

What You Need to Know about PWDs and Animals under the ADA and the FHA



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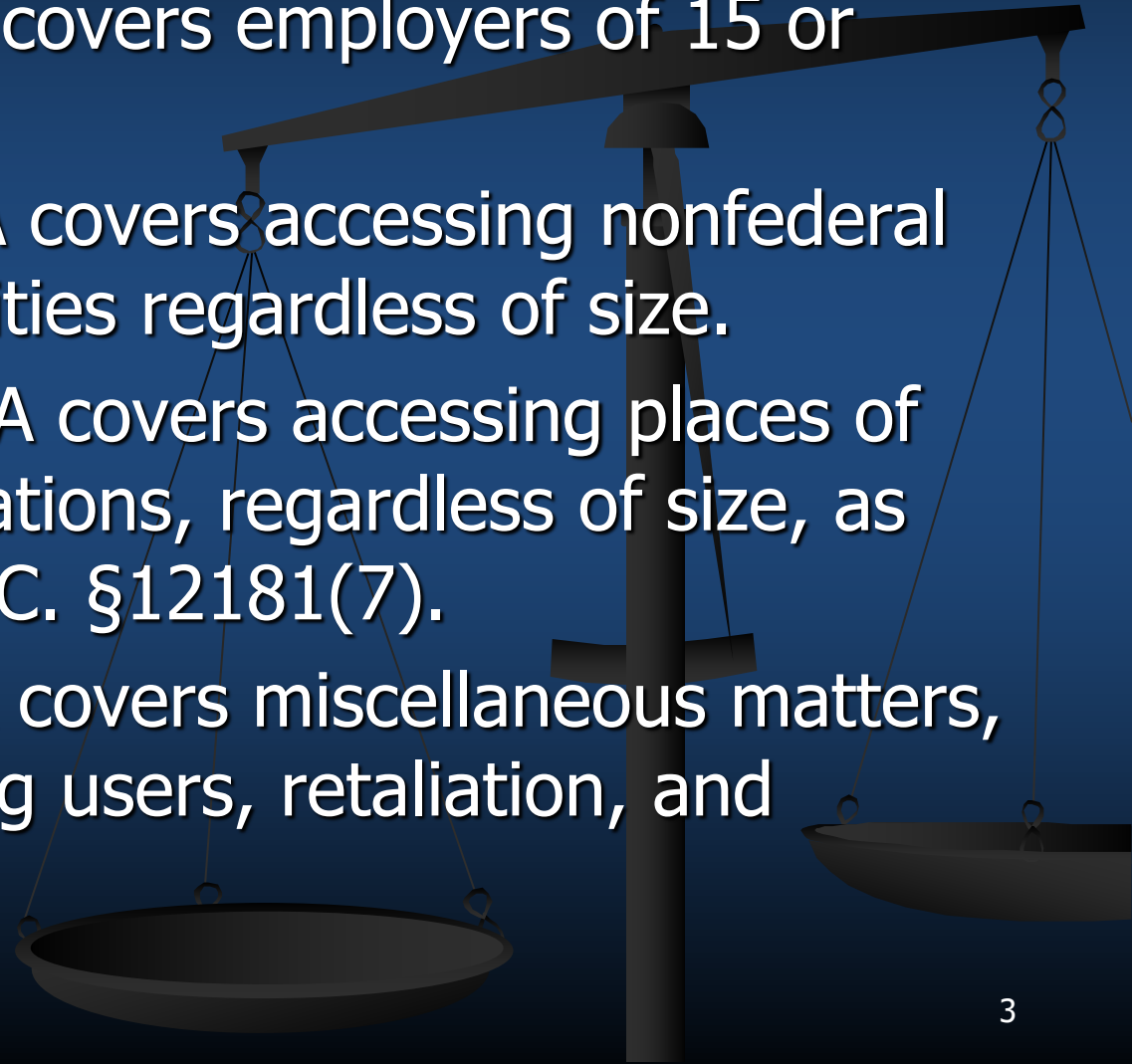
<https://www.understandingtheadacta.com/>

Session Objectives

- Gain an understanding of how different federal laws (ADA X 2, FHA), apply to animals used by persons with disabilities.
- Gain an understanding of the relevant Texas laws pertaining to service animals and service animals in training.
- Familiarize participants with the terminology used by the various laws: service animal; service animal in training; emotional support animals; assistance animals; and therapy dogs.
- Identify the legal responsibilities associated with the various types of animals; and
- Build the capacity of businesses and individuals to deal with the various kinds of animals in an appropriate way.

