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by Judith W. Spain, JD, CCEP and Teresa Belluscio, MRC, BCC

Animals in interviews? Don't get bit by non-compliance

- » Be prepared; be proactive. Know the basic elements of what constitutes disability discrimination under the Americans with Disabilities Act (ADA).
- » With the enactment of the ADA Amendments Act of 2008 (ADAAA), the definition of a disability has broadened, causing the identification of increased numbers of Americans with disabilities.
- » Employers are being challenged in the workplace with the presence of a plethora of animals accompanying qualified individuals with obvious or hidden disabilities.
- » Employers need to know the differences between service animals and assistance animals.
- » Interviewers need to know what questions the law allows you to ask about service animals when interviewing an applicant.

Fred Dolphin, an applicant for a position at your company, walks into the interview with a snake wrapped around his neck and carrying a poodle. Does this sound like the beginning of a really bad joke? Well, it is not.

Stephanie King, Department Hiring Manager, and Ben Miami, Human Resource representative, conducting the interview really couldn't help but notice the snake and the poodle. Both animals were very well behaved, and Fred seemed to not even be aware that the animals were in the room.

About 10 minutes into the interview, Stephanie burst out with, "Do you know that there is a snake around your neck? What is up with that?" She followed that outburst with, "Does the dog go with you everywhere?" Complete silence by Fred. Ben just lowered his head and wondered how much the disability

discrimination complaint filed against the company would cost.

So, what can you ask in an interview when you are looking at animals accompanying the applicants? Is there a distinction between a snake and a poodle? Well, of course there is a distinction between these types of animals but, in the eyes of the law, is there a clear distinction?

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The basic elements of what constitutes disability discrimination are defined in the Americans with Disabilities Act (ADA),¹ which was enacted in 1990 with Title II and III regulations released in 1991. With the ADA Amendments Act of 2008 (ADAAA),²



Spain



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the definition of a disability has broadened, which means that more Americans are identified as having disabilities. According to the 2010 U.S. Census, one in five Americans has a disability.³

Legal distinctions – service animals and assistance animals

Service animals

On September 15, 2010, the Department of Justice Civil Rights Division clarified the ADA Titles II and III regarding the definition of a “service animal.” A service animal is a “dog that is individually trained to do work or perform specific tasks for people with disabilities.”⁴ The clarification also added specific rules for the use of a miniature horse as a service animal. A miniature horse generally weighs between 70 to 100 pounds and is approximately 24 to 34 inches in height as measured to the shoulder of the horse.

The individual must be in control of their animal at all times, including having the animal harnessed or leashed unless this interferes with the animal’s ability to perform its tasks. Additionally, the service animal must be housebroken.

If your entity is the federal, state, or local government, a business, or a non-profit organization that serves the public, your company must allow service animals to be with an individual who has a disability everywhere the public is allowed. Few exceptions to this access exist, so unless the applicant is seeking a position in a location that requires a sterile environment

(e.g., hospital operating room), the service animal will be allowed on your property.

One caution—even though the ADA definition of a service animal is narrow, state and local laws may have broader definitions. You should research applicable state and local laws.

The Fair Housing Act applies to most public and private housing providers and provides protection for persons with a disability from discrimination in obtaining housing.

Assistance animals

Assistance animals are not defined under the ADA. Indeed, under the ADA, service animals are defined to specifically exclude assistance animals. Assistance animals are defined in the context of the Fair Housing Act (FHA)⁵ and 1988

Amendments as well as under Section 504 of the Rehabilitation Act of 1973 and the Air Carrier Access Act.⁶

The Fair Housing Act applies to most public and private housing providers and provides protection for persons with a disability from discrimination in obtaining housing. Section 504 covers housing providers who receive financial assistance from any federal agency. The FHA is enforced by the U.S. Department of Housing and Urban Development (HUD). Under both the FHA and Section 504, an “assistance animal” could also be called a comfort animal or an emotional support animal and is defined as “an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disabilities.”⁷ The Air Carrier Access Act prohibits discrimination against

individuals with disabilities by virtue of the disability in the provision of air transportation.

