TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014

ON THE FOLLOWING MEASURE:
H.B. NO. 1762, RELATING TO DISABLED PERSONS.

BEFORE THE:
HOUSE COMMITTEE ON HUMAN SERVICES

DATE: Thursday, January 30, 2014 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): David M. Louie, Attorney General, or
Candace J. Park, Deputy Attorney General

Chair Carroll and Members of the Committee:

The Department of the Attorney General opposes this bill because it violates the Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008 (Pub. L. 110-325) (collectively, the ADA).

Section 2 of this bill requires the Department of Human Services (Department) to issue service dog certifications for dogs who qualify as service dogs in accordance with section 347-2.5, Hawaii Revised Statutes, and prohibits any person from representing that a dog is a service dog unless that dog is certified by the Department.

Section 3 of this bill requires persons accompanied by a service dog to possess on their person a service dog certificate issued by the Department.

Section 4 of this bill imposes a fine or imprisonment, or both, for persons who represent that a dog is a service dog when the dog has not been certified by the Department.

Federal regulations implementing the ADA specifically provide that "[a] public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal." 28 CFR § 36.302(c)(6). The provision in section 3 of this bill is more restrictive than the federal regulation and requires identification of the dog as a certified service dog. Thus, it violates the ADA.

We respectfully request that the Committee hold this bill.

HAWAIʻI CIVIL RIGHTS COMMISSION

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

January 30, 2014
Rm. 329, 10:00 a.m.

To: The Honorable Mele Carroll, Chair
Members of the House Committee on Human Services

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: H.B. No. 1762

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

H.B. No. 1762 requires the Department of Human Services (DHS) to establish and administer a service dog certification program, allows DHS to charge a fee for such certification, requires service dogs owners or handlers to possess a service dog certification when entering a public accommodation, and establishes a penalty for falsely representing a dog as a service dog. The HCRC opposes this bill because it is more restrictive than federal law, and conflicts with the HCRC's interpretation of HRS Chapter 489 to allow other types of assistance animals as reasonable accommodations.

While state law protections against discrimination can be more expansive than federal law, federal law is a "floor" beneath which state law protections against discrimination cannot drop. *California Federal Sav. And Loan Ass'n v. Guerra*, 479 US 272, 290-292 (1987). U.S. Department of Justice (DOJ) rules relating to service animals state that a public accommodation shall not require documentation, such as proof that an animal has been certified, trained or licensed as a service animal (see 28 CFR §36.302). However, to

protect the public from abuse by persons who do not have service animals, the public accommodation can ask whether the animal is required because of a disability and what work or task the animal has been trained to perform. In addition, the public accommodation can require the service animal to be under the control of the animal's handler at all times, be housebroken, and have a harness, leash or other tether, unless the handler is unable to use these because of the handler's disability or if the use of these would interfere with the animal's work or tasks. If the above conditions are not met, the public accommodation may exclude the animal. H.B. No. 1762 is more restrictive and conflicts with these DOJ rules and would be invalid.

In addition, there are no state or federal standards for determining whether a dog is a trained service animal, and the bill would prevent out-of-state persons with disabilities from using their service animals while visiting the state. Furthermore, the HCRC enforcement section interprets HRS Chapter 489 as allowing other types of assistance animals as reasonable accommodations in public places.

For these reasons, the HCRC encourages the committee to hold this bill.

DISABILITY AND COMMUNICATION ACCESS BOARD

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

January 30, 2014

TESTIMONY TO THE HOUSE COMMITTEE ON HUMAN SERVICES

House Bill 1762 - Relating to Disabled Persons

The Disability and Communication Access Board (DCAB) is responsible for providing technical assistance regarding the Americans with Disabilities Act (ADA), and one major ADA issue our office deals with is service animals. Because the definition for service animals is so broad under the ADA, DCAB staff responds to approximately fifteen to twenty calls a week from private businesses, government agencies, and people with disabilities and their families asking how to identify a service animal or how to get a dog certified as a service dog.

DCAB acknowledges the extreme frustration over real and potential abuse due to the lack of identification and certification of service animals due to the broad nature of the ADA definition for service animals. However, we oppose the establishment of a certification program by the Department of Human Services and charging individuals to obtain certification.

The U.S. Department of Justice rules clearly state that identification (card, vest, etc.) cannot be required. The rules also limit the inquiries that an entity may ask of an individual with a dog under ADA Titles II and III to two questions. This provision related to certification would be more restrictive than what is permitted under the ADA, as would charging a person with a disability for certifying their dog as a service animal.

