

When Fido Comes to Work: Employers, Employees and Service Animals

Tamara E. Jones, J. D.

Pre-Loss Program Supervisor/Sen. Pre-Loss Attorney

Jeffrey Jones, J.D., Ph.D.

Associate Professor of Law and Philosophy



O R E G O N

Public Risk
Management Association

October 5, 2018



Agenda

- The Right Way to Think About Dis(Ability)
- Definitions
- The Laws that Apply to Your Workplace
- Case Law Developments
- The Interactive Process as it Applies to Employees with Service Animals
- Other Tips



First! The Right Way to Think About Dis(Ability)

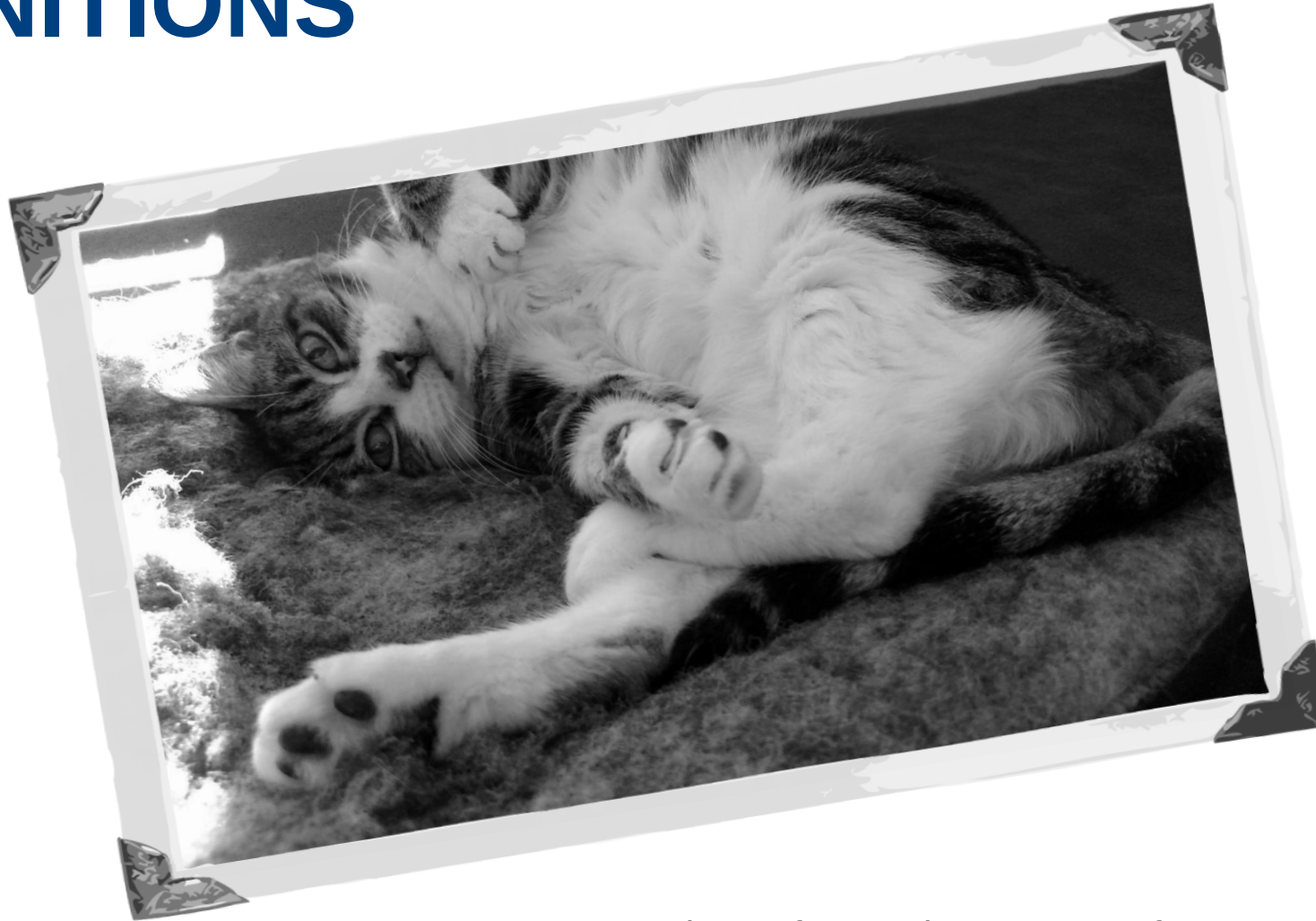
“Yeah, yeah: A physical or mental impairment that substantially limits a major life activity...”