ADA's Scope of Coverage vis a vis Service/ESA Animals

- Title I of the ADA covers employers of 15 or more employees.
- Title II of the ADA covers accessing nonfederal governmental entities regardless of size.
- Title III of the ADA covers accessing places of public accommodations, regardless of size, as defined in 42 U.S.C. §12181(7).
- Title V of the ADA covers miscellaneous matters, such as illegal drug users, retaliation, and interference.



Case Study

Larry, a witness in a case, comes to your business with a dog that he claims is his service animal. Larry has no visible disability.

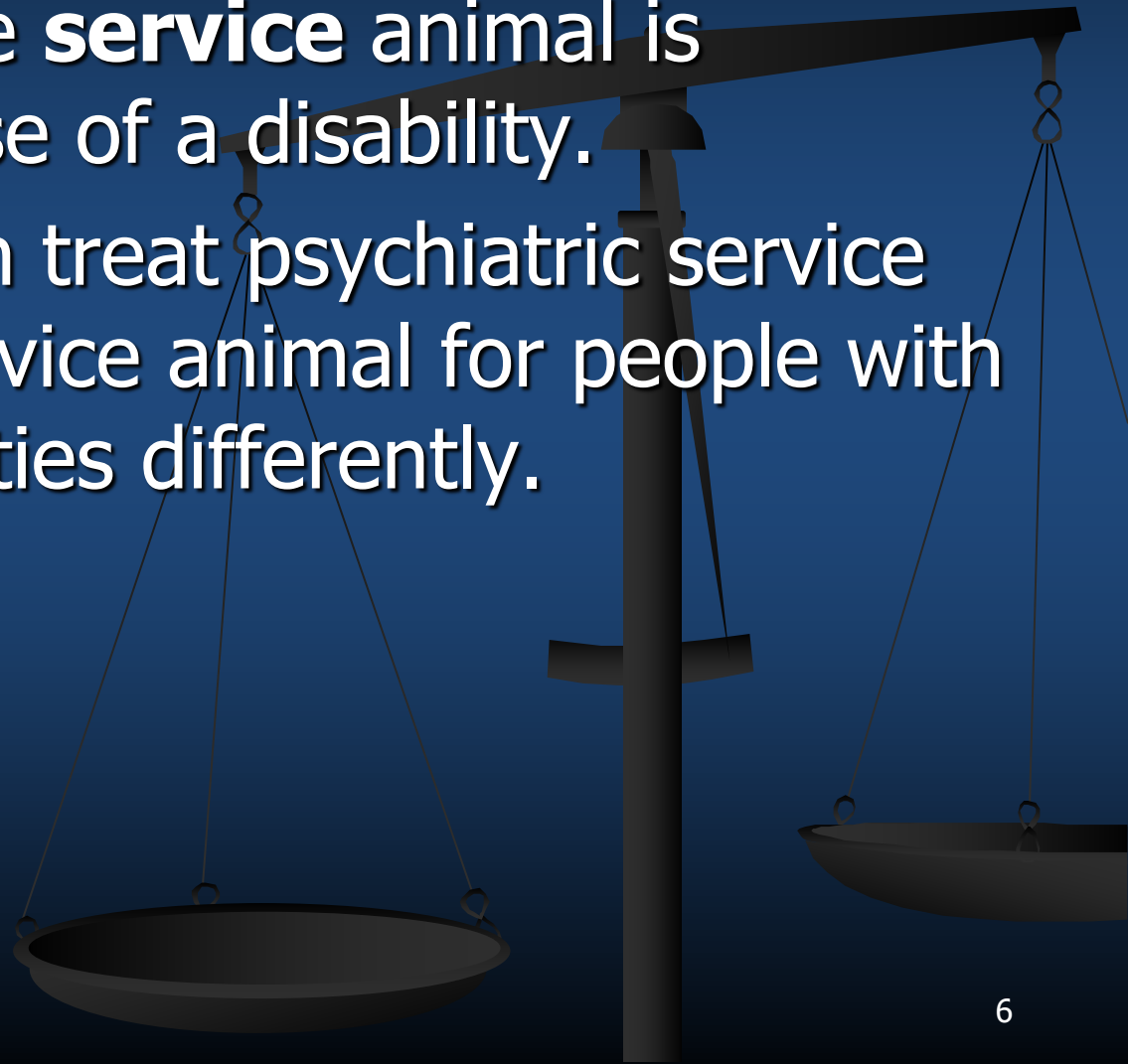
How do you proceed?