House Bill 1762 also establishes a penalty for falsely representing a dog as a service animal. DCAB is willing to work with the agency designated to enforce this provision to convene a roundtable discussion to develop criteria to be used to identify and enforce when a dog is falsely represented as a service animal. DCAB also notes that false representation of a service animal cannot be based on the absence of a certificate.

Thank you for the opportunity to testify.

Respectfully submitted,

Barbara Fischlowitz-Leong

BARBARA FISCHLOWITZ-LEONG
Chairperson
Legislative Committee

Francine Wai

FRANCINE WAI
Executive Director

HAWAII DISABILITY RIGHTS CENTER
1132 Bishop Street, Suite 2102, Honolulu, Hawaii 96813
Phone/TTY: **(808) 949-2922** *Toll Free*: **1-800-882-1057** *Fax*: **(808) 949-2928**
E-mail: **info@hawaiidisabilityrights.org** *Website*: **www.hawaiidisabilityrights.org**

THE HOUSE OF REPRESENTATIVES
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014

Committee on Human Services
Testimony on H.B. 1762
Relating to Disabled Persons

Thursday, January 30, 2014, 10:00 A.M.
Conference Room 329

Chair Carroll and Members of the Committee:

The Hawaii Disability Rights Center wants to offer its comments on this bill. So that the record is clear, we note at the outset that we are very sympathetic to the problem identified in the bill. Our office works hard to protect and fight for the rights of individuals with disabilities. We establish priorities and objectives each year, and have an intake screening process for the purpose of allocating our limited resources towards individual with disabilities whose cases are meritorious and whose needs are genuine.

I mention that because we have seen first- hand and come to understand all too well that the concerns outlined in this bill are real. We have had individuals contact our office with alleged claims of discrimination based upon a failure to accommodate their service animals, only to discover that these "service" animals were in reality nothing more than pets. We are also aware of advertisements on the internet and other means by which individuals can obtain so called "identification papers" to present for the purpose of falsely verifying that their pet is a service animal.

We absolutely do not support efforts of that nature. In fact, we are extremely upset when we see such conduct because it creates a negative backlash and further stigmatization against individuals who truly have disabilities and who are the very people we are created to assist. For that reason, conceptually we support the type of program or approach that is set forth in this bill, inasmuch as it would provide a mechanism for individuals with genuine disabilities and genuine service animals

to easily demonstrate that and avoid lengthy or detailed questions.

The difficulty however is that despite our general agreement in principle with the bill, it nonetheless appears to run afoul of federal law. The ADA and the Fair Housing Act often govern matters of this nature and they provide that no law can go beyond the parameters of their requirements. If it does then it is in violation. Those laws require merely that the individual demonstrate that they have a disability(though they are not required to reveal it with specificity or discuss it in detail) and that the animal is trained to assist them in some fashion to cope with the manifestations of their disability. If they can establish that, then they are entitled to the benefits of the disability laws and can receive reasonable accommodations for their service animals. There is no requirement or provision in the federal law for a certification process or for a state or local governing authority to further issue any license or tag or any other insignia that would establish the bona fide nature of the animal. There is also a general prohibition on charging additional fees to individuals with disabilities such as is contemplated in this bill . Therefore, the essential provisions in this bill exceed and violate the requirements of the federal law.

For all these reasons, while we would like to support the bill's efforts, we have to point out that in our view the bill would be not be sustainable under the current federal law. We would however also be willing and interested in working with the Committee and the chair and any others in the advocacy community to see if there might be a way or an approach that can accomplish the aims of the bill, but which would be in harmony with the federal law. We certainly stand ready to assist the Committee if it chooses to pursue that direction.

Thank you for the opportunity to testify on this measure.

kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 28, 2014 5:52 PM
To: HUStestimony
Cc: vmcozloff@eyeofthepacific.org
Subject: Submitted testimony for HB1762 on Jan 30, 2014 10:00AM

HB1762
Submitted on: 1/28/2014
Testimony for HUS on Jan 30, 2014 10:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Victoria Cozloff	Eye of the Pacific Guide Dogs Foundation	Oppose	No

Comments: The objective should not be to restrict or regulate service animals since ADA already does this. The objective should be regulating dog behavior in public places regardless whether they are service animals or not. The problem is the behavior of the dogs interfering with the service animal's concentration to carry out its duties.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 28, 2014 2:18 PM
To: HUStestimony
Cc: sherrianwitt@aol.com
Subject: Submitted testimony for HB1762 on Jan 30, 2014 10:00AM

HB1762
Submitted on: 1/28/2014
Testimony for HUS on Jan 30, 2014 10:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
sherrian witt	Witt Counseling Service	Support	No

Comments: Service dogs have shown to be invaluable for providing services for the disabled. A credible program for certifying eligible people for this service with a public education program is needed. I support this program

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January 28, 2014

From: Jeanne Torres, Guide Dog Handler

RE: BILL 1762

I am not in support of Bill 1762 and urge the committee to examine how this bill will successfully address the growing problems relating to service animals working with distractions caused by pets in public places.