But BIG PICTURE:

- “Medical” vs. “social” definitions of disability
- All of us are there right now or headed there...
- The human enterprise of enabling



DEFINITIONS



*Photo of Cupcake courtesy of
CIS Executive Director, Lynn McNamara*



What's the big difference?

A “**service animal**” is a dog that is “individually trained” to do work or perform tasks for the benefit of an individual with a disability.

- Examples: Guiding/alerting people who are blind or deaf, pulling a wheelchair, alerting and protecting a person with a seizure disorder, reminding a person with a mental illness to take prescribed medications, guiding a person with a mental illness out of the room during an anxiety attack.
- Oregon law: “assistance animals” and “dog guides.”



What's the big difference? (cont'd)

A “**comfort animal**” is, well, comforting.

- Sometimes referred to as an “emotional support animal” or a “companion animal” and includes what we think of as a “pet.”
- An animal who may provide great comfort to a companion, but has no specific task to perform if the person is having an emotional reaction.



How Some Entities React to the Difference





SERVICE ANIMAL LAW OVERVIEW

*Photo of Zeus courtesy of
CIS Pre-Loss Attorney, Katie Kammer*



citycounty insurance services
cisoregon.org

Key Distinction for CIS Members

Public Accommodation and Access to Services Law

(“PA Law”)

VS.

Disability Employment Law

(“Employment Law”)



Ready to be confused?

- Both PA Law and Employment Law address the rights of an individual to have a service animal.
- They originate from the same laws: the Americans with Disabilities Act and Oregon disability law.
- But...only one part of the laws require your organization to allow individuals to bring a service animal on to your premises.



Wait? What?

- ADA Public Accommodations Law: Title III (Public Accommodations) and, by extension, Title II (State and Local Government), addresses the rights of all **citizens in public spaces and private spaces open to the public.**
- Employment Law (Title I of the ADA): Addresses the rights and obligations of **employers and employees in the workplace.**



PA Law Basics re Service Animals

Title II and III (PA Law): Allow service animals in places of public “accommodation” (basically, wherever you provide services to the public), unless the presence of the service animal would result in a “fundamental alteration.”

- Expressly excludes “emotional support” or “comfort” animals from the protections afforded by PA Law.
- Includes “miniature horses” as an example of a “service animal” under certain conditions.



Employment Law Basics re Service Animals

Title I (Employment Law): Allow service animals only if the employee is a “qualified individual with a disability” who needs a “reasonable accommodation” in the form of a service animal to help perform the essential functions of his/her position.

- But...the ADA is completely silent with regard to service dogs and other animals as examples of appropriate accommodations.



So what does the ADA require of employers?

- Think of employees with service animals like any other employee on your staff who has a disability.
- Employee comes to you and asks for help – what do you do?
 - Engage in the interactive process
 - Assess available accommodations
 - Find an effective accommodation to help the employee do his or her job (even if it's not the one the employee wants)

