



HAWAI'I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 • PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

March 31, 2011
Conference Room 325
2:00 p.m.

To: The Honorable Gilbert Keith-Agaran, Chair
Members of the House Committee on Judiciary

From: Coral Wong Pietsch, Chair
and Commissioners of the Hawai'i Civil Rights Commission

Re: S.B. No. 892, S.D.2, H.D.1

The Hawai'i Civil Rights Commission (HCRC) has enforcement jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai'i constitutional mandate that "no person shall be discriminated against in the exercise of their civil rights because of race, religion, sex or ancestry". Art. I, Sec. 5.

The HCRC supports SB 892, SD2, HD1. The HCRC does not have objections to conforming H.R.S. §143-4 (dog licensing) or H.R.S. §347-13 (rights of blind, visually impaired and disabled persons in public conveyances) to recently finalized U.S. Department of Justice (DOJ) rules regarding service animals under Title II of the Americans with Disabilities Act (ADA), relating to government services and programs, and Title III of the ADA, relating to public accommodations. While the HCRC and state courts look to federal law for guidance, it is not controlling authority in interpretation of state civil rights laws, and the new DOJ ADA Title III rules do not control interpretation of the obligation of public accommodations to provide reasonable accommodations to persons with disabilities under H.R.S. Chapter 489. It is well accepted that state law can provide broader and stronger protections than federal law. See, California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 107 S. Ct. 683 (1987) (federal law is a "floor" beneath which

protections against discrimination should not drop, rather than a “ceiling” above which protections cannot rise under state discrimination laws.) Therefore, while the DOJ rules regarding service animals under the ADA Titles II and III narrowly define “service animals” to include dogs (and miniature horses) only, state statutes regarding reasonable accommodations for persons with disabilities in public accommodations may be interpreted more broadly.

In addition, SB 892, SD2, HD1 conforms H.R.S. § 515-3 to reflect the language in §504 of the federal Fair Housing Act (FHA). While the FHA does not make specific reference to service or assistance animals as reasonable accommodations, HUD, in its Handbook regarding subsidized multi family housing programs, and in a recent memo to its regional directors, states that that reasonable accommodations under the FHA §504 can include the use of “assistance animals”. Assistance animals are defined as animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability. HUD has clearly stated that the ADA Title II and III definitions of service animals only as dogs (or miniature horses) does not apply to the FHA. See, HUD Handbook 4350.3 § 2-44 (2009), Memorandum for All FHEO Regional Directors dated February 17, 2011, attached.

The HCRC, DCAB and other interested parties met to discuss language conforming state law with the reasonable accommodations provisions found in §504 of the FHA and in HUD and caselaw interpretations of that section to clarify that reasonable accommodations may include the use of assistance animals and the imposition of reasonable restrictions on the use of such animals. The language in Section 4 of SB 892, SD2, HD1, reflects that intent, consistent with current interpretation of federal and state fair housing law.

We therefore urge this committee to pass SB 892, SD2, HD1.

**HUD Handbook 4350.3:
Occupancy Requirements of Subsidized
Multifamily Housing Programs**

Example – Reasonable Accommodation that Does Not Create an Undue Financial and Administrative Burden

An applicant with a mobility impairment wants to live in a dwelling unit in a particular rental housing property. The owner requires all tenants to hand-deliver their rent to the rental office. The unit is almost a block away from the rental office, but there is a mailbox located just a few yards from the unit entry door. Under 24 CFR 100.204, the owner or manager of an apartment complex must permit the applicant to mail the rent payment to the rental office. This policy accommodation would not pose an undue financial and administrative burden on the owner and allows the applicant to have equal opportunity to use and enjoy the unit.

- E. For other guidance on how to determine whether a reasonable accommodation would result in an undue financial and administrative burden, refer to HUD Handbook 4350.1, *Multifamily Asset Management and Project Servicing*.

2-44 Assistance Animals as a Reasonable Accommodation

- A. Assistance animals are not pets. They are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provides emotional support that alleviates one or more identified symptoms or effects of a person's disability. Assistance animals – often referred to as "service animals," "assistance animals," "support animals," or "therapy animals" – perform many disability-related functions, including but not limited to guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing minimal protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support.
- B. A housing provider may not refuse to allow a person with a disability to have an assistance animal merely because the animal does not have formal training. Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, no special training is required. The question is whether or not the animal performs the disability-related assistance or provides the disability-related benefit needed by the person with the disability.
- C. A housing provider's refusal to modify or provide an exception to a "no pets" rule or policy to permit a person with a disability to use and live with an assistance animal would violate Section 504 of the Rehabilitation Act and the Fair Housing Act unless:
1. The animal poses a direct threat to the health or safety of others that cannot be reduced or eliminated by a reasonable accommodation,

2. The animal would cause substantial physical damage to the property of others,
 3. The presence of the assistance animal would pose an undue financial and administrative burden to the provider, or
 4. The presence of the assistance animal would fundamentally alter the nature of the provider's services.
- D. The fact that a person has a disability does not automatically entitle him or her to an assistance animal. There must be a relationship between the person's disability and his or her need for the animal.
- E. A housing provider may not require an applicant or tenant to pay a fee or a security deposit as a condition of allowing the applicant or tenant to keep the assistance animal. However, if the individual's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, at that time, the housing provider may charge the individual for the cost of repairing the damage if the provider regularly charges tenants for any damage they cause to the premises.