I have been a guide dog handler for over 10 years and can share numerous experiences in which my team was harmed or distracted into a confused state by other dogs in public places. As such, I can strongly agree that some safety measure should be put in place before unnecessary harm or death comes to any service animal team.

The proposed bill will not resolve the growing problems and I agree it conflicts with the rules relating to service animals under ADA.

I offer this opinion:

Identify the problem: Service animals trained to assist their handlers are distracted and/or charged by pets in the public places. These incidents cause confusion and often times, harm to the dog, handler or both.

Be aware of facts that compromise the service animal's working environment: 1) Business owners allow pets into their establishments. 2) Regrettably, business owners/operators are limited in their efforts to determine a dog's role. 3) Because of item 2, business owners tend to give up and hope for the best. 4) Service animals are trained to be inconspicuous. 5) Handlers are vulnerable to the unpredictable behavior of dogs that are not under full control. Finally, 6) the number of dogs entering public places is steadily growing.

Resolution: Understand that dogs in today's society have become not just man's best friend, but has become a major part of a household and handler's life. Dog owners naturally desire to have their dog with them simply because these dogs are loved whether or not they perform a service.

Regulation using the dog tag licensing process as a template can be implemented to control all dogs entering public places regardless of their role in the family.

A regulation requiring that all dogs entering a public place must carry a Public Access License issued by the same place dog tags are issued.

Regulation: Dogs must show proof of GCC (good citizen certificate) which will ensure that the dog will behave appropriately in public places. Dogs should also carry veterinary issued card certifying that they are up to date with their vaccinations lowering the risks of transmitting

diseases; that all dogs must be on the floor controlled by a leash not more than 5 feet with the exception of service animals. To name a few critical controlling rules.

The objective should not be on denying access to dogs but to controlling the behavior of dogs in public places. We cannot control dogs entering public places but I am confident that we can control the behavior.

Fines should be very stiff to discourage dogs that may cause serious harm.

kobayashi1-Joni

From: Joel Fischer <jfischer@hawaii.edu>
Sent: Tuesday, January 28, 2014 2:15 PM
To: HUStestimony; Rep. Mele Carroll
Subject: HB1762; 1/30; 10AM; Rm. 329

HB1762, Relating to Disabled Persons
HUS; Chair, Rep. Carroll

PLEASE KILL THIS BILL!

I have a disability, and I also have a certified service dog. I realize HUS members may think you are doing my community a service, but the absolute opposite is the case. You will be causing us enormous, unnecessary problems.

There are several reasons this bill should be killed:

1. IT IS ILLEGAL in at least two ways. 1. HB1762 contradicts the law of the land, specifically, the Americans with Disability Act (ADA). ADA explicitly states that only two questions may be asked of a person with a service animal. The first is, Is this a service dog? The second is, What tasks does the service animal perform? It violates the law to ask any other questions, e.g., when applying for a certificate. 2. Furthermore, NO SPECIAL IDENTIFICATION FOR THE SERVICE ANIMAL MAY BE REQUIRED by businesses and other entities, as required by HB1762. It is illegal for businesses to ask us for any specific tags, forms or any other identification.

2. HB1762 is vague and cannot be implemented. First, what training would be provided for a DHS official? Second, what criteria would such an official use to determine who gets a form and who

doesn't? Third, how would such an official make decisions? Fourth, how would objectivity be made part of the process? 5. It is illegal to ask disabled people to prove they are disabled or to ask that a service animal be required to perform the duties they are trained for (ADA). Since that is so, how could any one make a judgment about who is and who is not qualified?

3. The DHS is already overwhelmed. How could they possibly take on this complicated assignment. If the DHS delegated to Humane Societies, they are equally overwhelmed. They have no employees who are qualified to make these decisions. The implementation of this plan, with appropriate safeguards, is virtually impossible.