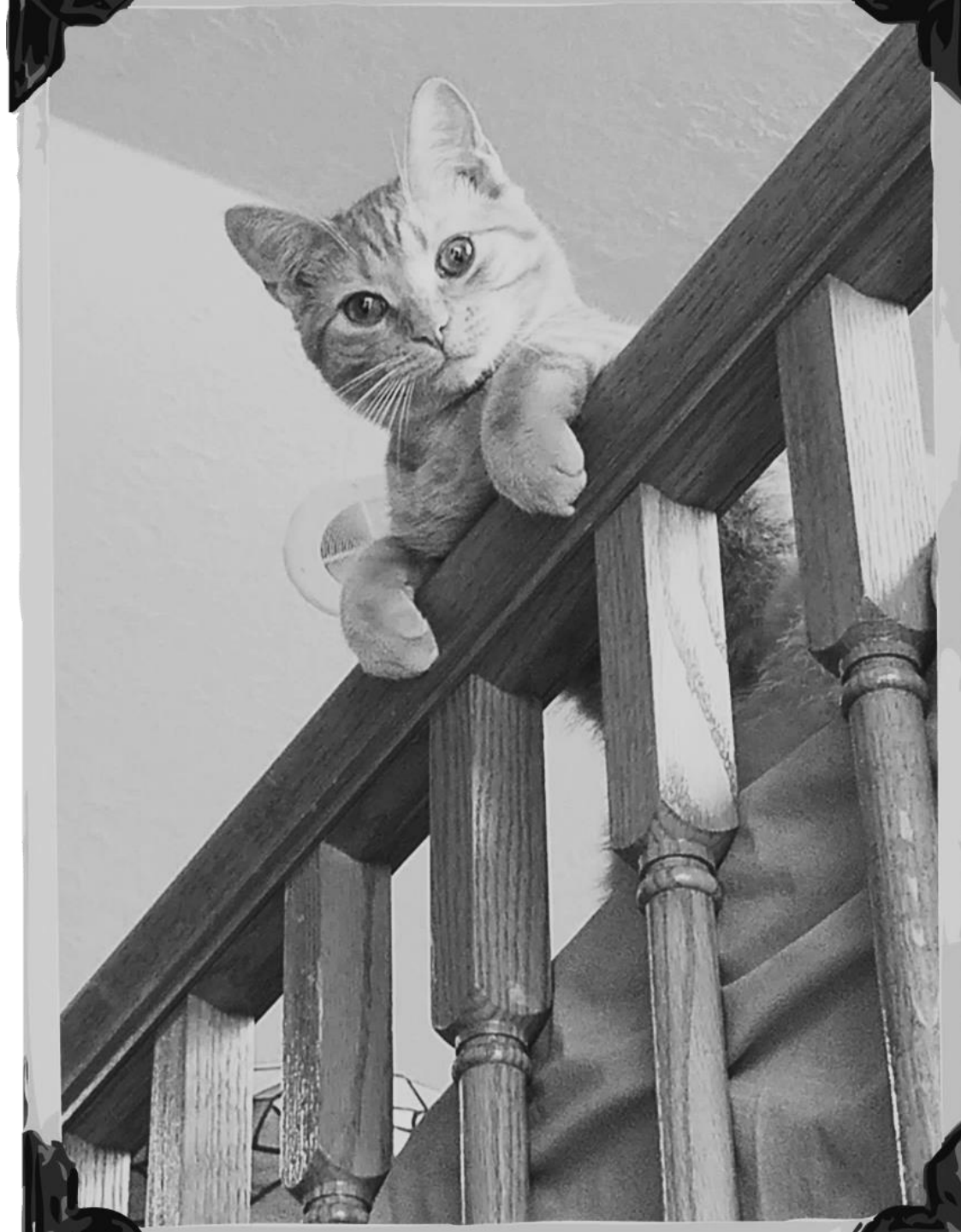


Reports from the Courts & EEOC Action



citycounty insurance services
cisoregon.org

*Photo of Tigger courtesy of
CIS HR Generalist/Analyst,
Pam Bowles*



Case #1: Rehab Act

Branson v. West (N. D. Illinois 1999 WL 311717)

- Veterans Administration violated Rehab Act by failing to allow paraplegic employee to use service dog to pull wheelchair, pick up and retrieve items, open and close doors, etc.
- VA denied employee's request without claim that granting accommodation was "undue hardship" or would fundamentally alter workplace (therefore reasonable).



Case #1: Rehab Act

Branson v. West (N. D. Illinois 1999 WL 311717)

- Note: Service dog in this case not necessary for employee to perform “essential job functions.”
- Court: “...It is undisputed that the use of a service dog could benefit the employee in her performance of many activities at work...”
- Not the test under the ADA.



Case #2: Mr. Nice Supervisor

Schultz v. Alticor/Amway Corp. (177 F.Supp.2d 674 W. D. Mich. 2001)

- Employee had disabilities that caused hearing loss and mobility difficulties. He got a service dog and asked his supervisor if he could bring the dog to work.
- “Of course!” says Mr. Nice Supervisor – no questions asked. **N-o-n-e.**



Case #2: Mr. Nice Supervisor (cont'd)

Schultz v. Alticor/Amway Corp. (177 F.Supp.2d 674 W. D. Mich. 2001)

- Complaints from co-workers led to a review by HR. HR determined that the dog wasn't necessary for employee to perform essential job functions. **Awkward...**
- Employee's failure to accommodate claim fails because employee could not identify an essential job function that required the aid of service dog.