What to do

- If not readily apparent dog is a service animal, then make the following two **inquiries**(28 C.F.R. §35.136(f)):
 - Is the **animal** required because of a disability?
 - What work or task the animal has been trained to perform.
 - Can you go further? Arguably, yes providing further questions are narrowly focused on the same inquiries.
- The work or task the animal performs has to be related to the disability.
- Key is determining whether the animal is trained to engage in recognition and response.

What not to do

- Ask whether the **service** animal is required because of a disability.
- Assume you can treat psychiatric service animals and service animal for people with physical disabilities differently.



Service Animal: ADA Continued

- Service animal two inquiries scheme only applies to title II and title III of the ADA and not to Title I.
- Service animal under ADA's title II and title III regulations is a dog and must be under control of the handler.
- Providing a set of criteria are met first, miniature horses get the same treatment as dogs under the ADA's title II and title III regulations but are not service animals
- Title I is a different "animal."
 - No rules whatsoever
 - Interactive process
 - Must the animal relate to essential functions of the job?
 - Is it the disability being accommodated or is it the essential functions of the job being accommodated?

Interactive Process



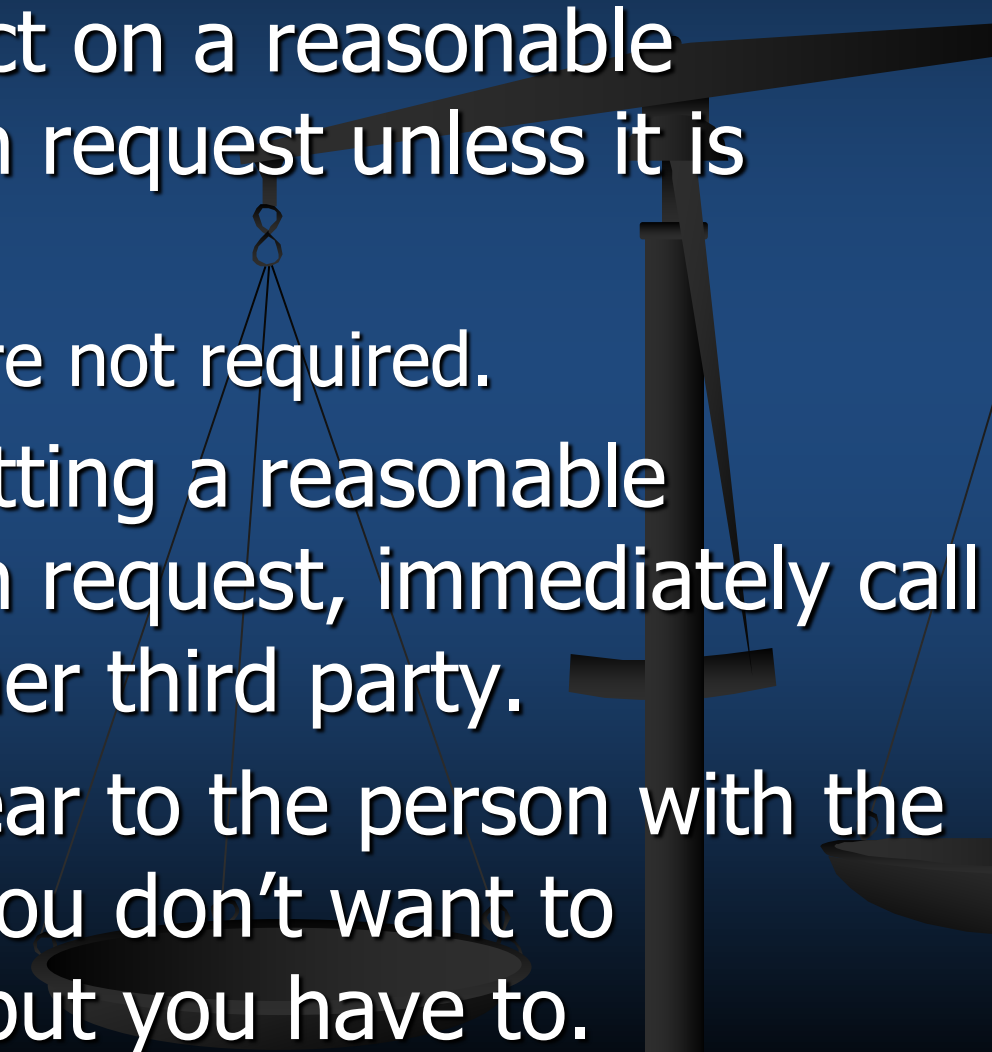
- A title I construct.
- Once an employer is aware of an accommodation request, employer must engage in the interactive process.
 - Magic words not required.
 - Employee only has to provide the employer with enough information so that the employer can be fairly said to know about the disability and the desire for an accommodation. EEOC v. Crain Automotive Holdings LLC (E.D. AR, 4/11/19).
 - FMLA notice by itself may or may not be sufficient.