4. THIS LAW WOULD DISCRIMINATE AGAINST THE DISABLED! People with disabilities are the very people who are least able to get around in their communities. Asking them to do so to get their forms creates another barrier in their lives.

5. This bill does not identify the scope of the problem or the need for the changes. All we have is a few anecdotes about incidents. That is a slim and inconsequential basis for a bill affecting the entire state!

Thank you for killing this bill.

Aloha, joel

--
Dr. Joel Fischer, ACSW
Professor (Ret.)
University of Hawai`i, School of Social Work
Honolulu, HI 96822

kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 28, 2014 5:05 PM
To: HUStestimony
Cc: jadestone87@hawaiiantel.net
Subject: Submitted testimony for HB1762 on Jan 30, 2014 10:00AM

HB1762
Submitted on: 1/28/2014
Testimony for HUS on Jan 30, 2014 10:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Joy Muranaka	Individual	Oppose	No

Comments: The objective should not be to restrict or regulate service animals since ADA already does this. The objective should be regulating dog behavior in public places regardless whether they are service animals or not. The problem is the behavior of the dogs interfering with the service animal's concentration to carry out its duties.

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kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 28, 2014 5:04 PM
To: HUStestimony
Cc: llujan@eyeofthepacific.org
Subject: Submitted testimony for HB1762 on Jan 30, 2014 10:00AM

HB1762
Submitted on: 1/28/2014
Testimony for HUS on Jan 30, 2014 10:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
LeAnn Lujan	Individual	Oppose	No

Comments: The objective should not be to restrict or regulate service animals since ADA already does this. The objective should be regulating dog behavior in public places regardless whether they are service animals or not. The problem is the behavior of the dogs interfering with the service animal's concentration to carry out its duties.

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kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, January 29, 2014 11:24 AM
To: HUStestimony
Cc: royal.kahana1@gmail.com
Subject: Submitted testimony for HB1762 on Jan 30, 2014 10:00AM

HB1762
Submitted on: 1/29/2014
Testimony for HUS on Jan 30, 2014 10:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Jim Johnson	Royal Kahana	Support	No

Comments: We are dealing with people claiming service dog status when it is very obvious the dog is clearly a pet. This causes problems with guests who do not like dogs rubbing against them and sniffing them in elevators and lobby areas. There needs to a penalty for such fraud.

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LATE

kobayashi1-Joni

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, January 29, 2014 5:42 PM
To: HUStestimony
Cc: pwatson@eyeofthepacific.org
Subject: Submitted testimony for HB1762 on Jan 30, 2014 10:00AM

HB1762
Submitted on: 1/29/2014
Testimony for HUS on Jan 30, 2014 10:00AM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Paulette Watson	Eye of the Pacific Guide Dogs Foundation	Oppose	No

Comments: The objective should not be to restrict or regulate service animals since ADA already does this. The objective should be regulating dog behavior in public places regardless whether they are service animals or not. The problem is the behavior of the dogs interfering with the service animal's concentration to carry out its duties.

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PETER L. FRITZ
200 NORTH VINEYARD BOULEVARD, #430
HONOLULU, HAWAII
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LATE

HOUSE OF REPRESENTATIVES
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014

COMMITTEE ON HUMAN SERVICES

Hearing: Thursday, January 30, 2014
Testimony on H.B. 1762
(Relating to Disabled Persons)

Chair Carroll, Vice-Chair Kobayashi, and members of the Committee, my name is Peter Fritz. I am and individual with a disability, past member and Chair of the State Rehabilitation Committee, member and Chair of the Disability and Communications Access Board and an attorney. I am testifying as an attorney with specialized knowledge of laws concerning individuals with disabilities **in Opposition to Sections 2 and 3 of H.B. 1762 and Section 4 as currently drafted.**

Section 2 of this bill would require the Department of Human Services to establish and administer a service dog certification program. Section 3 of this bill would require persons accompanied by a service dog to possess a service dog certificate issued by the Department of Human Services. Section 4 of this bill would establish a penalty for falsely representing a dog as a service dog.

It is my opinion as an attorney that Section 2 and Section 3 of this bill are void ab initio because it violates the Americans with Disabilities Act. With respect to Section 4, if the Committee wishes to establish a penalty for falsely representing a dog as a service dog, it is recommended that the Committee may wish to follow a similar law in California which made it a criminal penalty to falsely represent a dog assay service dog. A copy of California Penal Code § 365.7 is attached to this testimony as Exhibit 2.