Case #3: Tough Call

McDonald v. Department of Environmental Quality

(214 P3d 749 Montana Sup. Ct. 2009)

- Disabled employee with physical limitations and dissociative identity disorder requests to use trained service dog for bracing and to mitigate depressive episodes.
- DEQ readily approves request. The problem? While EE's workspace has carpet, the service dog has trouble navigating the DEQ's tiled hallways.



Case #3: Tough Call (cont'd)

McDonald v. Department of Environmental Quality

(214 P3d 749 Montana Sup. Ct. 2009)

- Employee confirmed that service dog is healthy, but has no success training it to walk on tile floors.
- After several slip and falls, service dog is reluctant to travel tiled hallways. Over next year-and-a-half employee ask employer to provide non-skid floor coverings.



Case #3: Tough Call (cont'd)

Must DEQ add non-skid floor coverings?

- a) No. Allowing EE's service animal to come to work was the reasonable accommodation.
- b) No. EE is requesting a reasonable accommodation for her dog, not herself.
- c) Maybe not. But DEQ must try to find some way to reasonably accommodate the EE's concern because safely navigating her workplace.
- d) Yes. The ADA requires that DEQ install non-skid coverings.



Case #3: Tough Call-McDonald v. DEQ (2009)

The Fallout

- DEQ did install mats on tiled floors but refused employee's requested accommodation of \$7,500 hallway runners or \$12k of carpeting.
- Meanwhile, the dog kept slipping and falling, suffered repeated injuries and became a less effective service dog. Employee eventually stopped bringing the dog to work.



Case #3: Tough Call (cont'd)

The Fallout

- After 17 months of requests for non-skid floor coverings, and now with no service animal at work, employee leaves DEQ. And sues.
- DEQ argued that it was not required to reasonably accommodate employee's service dog. **The Court didn't buy this – employee wins.**



Case #3: Tough Call (cont'd)

Lessons Learned

- Oddly, DEQ failed to argue that EE's requested accommodation would cause "undue hardship."
- Reasonable accommodation is an ongoing duty.
- Interactive process is a dance – Employers, don't stop dancing unless you're sure it's time...
- Don't forget the "undue hardship" analysis.



Case #4: No dog? No ADA Claim...

Rose v. Springfield-Greene County Health Department

(668 FSupp2d 1206 W. D. Missouri 2009)

- Plaintiff was prohibited from entering college, hospital, Wal-Mart and various other establishments accompanied by a monkey she claimed was service animal.
- Right now, primates aren't service animals under the ADA for any purpose, including employment. Only dogs, and in some cases miniature horses, but it's a slippery slope...



Case #5: What is “proper documentation?”

Alonzo-Miranda v. Schlumberger Tech. Co. (W. D. Texas 2014 WL 12489995)

- Employers can and should insist upon verifying medical information that an employee requires a service animal to perform essential job functions.
- But, given that the ADA does not provide certification guidelines for service dogs, what does proper documentation look like?



Case #5: Proper Documentation (cont'd)

Alonzo-Miranda v. Schlumberger Tech. Co. (W. D. Texas 2014 WL 12489995)

- Employee was an Iraq war veteran with confirmed PTSD who requested to bring “Train a Dog-Save a Warrior” service dog to work.
- Employer requested Employee’s doctor to complete internal “Clarifying Accommodations” form.



Case #5: Proper Documentation (cont'd)

Alonzo-Miranda v. Schlumberger Tech. Co. (W. D. Texas 2014 WL 12489995)

- Forms completed by employee's primary care physician, not doctor who diagnosed PTSD.
- Forms have short, often one-word responses with no discussion of PTSD in relation to essential job functions.
- One phrase: "...yes, he can't function without his dog."



Case #5: Proper Documentation (cont'd)

Alonzo-Miranda v. Schlumberger Tech. Co. (W. D. Texas 2014 WL 12489995)

Is this enough?