An assistance animal could be any type of animal; it is not limited to either a dog or miniature horse as defined under ADA. And, assistance animals do not need individualized training.

Just as stated above in reference to service animals, you should check state and local laws to determine if there is a broader definition of assistance animals and whether such animals could be used as a reasonable job accommodation.

Interview questions

What can be asked of an otherwise qualified individual with a hidden disability who is accompanied by a possible service animal during an interview? When it's

not obvious what purpose an animal serves for an individual with a disability, the law allows for limited inquiry. Two questions can be posed to the individual:

- ▶ Is the dog a service animal required because of a disability?
- ▶ What work or task has the service animal been trained to perform?⁸

Snake, poodle, and your company

Considering this scenario, these are the practical issues that you need to consider. What could be the possible scenario here? Is Fred a veteran and the snake is used to soothe his post-traumatic stress disorder? Maybe Fred lost his hearing because of an explosion and the poodle provides hearing assistance. How do you sort this out? What can you ask? What can you not ask? Should

you just proceed with the interview and ignore the animals in the room?

Visual observation

The applicant is accompanied by two, well-behaved animals—a snake and a poodle. Observe the visual presentation of the individual while conducting the interview as planned.

First, focus on what you know. Let's start with the snake. The snake cannot be a service animal. Perhaps it's an assistance

animal. What do you know about the laws concerning these animals? Rule out the Air Carrier Access Act; it's not applicable here. This is an interview. What do you know about the Fair Housing Act? The key word here is "housing."

Assistance animals

are allowed in the dwelling of an individual with a disability, and perhaps this snake does provide some emotional support to this individual. But, unless the job requires housing on your property, it is unlikely that the Fair Housing Act is applicable. So, what do you do?

- a. Address the applicant (Why? What is your thought process?)
- b. Ignore the presence of the snake
- c. Stop the interview and talk to the HR person outside the room
- d. Tell the applicant that he is no longer eligible for the job since no one likes snakes.

Answer: The snake is clearly not allowed in the interview as an emotional support animal. So, knowing that the

Assistance animals are allowed in the dwelling of an individual with a disability, and perhaps this snake does provide some emotional support to this individual.

snake is not permitted to be at the interview, you could (a) address the presence of the snake, ask him to leave, or better, stop the interview and reschedule it for a later date after explaining to Fred that he can request a reasonable accommodation; or (b) ignore the presence of the snake and continue with the interview, and (c) you can always stop the interview and talk to the HR person outside of the room.

Clearly we don't want you to pick (d). Did you really give Fred a fair chance on his interview?

Now consider the poodle. The poodle could be a service animal. Sure, the poodle is not the typical yellow or black Labrador Retriever that most commonly accompanies an individual with a disability; however, it is clearly possible that a poodle could be a service animal.

Observe the individual. Does this person have an obvious disability? Does the individual have a physical limitation or demonstrate a visual loss? If so, could your analytical conclusion be that the dog is a service animal? What if the individual does not have an obvious disability? If asking the allowed questions regarding the use of the animal adds value to your interview, you can ask the two specific questions identified above. But, should you? What should you do?

a. Ask the two questions about the poodle in the interview (i.e., Is the dog a service animal required because of a disability?

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

- b. Ignore the presence of the poodle
- c. Stop the interview and speak to the HR person outside of the room
- d. Start playing with the dog; give the poodle some dog biscuits.

Answer: It is possible that the poodle is a service animal and, thus, allowed to be in the

The poodle could be a service animal. Sure, the poodle is not the typical yellow or black Labrador Retriever that most commonly accompanies an individual with a disability; however, it is clearly possible that a poodle could be a service animal.

interview. You can (a) ask the two questions if the reason for the service animal is not obvious. If the response is that the dog is not a service animal, you can stop the interview and ask Fred to reschedule the interview without the animal. You can (b) ignore the presence of the poodle and continue on with the interview. If the dog is well-behaved, why

not just finish the interview? If the dog is not well-behaved, then perhaps it is not a service animal, and you should stop and ask the two questions. And, of course, you can always (c) stop the interview and speak to the HR person outside of the room.