Under the ADA Title III regulations issued by the Department of Justice (DOJ), there are two questions that a business or other public accommodation may ask to determine if an animal qualifies as a service animal:

(1) Is the animal required because of a disability?; and

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

A business may not ask these two questions when it is readily apparent that the service animal is performing a task for a patron with a disability (for example, a dog that is observed guiding a

person who is blind or has low vision). A copy of guidance concerning service animals, published by the Department of Justice, is attached as Exhibit 1.

An individual with a disability may not be asked questions about the nature or extent of the person's disability or be asked **to provide proof of service animal training, licensing or certification.** Because Section 2 and 3 together require individuals with disabilities to have their service animal certified and to have proof that the animal is certified, it is more likely than not that Section 2 and Section 3 of this bill violate the ADA.

With respect to Section 4 of this bill, which establishes a penalty for someone falsely representing that their dog is a service dog, the Committee should take notice of California Penal Code §365.7. This California code section makes it a criminal offense for someone to misrepresent that their animal is a service animal. This law has not been overturned since it was enacted in 1994. Furthermore, on January 2, 2014, the United States District Court for the Eastern District of California, held that the issuance of a citation for misrepresentation that an animal was a service animal did not violate the ADA. In depositions, the Plaintiff admitted that her dog was not a service animal. It is important to take note that the police officer's questions were the questions that were allowed by the ADA. In addition, as a criminal provision, it is enforceable by police officers which helped to protect small business owners when there is significant doubt as to whether an animal is a service animal. A copy of Lerma v. California (E.D. Cal. 2014) is attached as Exhibit 3.

Thank you for the opportunity to testify.

Respectfully Submitted,

PETER L. FRITZ

H.B. 1762

EXHIBITS

1. United State Department of Just this Guidance on Service Animals
2. California Penal Code §365.7
3. Lerma v. California (E.D. Cal. 2014)

1

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

ADA
2010 Revised Requirements

Service Animals

The Department of Justice published revised final regulations implementing the Americans with Disabilities Act (ADA) for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010, in the Federal Register. These requirements, or rules, clarify and refine issues that have arisen over the past 20 years and contain new, and updated, requirements, including the 2010 Standards for Accessible Design (2010 Standards).

Overview

This publication provides guidance on the term "service animal" and the service animal provisions in the Department's revised regulations.

- Beginning on March 15, 2011, only dogs are recognized as service animals under titles II and III of the ADA.
- A service animal is a dog that is individually trained to do work or perform tasks for a person with a disability.
- Generally, title II and title III entities must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go.

How "Service Animal" Is Defined

Service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities. 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, calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack, or performing other duties. Service animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person's disability. Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.

(continued, page 2)

This definition does not affect or limit the broader definition of "assistance animal" under the Fair Housing Act or the broader definition of "service animal" under the Air Carrier Access Act.

Some State and local laws also define service animal more broadly than the ADA does. Information about such laws can be obtained from that State's attorney general's office.

Where Service Animals Are Allowed

Under the ADA, State and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go. For example, in a hospital it would be inappropriate to exclude a service animal from areas such as patient rooms, clinics, cafeterias, or examination rooms. However, it may be appropriate to exclude a service animal from operating rooms or burn units where the animal's presence may compromise a sterile environment.

Service Animals Must Be Under Control

Under the ADA, service animals must be harnessed, leashed, or tethered, unless these devices interfere with the service animal's work or the individual's disability prevents using these devices. In that case, the individual must maintain control of the animal through voice, signal, or other effective controls.

Inquiries, Exclusions, Charges, and Other Specific Rules Related to Service Animals

- When it is not obvious what service an animal provides, only limited inquiries are allowed. Staff may ask two questions: (1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.

- Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.

- A person with a disability cannot be asked to remove his service animal from the premises unless: (1) the dog is out of control and the handler does not take effective action to control it or (2) the dog is not housebroken. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.

- Establishments that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises.

- People with disabilities who use service animals cannot be isolated from other patrons, treated less favorably than other patrons, or charged fees that are not charged to other patrons without animals. In addition, if a business requires a deposit or fee to be paid by patrons with pets, it must waive the charge for service animals.

- If a business such as a hotel normally charges guests for damage that they cause, a customer with a disability may also be charged for damage caused by himself or his service animal.

- Staff are not required to provide care or food for a service animal.

Miniature Horses

In addition to the provisions about service dogs, the Department's revised ADA regulations have a new, separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities. (Miniature horses generally range in height from 24 inches to 34 inches measured to the shoulders and generally weigh between 70 and 100 pounds.) Entities covered by the ADA must modify their policies to permit miniature horses where reasonable. The regulations set out four assessment factors to assist entities in determining whether miniature horses can be accommodated in their facility. The assessment factors are (1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner's control; (3) whether the facility can accommodate the miniature horse's type, size, and weight; and (4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.