- Employers are entitled to medical information sufficient to demonstrate that a service dog is necessary to help employee perform specific essential job tasks or functions.
- Determine your workplace's threshold of required documentation in advance.



Case #6: What's the EEOC up to?

E.E.O.C. v. CRST International, Inc. (Complaint 3:2017cv00241 M. D. Florida 2017)

EEOC: Trucking company wrongfully failed to accommodate a truck driver's request to have his dog with him as he drives his trucking routes.

- The dog does not drive!
- Instead, the dog in this case provides only emotional support for its owner's PTSD and mood disorder.



Case #6: What's the EEOC up to? (cont'd)

E.E.O.C. v. CRST International, Inc. (2017)

- The applicant claimed to have requested permission to bring his dog several times during the hiring process.
- Employer's "final" response: We have a "No Pet Policy;" your offer of employment is revoked.
- EEOC: The employer should have engaged in the interactive process before revoking his offer. It's an ADA violation. **Easy case.**



Case #6: What's the EEOC up to? (cont'd)

- The EEOC takes the position that an emotional support animal may be a required reasonable accommodation in the workplace.

Remember the slippery slope?

- No clear reason why "service animal" has to be limited to dogs. Dogs just happen to be what we've most trained...
- An emotional support animal may not enable an employee to perform particular essential tasks or functions, but may enable the employee to function normally at work.



The “Interactive Process” and Employees with Service Animals



citycounty insurance services
cisoregon.org

*Photo of Remington courtesy
of CIS HR Senior Consultant,
Sharon Harris*



The Interactive Process – The Basics

- The interactive process is mandatory and must be done in good faith.
- It occurs when:
 - An employee requests an accommodation; or
 - The employer recognizes an accommodation need.



Step 1: The Interactive Process

Recognize When an Employee Needs an Accommodation

- No magic words
- EEOC: The individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.
- Requests for accommodation can be made by almost anyone.



Step 2: The Interactive Process

Meet and Confer

- The employer's first question?
 - “How can we help you?”
- Discuss the employee's functional limitations:
 - “Why do you need a service animal?”
 - “Which duties can you perform without a service animal?”
 - “How does ____ affect your ability to do task ____?”
 - “How does a service animal enable you to ____?”



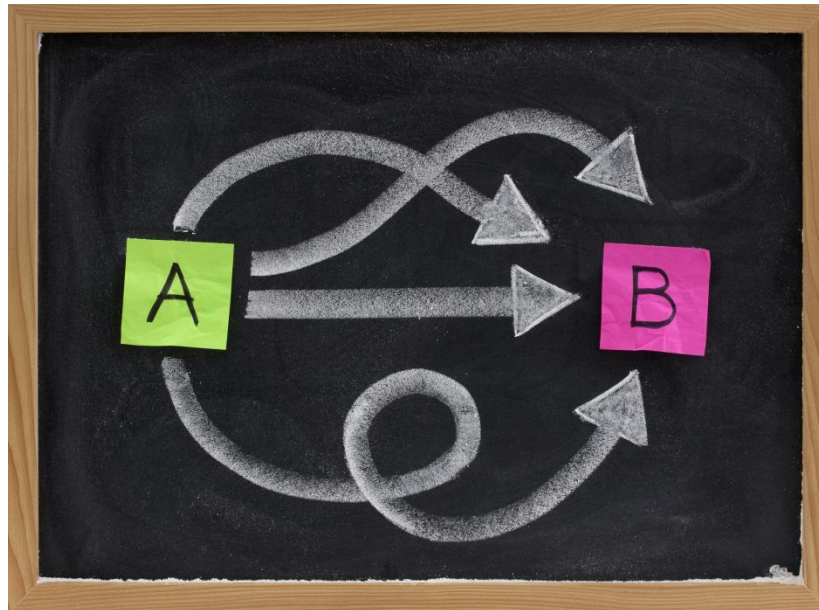
Step 2 (cont'd): The Interactive Process

- Get information about the service animal
 - “How was your service animal trained?”
 - “How long has he/she lived and worked with you?”
 - “Do you have any experience performing your duties with your service animal providing assistance?”
 - “How does your animal react to noise, visitors, etc.?”



