Service Animals in the Clinical Setting

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DOGS ALLOWED?

If you traveled by air in the past year, you probably noticed that the presence of animals is on the rise in airports and on airplanes. It is not just the airline industry facing the increased presence of service and emotional support animals. How you deal with them can expose you to litigation and negative publicity. Bear in mind that laws governing animals on planes are different than for those of us on the ground.

PET OR WORKER?

First and foremost, a service animal is distinguished from an emotional support animal and the rules of engagement for the two categories are different as well. While a business might be able to restrict access to an emotional support animal, the same is not true for a service animal. What is the difference between these two types of animals and what are the rules that govern them with respect to providing medical care and treatment to patients?

The service animal is considered a working animal - not a pet. Under the Americans with Disabilities Act, only dogs are recognized as service animals with an exception for miniature horses. Service dogs are not defined by breed. A service animal is trained to perform specific tasks for their owners and/or managing a condition. Some examples of such work or tasks include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications, and calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack. In contrast to this is the emotional support, therapy, comfort or companion animal. This animal is a pet whose sole function is to provide comfort or emotional support and therefore does not qualify as a service animal. The mere presence of the animal provides comfort.

The Americans with Disabilities Act defines service animals as dogs that are individually trained to do work or perform tasks for people with disabilities. The work the animal has been trained to do must be directly related to the person’s disability. The Americans with Disabilities Act mandates that all business organizations that serve the public must allow service animals to accompany people with disabilities into all areas of the facilities where

customers are normally allowed to go. Medical care facilities fall within the purview. The companion animal does not enjoy the same accommodations.

Currently, emotional support animals, comfort animals, and therapy animals are not specifically protected under the ADA, unless the owner can legitimately state the support/comfort/therapy animal is specifically trained to assist with their disability.

What then happens, in the clinician setting, when a first time patient walks in to register for his appointment and he is accompanied by his 75-pound Labrador Retriever, Sally? During the process of sign in, the front desk personnel cannot help but notice the animal and inquire about same. The dog is not wearing any identification and the new patient has no outward appearance of disability. What questions can and cannot be asked of the patient and, more importantly, what allowances must be made for this animal and its owner?

Okay to Ask*

(1) Is the dog a service animal required because of a disability; and/or

(2) What work or task has the dog been trained to perform?

*A practice cannot ask these two questions when it is readily apparent that the animal is trained to do work for an individual with a disability (e.g. a seeing e dog).

Conversely, there are questions that must **not** be asked. The front desk personnel cannot ask:

Don’t Ask

(1) What is the person’s disability;

(2) For medical documentation, an identification card, or training document for the dog; and/or

(3) That the dog demonstrate its ability to perform the work.

There are potential concerns for a service animal to accompany a patient in all aspects of medical care and treatment. For example, in a surgical procedure with gowns and masks in a sterile environment, it would be extremely burdensome, if not impossible, to have a service animal present due to the sterile field. The law requires that the medical provider provide reasonable accommodation. There are reasonable limits with each situation which may be imposed on these animals that accompany a patient. Another example of a sterile environment where service animals can be excluded, in addition to the surgical setting, is a burn unit.

What might be a less clear situation? For example, let’s say a patient is coming in for a procedure in the clinician’s office which does not require a sterile field but will require gloves and penetration of the patient’s skin. Can this healthcare provider preclude the

service animal from accompanying the patient into the exam room where this procedure will be performed? What is the reason and rationale for excluding the animal? Allowing a well-groomed service animal in a clinical setting likely creates no greater risk of germs or disease than a human being present, as long as the dog is under the control of the owner and housebroken. If the dog is not, access may be denied. Some facilities provide a crate on site where a service animal can be contained while the handler is in a restricted area or are able to provide for the stewardship of the service animal. Perhaps a family member can take the dog during the procedure.

Tennessee is not alone in seeing an upswing of litigation involving patients who have been denied access to medical care because of the presence of their service animal. As with any litigation, press coverage, which can have a negative impact on the healthcare provider's business, along with attorney's fees, costs and the stress of litigation are factors to consider. Service dog litigation is a hot topic and is likely to yield press coverage. It is worth noting that some states (23 out of 50) are enacting laws to punish those with fake service animals. At this time, Tennessee is not one of them. See this page for more information.

What damages could a person denied access to medical care seek if their rights under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973 have been violated?[i] Those defendants must be prepared to say that their actions were legitimate and non-discriminatory and that making allowances for this animal would fundamentally alter the nature of their services, program, and activity. Those aggrieved are likely to complain of emotional distress and, if a violation is deemed to have occurred, they will be entitled to damages for same and potentially, the prevailing party's attorney's fees. To award attorney's fees, on behalf of the plaintiff, is within the Court's discretion. These are usually awarded in cases of deliberate indifference or reckless disregard. The threshold for establishing deliberate indifference is not terribly high. The attorney's fees can be quite exorbitant in these situations and while there might be a low damage award, otherwise, the attorney's fees can become, quite literally, the tail that wags the dog (pun intended). A 2016 settlement between the U.S. National Federation for the Blind and Uber had attorney's fees in excess of $2,000,000.00 awarded to the U.S. National Federation for the Blind. *See* https://arstechnica.com/tech-policy/2016/12/lawyers-who-sued-uber-over-service-animals-will-get-2-38m-fee-award/