Interactive Process



- Liability is on whoever breaks down interactive process.
 - But rule may be different for effective communication.
- In title I matters, the employer has the right to obtain a reasonable amount of documentation justifying the accommodation request.
- Unreasonable delay in granting accommodation is actionable.
- Interactive process is a title I concept but the ADA scheme, case law, common sense, and preventive law **demand** applicability in title II, III and Rehabilitation Act contexts as well.

Do's and Don'ts of the Interactive Process

- Don't: Fail to act on a reasonable accommodation request unless it is explicit.
 - Magic words are not required.
 - Don't: Once getting a reasonable accommodation request, immediately call a vendor or other third party.
 - Don't: Make clear to the person with the disability that you don't want to accommodate but you have to.
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Do's and Don'ts of the Interactive Process

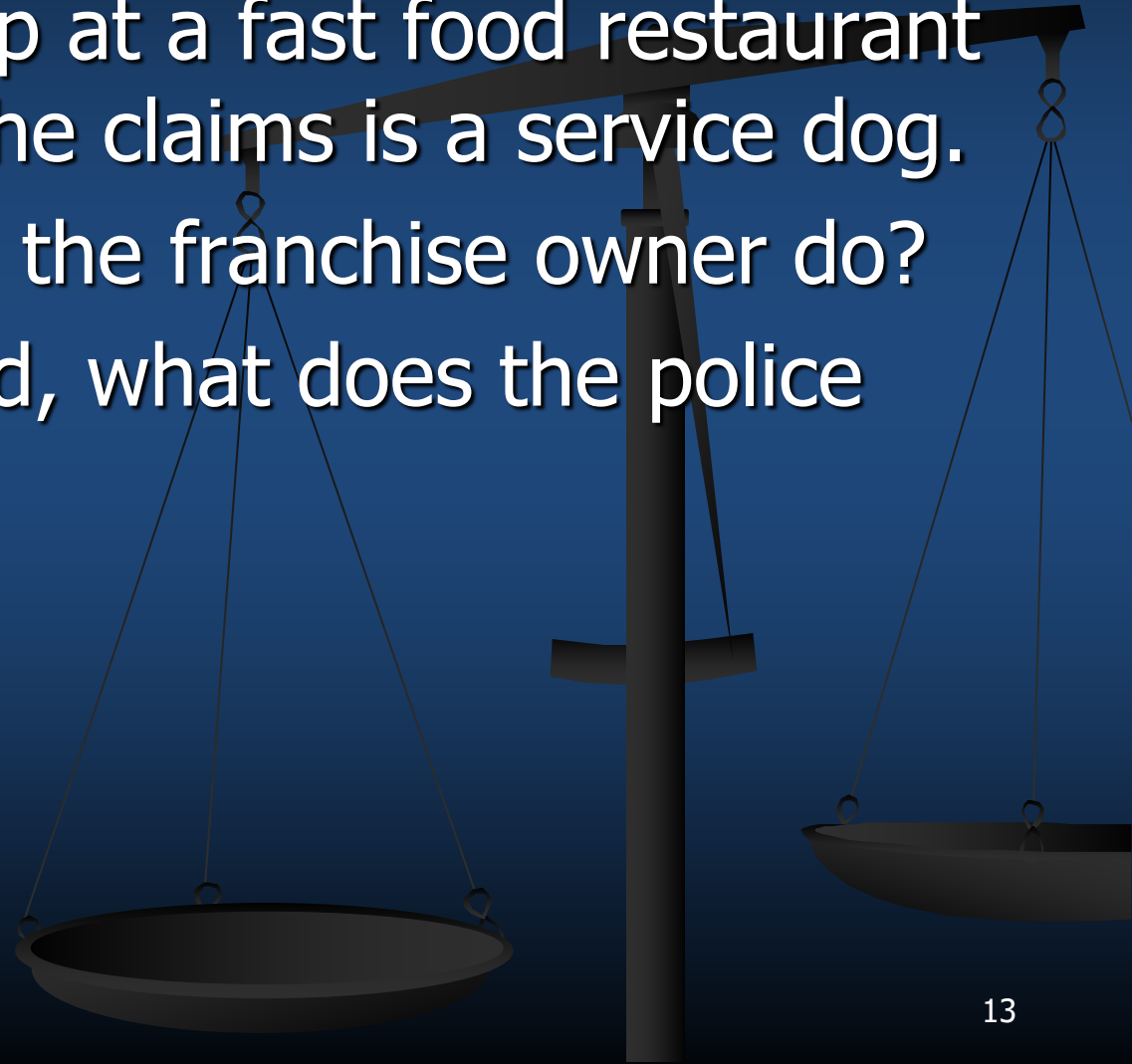
- Don't: Make clear that the process will be adversarial and not collaborative.
- Don't: Ignore suggestions from the person with a disability as to what works and/or make it clear you don't care what works.
- Don't: Assume that you know more about the ADA than the person making the request for a reasonable modification/accommodation (Be prepared to defend no or take it or leave it answers).
- Don't pity or feel sorry.
- Do: Value the person with a disability as an individual.
- Do: Make clear and demonstrate that you are interested in a collaborative and not an adversarial process.