Step 2 (cont'd): The Interactive Process

- Discuss whether there are alternatives to a service animal
 - If the underlying condition relates to stress, for example, can the employee take extra breaks? Work in a more quiet area?
 - Possible assistance: <https://askjan.org/topics/servanim.htm>



Step 3: The Interactive Process

Require Medical Information from the Employee that Supports His/Her Request

- We want to know whether there are accommodations available – *service animal or otherwise* - that would allow the employee to perform the essential functions of her job.
 - An employer is not required to rely on an employee's word.
- Consult with counsel or CIS if you need help at this stage!



Step 3: The Interactive Process

Question: Can we ask the employee to provide proof of some kind that the animal is fully trained to perform the duties the animal will perform?

- Disability Rights Oregon: Yes
- The ADA/Oregon law: Maybe



Step 3: The Interactive Process

Question: Can employers push back on doctors whom they suspect may be too liberal in prescribing “service” (as opposed to mere “comfort”) animals?

- Answer: Yes, but you’ll pay for it.
- Instead of paying for a second opinion, consider whether we’re asking the proper questions about purpose, task, and essential functions – *is there a connection?*



Step 4: The Interactive Process

Follow up with the Employee

- Write an accommodation plan or other document:
 - Here's what we discussed on XX date and XX date.
 - Here's what we considered (info from the employee and his/her doctor, other sources).
 - Here's what we're prepared to offer.
 - If applicable: Why we're not authorizing the use of a service animal.



Step 4 (cont'd): The Interactive Process

Follow up with the Employee

- Write an accommodation plan or other document:
 - Here's what we expect of you *and* your service animal.
 - Examples: What does the employee need to do to ensure that the animal has time to relieve himself/herself? What happens if the service dog starts barking or growling? Snacks, water bowl? Grooming?
 - On XX date we'll meet again to see how things are working out.
- Get the employee to sign the document.



OTHER TIPS



*Photo of Dexter courtesy of
OR-PRIMA VP Bryan Aalberg*



citycounty insurance services
cisoregon.org

How do we announce this to our staff?

- Topics for consideration:
 - How to interact with the service animal (petting the “really cute little dog” is generally not allowed).
 - This doesn’t mean you can bring a pet to work!
- Remember: No discussion about the employee’s medical condition, even if the employee authorizes you to do so in writing.
- Be prepared to explain why the ADA is not a paternalistic statute – it’s an enabling statute.



Other Issues

How do I address this with an employee who fears dogs? Or who has allergies to animal dander?

- Talk to the employee.
- Consideration may need to be given to whether the allergy is a “disability” that requires accommodation. Sigh.
 - Banning all service animals from the workplace would not be a “reasonable accommodation.”



Other Issues (cont'd)

How do I address this with an employee who fears dogs? Or who has allergies to animal dander?

- Options for eliminating in-person contact or minimizing exposure:
 - Are there animal-free areas where the employee can work?
 - Would a portable air filter help the allergic employee?
 - Could you help the frightened employee navigate the office and building without running into the service animal?



Other Issues (cont'd)

How do I address this with an employee who fears dogs? Or who has allergies to animal dander?

- Options for eliminating in-person contact or minimizing exposure:
 - Ask the employee who uses the service animal if he/she is willing to temporarily use other accommodations to replace the functions performed by the service animal during meetings attended by both employees.



Other Issues and Tips

- Consider now, before you get a service animal request, what your organization's policy is on pets and service animals in the workplace.
- Implement a policy that addresses both pets in the workplace and some of the basic requirements for service animals (make sure the policy notes the distinction).
 - SHRM 2016 Employee Benefits survey: Only 7% of employers permit pets in the workplace.



CIS Member Success (?) Stories

- City of Sherwood Police Department
- Umatilla County
- City of Wilsonville



Photo of Sherwood Police Officer Bill Collins and Milagro ("Mila")





Questions?

*Let's play "Stump the Lawyer"
and "Stump the Professor"!*

*No one is dumb who is curious.
The people who don't ask questions
remain clueless throughout their lives.
-- Neil deGrasse Tyson*



citycounty insurance services
cisoregon.org

Thank you, **OR-PRIMA!**

Tamara E. Jones, J. D.