Subsection 5: Additional Fair Housing Act Requirements

2-45 Fair Housing Act Basic Accessibility Requirements

The Fair Housing Act requires that all buildings designed and constructed for first occupancy after March 13, 1991 meet certain basic accessibility requirements. This requirement applies to all new construction, regardless of the presence of federal financial assistance. See 24 CFR 100.205. Owners of properties that should have been constructed in accordance with these requirements but were not, are obligated to retrofit their units to bring them into compliance with the Act. If a tenant in one of these properties requests modifications to a unit that should have been made at the time of construction, the owner has an affirmative obligation to make and pay for those modifications as part of its original obligation to conform to the Fair Housing Act design and construction requirements.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

February 17, 2011

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

MEMORANDUM FOR: All FHEO Regional Directors
Regional Counsel

FROM: Sara K. Pratt, Deputy Assistant Secretary for Enforcement
and Programs, ED

SUBJECT: New ADA Regulations and Assistance Animals as
Reasonable Accommodations under the Fair Housing Act
and Section 504 of the Rehabilitation Act of 1973

I. Purpose

This memo explains that the Department of Justice's (DOJ) recent amendments to its Americans with Disabilities Act (ADA) regulations¹ do not affect reasonable accommodation requests under the Fair Housing Act (FHAct) and Section 504 of the Rehabilitation Act of 1974 (Section 504). The DOJ's new rules limit the definition of "service animal" in the ADA to include only dogs. The new rules also define "service animal" to exclude emotional support animals. This definition, however, does not apply to the FHAct or Section 504. Disabled individuals may request a reasonable accommodation for assistance animals in addition to dogs, including emotional support animals, under the FHAct or Section 504. In situations where both laws apply, housing providers must meet the broader FHAct/Section 504 standard in deciding whether to grant reasonable accommodation requests.

II. Definitions of Service Animal

The DOJ's new ADA rules define "service animal" as any 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. The new rules specify that "the provision of emotional support, well-being, comfort, or companionship do not constitute

¹ Nondiscrimination on the Basis of Disability in State and Local Government Services, Final Rule, 75 Fed. Reg. 56164 (Sept. 15, 2010) (to be codified at 24 C.F.R. part 35); Nondiscrimination on the Basis of Disability in State and Local Government Services, Final Rule, 75 Fed. Reg. 56236 (Sept. 15, 2010) (to be codified at 24 C.F.R. part 36).

work or tasks for the purposes of this definition.” Thus, trained dogs are the only species of animals that may qualify as service animals under the ADA (there is a separate provision regarding miniature horses) and emotional support animals are expressly precluded from qualifying as service animals.

Neither the FHAct, Section 504, nor HUD’s implementing regulations contain a specific definition of the term “service animal.” However, species other than dogs, with or without training, and animals that provide emotional support have been recognized as necessary assistance animals under the reasonable accommodation provisions of the FHAct and Section 504. The new ADA regulation does not change this FHAct/Section 504 analysis, and specifically notes, “[u]nder the FHAct, an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a ‘reasonable accommodation’ that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the animal does not pose a direct threat.”² In addition, the preambles to the new rules state that emotional support animals do not qualify as service animals under the ADA but may “nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct.”³

III. Applying the Law

Under the FHAct and Section 504, individuals with a disability may be entitled to keep an assistance animal as a reasonable accommodation in housing facilities that otherwise impose restrictions or prohibitions on animals. In order to qualify for such an accommodation, the assistance animal must be necessary to afford the individual an equal opportunity to use and enjoy a dwelling or to participate in the housing service or program. Further, there must be a relationship, or nexus, between the individual’s disability and the assistance the animal provides. If these requirements are met, a housing facility, program or service must permit the assistance animal as an accommodation, unless it can demonstrate that allowing the assistance animal would impose an undue financial or administrative burden or would fundamentally alter the nature of the housing program or services.⁴

Under the ADA, the animal need only meet the definition of “service animal” to be covered by the law. No further test or reasonable accommodation analysis should be applied. An individual’s use of a service animal in an ADA-covered facility should not be handled as a request for reasonable accommodation. If an animal qualifies as a “service animal,” ADA-

² 75 Fed. Reg. at 56194, 56268.

³ 75 Fed. Reg. at 56166, 56240.

⁴ The request may also be denied if the specific animal in question poses a direct threat to the health and safety of others that cannot be reduced or eliminated by a reasonable accommodation or if the specific animal would cause substantial physical damage to the property of others that cannot be reduced or eliminated by a reasonable accommodation.

covered entities may not restrict access to a person with a disability on the basis of his or her use of that service animal unless the animal is out of control and its handler does not take effective action to control it or if the animal is not housebroken. The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go.