Do's and Don'ts of the Interactive Process (Continued)

- Do: If you get stuck as to what might work, call the Job Accommodation Network.
- Do empathize and listen.
- Do: Involve the person with a disability in the process immediately and keep him or her posted.
- Do: Remember you will have to make the accommodation unless you can show an undue hardship/burden.
- Do: Know what a reasonable accommodation is.

Case Study: Service Animal at a Fast Food Restaurant

- Person shows up at a fast food restaurant with an animal he claims is a service dog.
- What do you as the franchise owner do?
- If police is called, what does the police do?



Therapy Animals



- You can find therapy animals in hospitals, classrooms, colleges, professional offices, etc.
 - I have also seen the term "facility animal," which as far as I can tell is essentially a therapy animal.
- They are trained to help someone else other than the handler to feel better.
- Do not get the protection of service animals under the ADA.

Case Study

SA or ESA Landlord Tenant Dispute

- Landlord claims that tenant has not paid pet deposit for the animal she keeps in the apartment. Tenant claims the animal is a service animal or an emotional support animal. How do you handle?

Case Study

SA or ESA Landlord Tenant Dispute

- See earlier slide for what is a service animal under the ADA.
 - A service animal under the ADA is a dog. That said, miniature horses get similar treatment if they first meet a balancing test.
- Different rules for the Fair Housing Act
 - Rules come from a January 2020 HUD circular and **not** from any regulations or statute.

HUD Circular: Types of Animals

- A service animal means the same as under the ADA regulations, which is a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Also, the work or tasks performed by the service animal must be directly related to the individual's disability.
 - Think in terms of whether the dog is trained to engage in recognition and response.

HUD Circular: Types of Animals

- Assistance animal now includes both service animals and support animals.
- Assistance animal under the circular also has a narrower meaning of including animals acting as service animals but they are not dogs.
- An animal providing therapeutic emotional support for individuals with disabilities is a support animal.
- Assistance animal need not be individually trained or certified.
 - Not restricted to dogs.

HUD Circular: The Process

- Step one: determine whether the animal is a service animal by asking yourself: 1) is it a dog; 2) if so, is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?; 3) if yes, then you have a service animal.
- Step two: if it is not readily apparent that the animal was a service animal, then ask: 1) is the animal required because of a disability?; and 2) what work or tasks has the animal been trained to perform?
 - Can you go beyond those two questions?
- Step three: if the disability is not observable, the housing provider may request information regarding both the disability and the disability related need for the animal. The housing provider is not entitled to know the individual's diagnosis. The information provided by the tenant must reasonably support the tenant's assertion that he or she has a disability. Finally, the tenant must be given a reasonable opportunity to provide information that reasonably supports his or her request.