Case law on service animals in the health care setting is scarce, and the few cases that exist are fact specific and highlight the importance of individual assessments for each situation. For example, in *Tamara v. El Camino Hosp.*, 964 F.Supp.2d 1077 (N.D. Cal. 2013), a patient sued a hospital because of its *blanket* policy excluding service dogs from its psychiatric ward claiming the presence of service animals would fundamentally alter the nature of its services because it would cause disruption. The plaintiff in that case used her dog to help her balance when walking and to perform other physical tasks, such as picking up dropped objects. The hospital provided a walker in place of the service dog, but the Plaintiff claimed this made mobility more difficult because she could not pick up dropped objects and could not maneuver in the bathroom. The court found that the hospital's policy of blanket exclusion of service animals without conducting an individualized assessment

violated the Americans with Disabilities Act and the Rehabilitation Act. Specifically, the court noted that evidence of direct threat must be based on actual risk determined from an individualized assessment, not just speculation or generalizations. The court found that the ward's most unstable patients were kept in a locked ward and therefore would not have any contact with the plaintiff's service dog. The court further found that the hospital should have assessed the plaintiff's ability to care for the dog and made reasonable accommodations for this, such as allowing a friend or other third party to take the dog out of the ward for care. Finally, the court found that other hospitals had policies which allowed service animals into psychiatric wards and that an occupational therapist who worked at the hospital was repeatedly allowed to bring her own dog into the ward.

In another example, *MCAD v. Unident Dental Center*, Docket NO. 05- BPA- 01057 (Hearing Officer Opinion, February 14, 2014), an office that provided dental services was sued as a result of their failure to allow Ms. Mahoney to have her toy poodle, which had been trained to assist her with her hearing deficits as well as provide her with emotional support, to accompany her to a double root canal procedure. The decision was made in the office, and in the presence of other patients, that the dog would not be allowed to go with the patient into the examination room. The patient was instructed to take the dog home and return for the treatment if she so desired. The patient claimed that this confrontation was unsettling and embarrassing and, thus, she had suffered emotional distress.

The staff at the dental office explained the concerns regarding performing a root canal procedure while the patient held her a dog during that procedure or examination. The dentist explained the increased health and safety concerns when a dog was in such close proximity to the patient’s mouth during this surgery. In this particular case, the Tribunal found this testimony to be quite credible. Due to legitimate worry about maintaining a sterile and sanitary operative environment along with concerns about possible infection, and the concerns of unanticipated movement or reactions of the animal to the noise of drills and machines while sharp instruments were being used, the dentist was found to have acted appropriately in excluding the dog from the root canal procedure. The presence of the dog could have potentially caused injury or harm to the patient or others.

What is clear in this case, and other cases, is that staff education and patient communication is key. Had the patient advised the dentist office prior to the day of the procedure or when the procedure was scheduled that she requested the presence of her service animal, this discussion could have been held privately and well before the day of the actual root canal. This communication issue is instructive to us. When scheduling patients, and particularly new patients, it might be helpful to include a question on whether a service animal will accompany the . Knowing this information in advance can educate and prepare the physician’s office or facility, as well as the patient, as to how each individual situation will be handled. Remember to avoid the “Don’t Ask” questions. Above all, if faced with an animal and the employee is unsure how to handle the situation, seek help and avoid any public confrontation that could be a catalyst for emotional distress, anguish or embarrassment.

Problems seem to arise when an unanticipated or unexpected event occurs when a patient with a service animal walks in and demands that the service animal be allowed to accompany them to their procedure or examination. This, coupled with a lack of education on behalf of the employee, can result in a bad outcome. Bear in mind that a service animal may be denied access to areas where a patient would generally be allowed, when it can be demonstrated that the presence or behavior of that particular animal would create a fundamental alteration or direct threat to other persons or to the nature of the goods and services provided. The obvious example is the operating room where gowns and masks are required to reduce contamination and the environment is sterile. Accommodations might be made to allow the dog to accompany the patient in areas where family members can be until the patient is taken to surgery.

Can the physician's office decline to have the service animal go into the exam room with the patient even though it is a service animal that has been trained to perform tasks? Simply having a crate does not solve the problem. If the area is one where the presence of the animal would not alter the medical care provided and the animal is indeed a service animal that has been trained, then the correct action would be to allow the service animal in the examining room.

The issues with accommodating a service animal are legitimate and can result in serious consequences, litigation and unpleasant publicity among them. With the increase in emotional support animals on the rise, the lines can become blurred when dealing with true service animals. Best practices are to be informed, be prepared and educate your staff on what can be asked when faced with a patient and an animal and how best to handle the situation.

Sources:

https://www.ada.gov/service_animals_2010.htm

Service animals within health Care Facilities. Strategies for regulatory compliance. Hughes, Patricia A and Rozovsky, Fay A., ASPR: Understanding How to Accommodate Service Animals in Health Care Facilities.

[i] Section 504 of the Rehabilitation Act of 1973 comes into play when the facility is a Medicare recipient

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