The new ADA definition of "service animal" applies to state and local government services, public accommodations, and commercial facilities; the FHAct covers housing services and facilities; and HUD's Section 504 regulations apply to all recipients of HUD-funds. Some types of entities, such as rental offices and housing authorities, are subject to both the service animal requirements of the ADA and the reasonable accommodation provisions of the FHAct or Section 504. Entities must ensure compliance under all relevant civil rights laws. Compliance with the ADA's regulations does not ensure compliance with the FHAct or Section 504. An entity that is subject to both the ADA and the FHAct or Section 504 must permit access to ADA-covered "service animals" and, additionally, apply the more expansive assistance animal standard when considering reasonable accommodations for persons with disabilities who need assistance animals that fall outside the ADA's "service animal" definition.

IV. Conclusion

The ADA regulations' revised definition of "service animal" does not apply to reasonable accommodation requests for assistance animals in housing under either the FHAct or Section 504. Rules, policies, or practices must be modified to permit the use of an assistance animal as a reasonable accommodation in housing when its use may be necessary to afford a person with disabilities an equal opportunity to use and enjoy a dwelling, common areas of a dwelling, or participate in, or benefit from, any housing program receiving Federal financial assistance from HUD, unless an exception applies.



DISABILITY AND COMMUNICATION ACCESS BOARD

919 Ala Moana Boulevard, Room 101 • Honolulu, Hawaii 96814
Ph. (808) 586-8121 (V/TDD) • Fax (808) 586-8129

March 31, 2011

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY

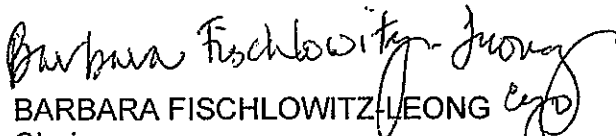
Senate Bill 892, SD2, HD1 - Relating to Service Animals

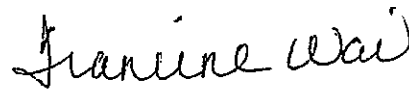
The Disability and Communication Access Board supports Senate Bill 892, SD2, HD1. The purpose of this bill is to conform §143-4, Hawaii Revised Statutes (HRS), regarding dog licensing to applicable provisions of the Americans with Disabilities Act; §347-13, HRS to the Americans with Disabilities Act rules for Titles II and III, that went into effect on March 15, 2011, and §515, HRS to the current Fair Housing Act as it relates to the issue of service animals.

Our office collaborated with the Hawaii Civil Rights Commission to develop the House Draft 1 when it was heard in the House Committee on Health. We support House Draft 1 and ask that this bill be passed out of Committee.

Thank you for the opportunity to testify.

Respectfully submitted,


BARBARA FISCHLOWITZ-LEONG
Chairperson
Legislative Committee


FRANCINE WAI
Executive Director

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

850 SOUTH KING STREET 10TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 788-8500 • FAX: (808) 788-5563 • INTERNET: www.honolulu.gov/hr

PETER B. CARLISLE
MAYOR



NOEL T. ONO
DIRECTOR

March 31, 2011

The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary
The House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

Subject: Senate Bill No. 892, SD2, HD1, Relating to Service Animals

I wish to acknowledge the amendments made to the above-referenced bill by the Committee on Health in consideration of comments offered by the Disability and Communication Access Board, Hawaii Civil Rights Commission and the City & County of Honolulu's Equal Opportunity Office. We urge that this bill be passed as presented in Senate Bill No. 892, SD2, HD1.

Yours truly,

A handwritten signature in black ink, appearing to read "Noel T. Ono", is written over a horizontal line.

Noel T. Ono
Director

Dear Chair Keith-Agaran, Vice Chair Rhoads, and the members of the House Committee on Judiciary,

I support SB 892, SD2, HD1.

Individuals who use service animals and their friends and families have worked hard toward updating federal laws to decrease and eliminate discrimination in various settings and situations, such as public conveyances and real estate transactions. Some of our friends, both here in Hawai'i and on the mainland, are among them.

Please pass this bill so our state laws that refer to service animals will be neither obsolete, nor inconsistent with the ADA and FHA on the federal level.

Thank you for your time and consideration.

Sincerely,

Ronalene White - Kahalu'u, HI
VP, Anuenue Chapter
National Federation of the Blind of Hawai'i

From: Susan Luehrs [hawaii.fido.dogs@gmail.com]
Sent: Tuesday, March 29, 2011 6:31 PM
To: JUDtestimony
Subject: SB892

Hawaii Fi-Do Service Dogs supports this bill to update and conform State law to the federal Americans with Disabilities Act and Fair Housing Act by amending certain laws regarding the use of service animals in statutes relating to dog licensing, public conveyances, and discriminatory practices in real estate transactions.

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Susan Luehrs
Executive Director
Hawaii Fi-Do

Phone: 808-638-0200
www.hawaii.fido.org