Clearly, don't pick (d). A service animal is a working animal and you should not disrupt their work. Also a service animal is considered "part" of the handler. You would not reach out and start playing with the handler, so you should not do the same with the dog.

Think before acting

Why would you consider addressing the applicant about the animals? Are you trying

to get relevant information or are you just curious? Consider this: If addressing the applicant about the presence of the animals is not relevant to the job that Fred is applying for, why are you asking the questions? If Fred is being interviewed for a position working on a factory floor and even wearing jewelry or loose clothing is forbidden for safety reasons, asking the question about the animals might be relevant. If this is the case, which questions should you ask? Do you address the existence of both animals, or do you ask allowable questions regarding the service animal and then, as a normal part of the interview, inform the applicant of the regulations regarding appropriate clothing and self-adornment on the factory floor. If Fred is being interviewed for an IT position working at a desk in a single person office, is it relevant to ask any questions regarding the animals during the interview?

Consider the implications of your actions

Asking too many questions in this scenario, when they don't seem relevant to the job, may be considered disability discrimination. If the applicant is the best qualified candidate for the job, but is not chosen, could your questions come back to bite you? Does your company want to defend an ADA discrimination case?

Asking allowable questions regarding the poodle would be appropriate if you observe that the individual does not have an obvious disability; however, if it's not necessary to know the answer to this question during the interview process, avoid the unnecessary questions. Don't ask those questions at this point in the interview. That way, you have insured that all candidates were interviewed and considered only on the merit of their qualifications and not on whether or not your company would have to reasonably accommodate their disability by allowing a poodle (or snake) onto the premises.

Avoid trouble with your HR department by not going rogue during the interview. Stick to your pre-agreed upon interview questions; ask the same questions of all applicants; provide the same opportunities for each applicant.

Best practices in interviewing individuals with obvious or hidden disabilities

- 1. Training, training, and more training.** The time to know the ADA laws is before the interview and not during the interview. Training should be provided to receptionists, HR staff, and anyone involved in the interviewing process.
- 2. Reasonable accommodation.** The ADA requires that reasonable accommodation be made during an interview. Know how to execute accommodations when presented with a request.
- 3. Consistency.** Utilize the same questions with each applicant. Develop agreed-upon questions that focus upon determining the qualifications of the applicant to find the best qualified candidate. Know the law. ADA law prohibits direct inquiries into an individual's disability until a job offer is made.⁹
- 4. Job postings.** Ensure that job postings include the essential job functions of a position or that such information is provided to applicants. This will enable job seekers to decide if they can perform the essential job tasks with or without an accommodation. Remind hiring officials that individuals with disabilities cannot be excluded from jobs because they cannot perform minor or marginal tasks.
- 5. Blind first interview.** (Truly no inappropriate comment intended.) When conducting first interviews, consider the possibility of using the phone to eliminate visual bias. However, ensure that you offer all candidates an alternate method like instant message or another form of messaging to accommodate an individual who is deaf.

Conclusion

You made it through the interview with no further questions about the animals. Afterwards, Ben had quite the conversation with Stephanie regarding the appropriate questions to ask during an interview. You decided to hire Fred. Fred was the most qualified candidate; he happens to have a disability for which a reasonable accommodation is needed. The poodle provided that reasonable accommodation, and the poodle can accompany Fred to work.

But, not the snake... the snake gets to stay home. *

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3. U.S. Census Bureau, Newsroom Archive: "Nearly 1 in 5 People have a Disability in the U.S., Census Bureau Reports" July 25, 2012. Available at http://bit.ly/1_in_5
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6. 14 CFR 382, Nondiscrimination on the Basis of Disability in Air Travel. Available at http://bit.ly/air_consumer
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9. U.S. Equal Employment Opportunity Commission: Final Report on Best Practices for the Employment of People with Disabilities in State Government. Part 1 C Interviews. October 31, 2005. Available at http://bit.ly/eoec_best_practices

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