HUD Circular: Process Continued

- The circular has a document attached to it entitled "guidance on documenting an individual's need for assistance animals and housing," that HUD believes helps ensure that housing providers receive the disability related information necessary to make the reasonable accommodation decision.
- Information about a disability may come from a variety of sources, including: 1) a disability determination from a federal, state, or local governmental agency; 2) receipt of SSDI, SSI, or disability benefits or services from another federal, state, or local agency; 3) eligibility for housing assistance or housing voucher received because of disability; or 4) information confirming disability from a healthcare professional, such as a physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse.

HUD Circular: Documentation

- Documentation
 - Documentation from the Internet is not by itself sufficiently reliable to establish an individual has a non-observable disability or disability related need for an assistance animal.
 - Documentation provided over the Internet can be sufficient if the healthcare professional can confirm the person's disability and the need for an animal and also have personal knowledge of the individual.
 - Reasonably supporting information is defined as often coming from a licensed healthcare professional that is knowledgeable about the person with the disability's condition and is specific to the individual and the assistance or therapeutic emotional support provided by the animal.

HUD Circular: Documentation Continued

- Documentation must provide a relationship or connection between the disability and the need for the assistance animal, especially where the disability is not observable or where the animal provides therapeutic emotional support.
- A housing provider cannot insist on specific types of evidence if the information provided or known to the housing provider meets the requirements of the circular. Also, disclosure of details about the diagnosis or severity of the disability or medical records or medical examination cannot be required.

HUD Circular:

Types of Animals Allowed

- If an animal is not a service animal, it must be an animal commonly found in households. If it is not an animal commonly kept in households, then the animal does not have to be allowed except in very rare circumstances.
- Animals commonly kept in households include dogs, cats, small birds, rabbits, hamsters, gerbils, other rodents, fishes, turtles, or other small domesticated animals traditionally kept in the home for pleasure rather than for commercial purposes.

HUD Circular: Types of Animals Allowed

- Barnyard animals, monkeys, kangaroos, and other non-domesticated animals are not considered common household animals.
- If the animal is not a common household animal, "then the requestor has the **substantial burden** of demonstrating a disability related therapeutic need for the specific animal or the specific type of animal."
 - Trained Capuchin monkeys are one type of a unique type of support animal.

HUD Circular: Miscellaneous Matters

- If the assistance animal poses a direct threat that cannot be eliminated or reduced to an acceptable level, then the animal can be refused by the housing provider.
- A housing provider cannot charge a fee for processing a reasonable accommodation request.
- Pet rules are not applicable to service animals, assistance animals, and support animals.
- All animals are subject to conduct rules.
- Housing providers cannot charge a deposit, fee, or surcharge for a service or assistance animal that can charge the tenant for damages the animal causes if that is the provider's usual practice to charge for damage caused by tenants.

HUD Circular:

Assistance Animals Continued

- HUD Circular Wildcard:
 - With respect to all this stuff that you have just learned about what the fair housing folks require with respect to animals, it is debatable whether any of it needs to be followed by a court.
 - All this stuff comes from a HUD circular.
 - The Fair Housing Act contains nothing about animals.
 - There is a short regulation from Housing and Urban Development talking about service animals.
 - Considering language in *Kisor v. Wilkie* and the existing HUD regulatory provision, circular could very well be given judicial deference. That said, don't forget about applicable state law, such as...

Chapter 121 TX Human Resources Code

- §121.002(1) defines assistance animal in-service animal the same. Definition is consistent with DOJ regulations.
- §121.002 (2) prohibits harassment that impedes or interferes with or is intended to impede or interfere with a service animal's performance of its duties or which places a person with a disability using an assistance animal/service animal, or a trainer training and assistance animal, in danger of injury.
- §121.002 (5) defines public facility very broadly.
 - When it comes to air transportation, watch out for the other ADA (Airline Deregulation Act).

Chapter 121 TX Human Resources Code

- §121.003 sets forth "because of," as the causation standard but that can mean a lot of different things.
- §121.003 (i) provide that a service animal and training cannot be denied admittance to any public facility when accompanied by an approved trainer.
 - Approved trainer is not defined.
- §121.003 (l) adopt the DOJ two inquiries approach when the person's disability is not readily apparent.
- §121.003 (j) prohibits a person from assaulting, harassing, interfering with, killing, or injuring in any way, or attempting to assault, harass, interfere with, kill, or injure in any way, an assistance animal.