For more information about the ADA, please visit our website or call our toll-free number.

ADA Website
www.ADA.gov
To receive e-mail notifications when new ADA information is available, visit the ADA Website's home page and click the link near the top of the middle column.

ADA Information Line
800-514-0301 (Voice) and 800-514-0383 (TTY)
24 hours a day to order publications by mail.
M-W, F 9:30 a.m. – 5:30 p.m., Th 12:30 p.m. – 5:30 p.m. (Eastern Time)
to speak with an ADA Specialist. All calls are confidential.

For persons with disabilities, this publication is available in alternate formats.

2

Sec. 365.7

(a) Any person who knowingly and fraudulently represents himself or herself, through verbal or written notice, to be the owner or trainer of any canine licensed as, to be qualified as, or identified as, a guide, signal, or service dog, as defined in subdivisions (d), (e), and (f) of Section 365.5 and paragraph (6) of subdivision (b) of Section 54.1 of the Civil Code, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, by a fine not exceeding one thousand dollars ($1,000), or by both that fine and imprisonment.

(b) As used in this section, "owner" means any person who owns a guide, signal, or service dog, or who is authorized by the owner to use the guide, signal, or service dog.

(Added by Stats. 1994, Ch. 1257, Sec. 12. Effective January 1, 1995.)

Added by Stats. 1994, Ch. 1257, Sec. 12. Effective January 1, 1995.

3

REGINA LERMA, Plaintiff,
v.
CALIFORNIA EXPOSITION AND STATE FAIR POLICE, et al., Defendants.
No. 2:12-cv-1363 KJM GGH PS
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
Dated: January 2, 2014

FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding pro se with this action.[1] On November 14, 2013, defendants filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. (ECF No. 29.) The motion was noticed for hearing on December 12, 2013. (Id.) Pursuant to this court's Local Rules, plaintiff was obligated to file and serve a written opposition or statement of non-opposition to the pending motion at least fourteen (14) days prior to the hearing date, i.e., by December 2, 2013.[2] See E.D. Cal. L.R. 230(c).[3] That deadline passed without plaintiff having filed a written

Page 2

opposition or statement of non-opposition with respect to the motion for summary judgment. On December 3, 2013, plaintiff was ordered to show cause for her failure to file an opposition to the motion, and to file an opposition by December 17, 2013. Plaintiff was warned at that time that failure to comply with the order might result in dismissal of this action. Plaintiff has not filed an opposition.

DISCUSSION

Defendants' motion seeks summary judgment or, in the alternative, summary adjudication pursuant to Fed. R. Civ. P. 56(c) alleging that it is entitled to judgment as a matter of law.

I. Legal Standards for Motion for Summary Judgment

The "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Summary judgment is appropriate when it is demonstrated that there exists "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under summary judgment practice, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita, 475 U.S. at 585-86. In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in

Page 3

support of its contention that the dispute exists. See Matsushita, 475 U.S. at 586. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Anderson, 477 U.S. at 248.

In the endeavor to establish the existence of a factual dispute, the non-moving party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 630. The evidence of the non-moving party is to be believed and all justifiable inferences are to be drawn in its favor. See Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), aff'd, 810 F.2d 898 (9th Cir.1987). To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita, 475 U.S. at 586-87 (internal citation and quotation omitted).

II. Legal Standards Relating to Unopposed Motion for Summary Judgment

A district court may not grant a motion for summary judgment simply because the nonmoving party does not file opposing material. See Heinemann v. Satterberg, 731 F.3d 914 (9th. Cir. 2013). Under Rule 56(e), a section entitled "Failing to Properly Support or Address a Fact," "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials-including the facts considered undisputed-show that the movant is entitled to it; or (4) issue any other appropriate order." Fed. R. Civ. P. 56(e) (2010). Thus, in order to grant summary judgment, district courts must assess the movant's

motion and supporting materials and may consider the movant's assertions of fact undisputed in doing so. Id.; see also Heinemann, 731 F.3d 914.