Senior Pre-Loss Attorney /
Pre-Loss Program Supervisor

503-763-3845

tjones@cisoregon.org

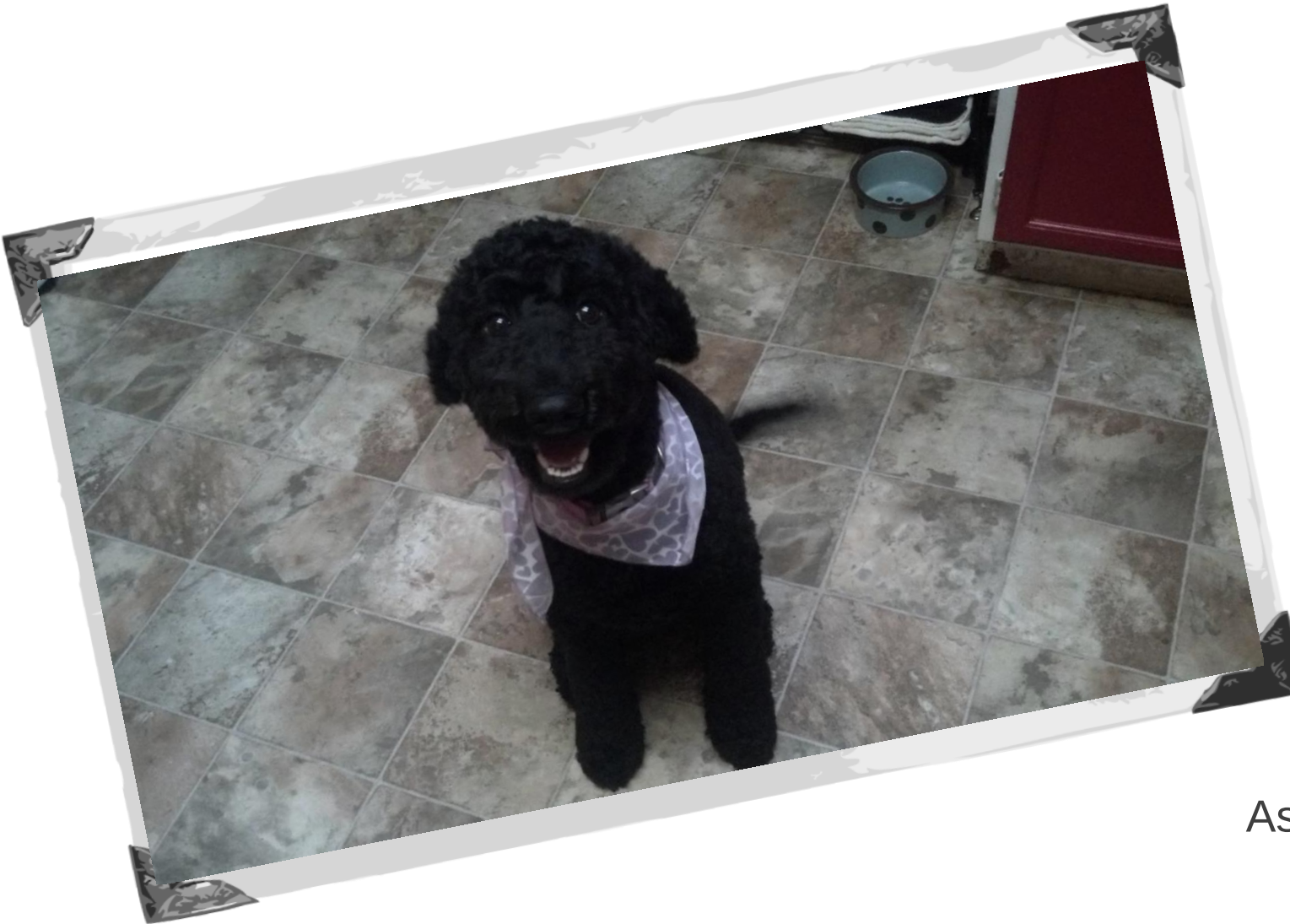
Jeffrey Jones, Ph.D., J.D.

Associate Professor of Law & Philosophy
Lewis & Clark Law School

503-768-6921

jdj@lclark.edu

www.legalcide.com



citycounty insurance services
cisoregon.org