Chapter 121 TX Human Resources Code

- §121.005 (b) provides that animal must be properly harnessed or leashed if used for assistance in travel or auditory awareness.
 - ADA is more nuanced.
 - Cause of action exist if an unleashed or untarnished animal injures a person because of the failure to have that animal on a leash or on a harness.

Chapter 121 TX Human Resources Code: Remedies

- Remedies for violation of chapter 121 include:
 - Misdemeanor punishable by a fine of not more than \$300 and 30 hours of community service.
 - Civil suit for damages with a conclusive presumption of damages in the amount of at least \$300 to the person with a disability.
- §121.006 provides that a person misrepresenting that the animal is a service animal by use of a harness or leash of the type commonly used by persons with disabilities is a misdemeanor subject to a fine of not more than \$300 and 30 hours of community service
 - What if the animal is not on a harness or leash of the type used by persons with disabilities?

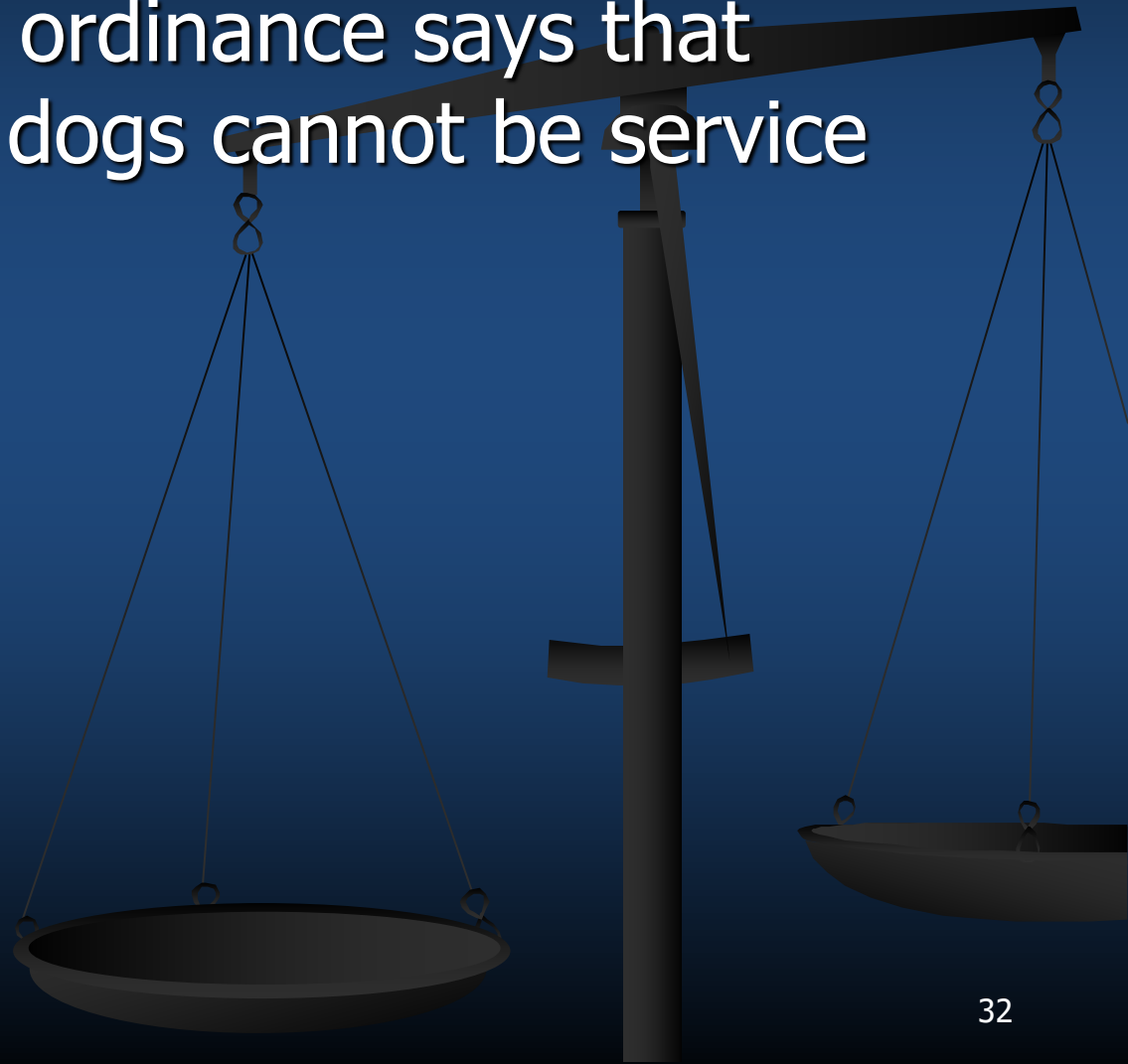
Case Study:

The Nightmare Scenario

- Cohen v. Clark (IA 2020)
 - <https://www.williamgoren.com/blog/2020/07/07/emotional-support-animal-iowa-supreme-court-cohen-clark/>
 - The Illinois Assistance Animal Integrity Act provide that a housing provider cannot deny an assistance animal solely due to the disability related needs of another resident. Instead, it has to attempt to balance the disability related needs of all residents.
 - Which prevails? The HUD circular or the Illinois Assistance Animal Integrity Act?
 - Kisor v. Wilkie

Case Study: the ADA Noncompliant County Ordinance

- A county or city ordinance says that certain kinds of dogs cannot be service animals.
- Kosher?



Remedies Available Under the ADA/RA



- Title I of the ADA- same remedies as found in title VII of the Civil Rights Act, which includes attorney fees.
- Title II of the ADA/Rehabilitation Act remedies are hooked into title VI of the Civil Rights Act, which includes attorney fees.
 - Cannot get punitive damages, *Barnes v. Gorman*, 536 U.S. 181 (2002).
 - Emotional distress damages Title II v. Rehabilitation Act? (*Cummings v. Premier Rehab Keller*).
- Title III of the ADA- injunctive relief and attorney fees are the only remedies available.
- Retaliation and interference causes of action (title V), 42 U.S.C. §12203, relate back to whatever title is applicable (title I, II, or III).

Summing Up

- The rules are complicated because different federal rules are involved plus numerous state specific statutes.
 - TX statutes pretty closely hew to ADA and ADA final regs.
- Don't forget about the interactive process and its do's and don'ts.
 - Get into the head of the person with a disability.
- Importance of knowledgeable trainers and knowledgeable legal counsel.

Resources

- Understanding the ADA blog:
<https://www.understandingtheada.com/>
- <https://www.williamgoren.com/blog/2019/07/02/kisor-v-wilkie-decided-auer-deference-dead-reformed/>
- <https://www.williamgoren.com/blog/2020/07/07/emotional-support-animal-iowa-supreme-court-cohen-clark/>
- <https://www.williamgoren.com/blog/2019/04/04/dos-and-donts-interactive-process/>
- <https://www.williamgoren.com/blog/2020/02/04/animals-in-housing-new-hud-circular/>
- <https://www.williamgoren.com/blog/2013/04/22/difference-between-service-dogs-and-therapy-dogs-emotional-support-animals/>
- <https://www.understandingtheada.com/blog/2021/04/05/certification-or-professional-training-service-animal-ada/>

More Resources

- <https://www.understandingtheada.com/blog/2018/06/13/just-where-are-esa-and-service-animals-allowed-on-college-and-university-campuses-the-true-false-analysis/>
- <https://www.understandingtheada.com/blog/2017/08/09/fair-housing-act-emotional-support-animals-and-service-dogs-noncompliance-can-cost-you-big-time/>
- <https://www.understandingtheada.com/blog/2016/10/31/service-dogs-emotional-support-animals-employment-title-i-ada/>
- https://www.animallaw.info/statute/il-assistance-animals-assistance-animalguide-dog-laws#s125_32 (MI State Animal Legal and Historical Center).
- <https://www.understandingtheada.com/blog/2022/07/12/accommodating-the-disability-and-not-the-essential-functions-of-the-job/>
- <https://www.understandingtheada.com/blog/2022/01/19/causal-link-accommodation-disability/>

More Resources

- <https://www.understandingtheada.com/blog/2021/01/13/witness-testifying-service-animal-violate-fair-trial-confrontation-clause/>
- <https://www.understandingtheada.com/blog/2021/01/13/witness-testifying-service-animal-violate-fair-trial-confrontation-clause/>

Thank you!

Comments and/or Questions?