The hearing on defendants' motion was continued and plaintiff was given the opportunity to file an opposition. Plaintiff failed to comply with the order to show cause and has filed absolutely nothing. The motion for summary judgment is therefore unopposed. As discussed below, and as is evident from the record, the case involves plaintiff's attempt to bring a pet Cocker Spaniel puppy into an amusement park and pass it off as a trained service animal under the ADA. On a separate prior occasion, plaintiff attempted to enter the same park without the puppy, instead attempting to bring in outside food of a commercial nature that was no different than the food sold inside the park, but which she claimed she needed pursuant to her disability as a borderline diabetic and her children's status as anemic. Defendants' motion clearly establishes these facts, showing that plaintiff's filing of this action has clearly wasted the court's and defendants' time and diverted the court's attention away from cases which truly merit attention and plaintiffs who are truly disabled.

The court will assess defendants' motion on the present record.

III. Standards Relating to Service Animals Under the ADA

The Americans with Disabilities Act ("ADA") provides in part:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods,

> services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

> To state a claim under Title III of the ADA, a plaintiff must show that he or she is disabled within the meaning of the ADA; that the defendant is a private entity that owns, leases, or operates a place of public accommodation; and that the plaintiff was denied public accommodation by the defendant because of his or her disability.

Moeller v. Taco Bell Corp., 816 F.Supp.2d 831, 847 (N.D. Cal. 2011), citing Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc., 603 F.3d 666, 670 (9th Cir.2010).

> Service animal means 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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. .... The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

28 C.F.R. § 36.104 (2013). A dog which provides the owner with a sense of security and comfort does not meet the statutory definition of a service animal. Baugher v. City of Ellensburg, WA, 2007 WL 858627, *5 (E.D. Wash. Mar. 19, 2007).

> Federal regulations require[] that a particular service animal be trained to work for a disabled individual. Access Now, Inc. v. Town of Jasper, Tenn., 268 F.Supp.2d 973, 980 (E.D.Tenn.2003). Courts that have considered the training requirement for service animals recognize that federal regulations do not set forth any standards or requirements specifying the amount or type of training that an animal must receive to qualify as a service animal, nor the type or amount of work a service animal must provide for the disabled person. Id. ("the issue of whether the horse is a service animal does not turn on the amount or type of training"). See also Bronk v. Ineichen, 54 F.3d 425, 430-31 (7th Cir.1995) (federal law does not require the service animal to be trained at an accredited training school); Green v. Housing Auth. of Clackamas Co., 994 F.Supp. 1253, 1256 (D. Oregon 1998) ("there is no federal ... certification process or requirement for hearing dogs, guide dogs, companion animals, or any type of service animal."); Vaughn v. Rent-A-Center, Inc., 2009 WL 723166 at *10 (S.D.Ohio 2009). "The relevant question for the court is whether

> the animal helps the disabled person perform tasks to ameliorate the ADA disability." Vaughn, 2009 WL 723166 at *10 (citing Access Now, Inc., 268 F.Supp.2d at 980; Bronk, 54 F.3d at 431).

Miller v. Ladd, 2010 WL 2867808, *4 (N.D. Cal. Jul. 20, 2010).

"A public accommodation may ask an individual with a disability to remove a service animal from the premises if: ... (ii) [t]he animal is not housebroken." 28 C.F.R. § 36.302(c)(2).

"If a public accommodation properly excludes a service animal under § 36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises." Id., (c)(3).

IV. Undisputed Facts

As plaintiff filed no opposition, defendants' facts are undisputed. On May 13, 2012, plaintiff attempted to enter the Raging Waters amusement park ("Park") with two children and

Page 6

prohibited food, stating that she was diabetic and that the children were anemic. (Siegrist Dec. at ¶ 11.) According to California Exposition and State Fair police officer Siegrist, plaintiff stated that per the ADA, she could bring her own food into the park and would sue anyone who interfered. (Id.) Officer Siegrist observed that plaintiff had three Subway sandwiches, chips, and "lunchables." She did not claim that these foods were for special dietary needs. When staff informed her that she could keep the "lunchable" containers inside the Park but not the remainder of the food, and that she could leave during the day to consume this food outside and then return to the Park, plaintiff found this suggestion unacceptable. (Id. at ¶ 12.) In this regard, plaintiff testified at her deposition that the reason she did not want to purchase similar food sold inside the Park was that she could not use her food stamps to buy food there, but was able to use food stamps to purchase the food she purchased outside and brought to the Park. (Griggs Decl., Ex. 1 at 148.)

