodations, an assistance dog in training to be wearing an assistance dog identification tag. This requirement would be consistent with *Civ. Code* § 54.2 (which requires dogs in training to wear an assistance dog identification tag), while not offending 28 C.F.R. § 36.302 since federal law does not apply to dogs in training.

These clarifying amendments may reduce the number of service dog lawsuits filed, while providing clearer guidance to California businesses, consumers, and courts.