On May 20, 2012, Officer Siegrist recognized plaintiff from the previous week at the Park as she again attempted to gain entry, this time with her two children and a puppy which she claimed was a "service dog." (Siegrist Decl. at ¶ 4.) When Officer Siegrist asked plaintiff what task the dog had been trained to perform, plaintiff responded by stating "all I have to tell you is it's a service dog and I'm going to sue you." (Id. at ¶ 6.) When asked how she would handle the dog's need to relieve itself or whether it was housebroken, she responded again that she was going to sue the officer. (Id.) Officer Siegrist could not determine whether the puppy was housebroken or whether it was a service animal as defined by the ADA. He therefore informed plaintiff that based on the limited information provided by plaintiff, he could not determine that the puppy met the ADA requirements and directed plaintiff to remove it from the property. He informed her that she could return to the Park without the puppy if she agreed to comply with local, state and federal laws. (Id. at ¶ 7.) With plaintiff's driver's license number, Officer Siegrist was able to confirm that plaintiff was known to the Sacramento County CJ system.[4] (Id.

Page 7

at ¶ 8.) Officer Siegrist prepared a crime report on that date, charging plaintiff with fraudulently representing herself as a service dog owner, pursuant to Cal. Penal Code § 365.7. (Id. at ¶ 9, Ex. 1.)

At her deposition, plaintiff admitted the aforementioned facts as described by Officer Siegrist. (Griggs Decl., Ex. 1 at 164-66, 168, 136-37, 161-62, 145 - 48.) She also admitted that her dog was not individually trained to perform any task for her, but that it was limited to having been house trained and trained to be friendly and obedient. (Id. at 136-37.) In fact, plaintiff conceded at her deposition that she took

the dog to the Park because she "needed the dog to be able to get through the day," to help her feel better, and because the children wanted to bring it there. (Id. at 172.) She also admitted that she does not take this dog everywhere she goes, but it is based on her "health" and how she feels. (Id. at 130.)

V. Analysis

In their motion, defendants argue that plaintiff was properly denied access to the park under the ADA because her dog was not a service animal under the Act's definition. This third prong of the ADA analysis is the only one at issue in this case. The undisputed facts clearly establish that plaintiff's puppy was not a service animal within the regulatory definition provided above. Plaintiff testified that her dog was not individually trained to perform tasks for her benefit as an individual with a disability, but only received housetraining and typical obedience training. These types of tasks are not directly related to plaintiff's claimed disability. Furthermore, plaintiff conceded that her dog's purpose was to help her get through the day and feel better, a type of emotional support and comfort, which is exactly the type of aid specifically excluded as work or tasks under the definition provided. 28 C.F.R. § 36.104. Also excluded is companionship, which is the reason plaintiff's children wanted her dog to accompany them to the park, according to her testimony. Just as in Davis v. Ma, 848 F.Supp.2d 1105, 1115 (C.D. Cal. 2012), plaintiff's puppy was not trained as a service animal, but had only some basic obedience training, and therefore no triable issue of fact is created.

Furthermore, plaintiff refused to respond to the park officer's question whether the dog was housetrained, and therefore it was permissible for him to deny her access on this basis. 28

Page 8

C.F.R. § 36.302(c)(2). Finally, Officer Siegrist complied with the ADA in advising plaintiff that she could return to the park without her dog if she so desired. 28 C.F.R. § 36.302(c) (3).

Therefore, defendants were permitted to deny access to plaintiff's dog as a matter of law. Plaintiff has not only brought a frivolous lawsuit which has wasted both the time and expense of opposing counsel and the court, but has failed to prosecute her action by utterly neglecting to file an opposition to defendants' motion.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that defendants' November 14, 2013 motion for summary judgment, (ECF No. 29), be GRANTED, and judgment be entered in favor of defendants.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

Notes:

[1] This case proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21) and 28 U.S.C. § 636(b)(1).

[2] Because November 28 and 29, 2013 were court holidays, the filing deadline was extended to the next available court date which was Monday, December 2, 2013. Fed. R. Civ. P. 6(a).

[3] More specifically, Eastern District Local Rule 230(c) provides:

> **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of the motion shall be in writing and shall be filed and served not less than fourteen (14) days preceding the noticed (or continued) hearing date. A responding party who has no opposition to the granting of the motion shall serve and file a statement to that effect, specifically designating the motion in question. No party will be entitled to be heard in opposition to a motion at oral arguments if opposition to the motion has not been timely filed by that party. . . .

[4] Defendants contend that at her deposition, plaintiff admitted that that she was a convicted felon; however, the deposition pages cited in support are missing from the record. (Griggs Decl., Ex. I at 189-194.) In any event, this fact is not relevant to the determination.
