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February 19, 2019

TO: The Honorable Senator Russell E. Ruderman, Chair
Committee on Human Services

The Honorable Senator Karl Rhoads, Chair
Committee on Judiciary

FROM: Pankaj Bhanot, Director

SUBJECT: **SCR 9/SR 8 - REQUESTING THE DEPARTMENT OF HUMAN SERVICES TO
EXAMINE THE IMPLEMENTATION OF ACT 217, SESSION LAWS OF HAWAII
2018, REGARDING MISREPRESENTATION OF SERVICE ANIMALS**

Hearing: February 20, 2019, 3:00 p.m.
Conference Room 016, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent of the resolution, and respectfully offers comments. DHS is concerned that individuals who misrepresent their pet as a service animal may impede or interfere with the work of a service animal or otherwise interferes with the appropriate use of a service animal by a disabled individual. Individuals with service animals may also experience differences in services in businesses required to accommodate their service animal when that business has had negative encounters with owners and their pets. We also acknowledge the business owner who is trying to accommodate customers and disabled individuals with legitimate service animals, and while also having to address individuals with their pets. However, in attempting to create a legal sanction against misrepresenting a pet as a service animal, it is unclear how to enforce the law as written.

PURPOSE: The purpose of the resolution is to request DHS to examine the implementation of Act 217, Session Laws of Hawaii 2018, regarding misrepresentation of Service Animals.

Last session at the urging of the Senate Committee on the Judiciary to review SB2461 SD1 – Relating to Service Animals, See STAND. COM. REP. NO. 2547, DHS submitted testimony articulating that it did not have the expertise or ability to certify whether an animal is sufficiently trained to be a service animal, nor does it have investigative capabilities to determine where a violation of the proposed measure's provisions have occurred.

As we did in SB2461 SD1, and again in this year's HB 1074, we encouraged increased public education and outreach regarding the importance of trained service animals to those individuals who rely upon such working animals for health, safety, and independence. We also encouraged the legislature to convene a work group and to consider consultation with an Americans with Disabilities Act (ADA) specialist of the U.S. Department of Justice. Neither suggestion was taken up by the Legislature.

Following the enactment of SB2451 SD1 as Act 217, SLH 2018, we reviewed the language and determined that the one fact that can clearly be established, is whether the service animal is a dog. If the service animal was another specie, it would clearly be misrepresentation.

However, other than this basic question of specie, the DHS program and staff covered by Chapter 347, Hawaii Revised Statutes, that administers work with the blind, vocational guidance, training, and placement in employment and other services, do not have experience with otherwise enforcing or policing public accommodations when a recipient of DHS services or other individual believes their rights as identified in the Chapter have been violated. Staff do not have any experience training or observing service animals.

It appears that a law enforcement officer or staff of the public accommodation may be the more appropriate individual to enforce a case of misrepresentation. However, it is not entirely clear how or who can make the claim of misrepresentation of a service animal against an owner other than as a defense. In Lerma v. Cal. Exposition & State Fair Police, (E.D. Cal., 2014), the case referenced by one testifier in SB2451 SD1 (2018) as successful enforcement of laws regarding misrepresentation of service animal, this case involved the

plaintiff with a puppy and a State Fair Police Officer, who was present and able to observe the plaintiff with the puppy claimed to be a service animal.

In Lerma, the officer asked plaintiff what task the dog had been trained to perform, plaintiff responded "all I have to tell you is it's a service dog and I'm going to sue you." (Officer's declaration, 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.) The Officer 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. The officer informed the plaintiff that she could return to the State Fair 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, the Officer confirmed that plaintiff was known to the Sacramento County CJ system. (Id., at ¶ 8.) The officer then prepared a crime report, charging plaintiff with fraudulently representing herself as a service dog owner, pursuant to Cal. Penal Code § 365.7. (Id. at ¶ 9, Ex. 1.)

Note that the Lerma case and other cases referenced involving service animals, requires the individual with the service animal to assert their claim under Title III of the ADA, including that they are disabled as provided by the ADA, that the defendant owns, leases or operates a place of public accommodation, and that the plaintiff was denied accommodation because of the disability. Also note that in Lerma, the officer initiated a criminal case charging plaintiff Lerma with fraudulently *representing herself* as a service dog owner.

As Act 217, SLH 2018, is drafted, while there is a clear civil penalty, it does not appear or it is unclear how and where an individual can assert a claim that another individual is misrepresenting their pet as a service animal. It appears from the cases, that misrepresentation of the pet as a service animal is more often asserted as a defense to a case of discrimination.

28 CFR § 36.302(c), see <https://www.law.cornell.edu/cfr/text/28/36.302>, provides the relevant law, regarding service animals. Per the U.S. Department of Justice, Civil Rights

Division, Disability Rights Section, as provided by the Americans with Disabilities Act (ADA), where it is not obvious that a dog is a service animal, only two specific questions may be asked: (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?

An owner who answered (1) with "no," would not necessarily be misrepresenting their dog as a service animal, and question (2) would not need to be asked. This person could be asked to leave the public accommodation and informed they could return without their pet.

An owner who answered (1) with "yes," and provided a reasonable response to (2), would not be misrepresenting their pet as a service animal. It would violate the ADA to ask the person what their disability is, and it would also be a violation to ask the owner to have the service animal demonstrate the task, or require documentation, ID tag, vest, harness, or certification of training.

Potentially, an owner who answered (1) with "yes," and could not answer (2) with a task may be perhaps misrepresenting their pet as a service animal; however, if the person has an anxiety or seizure disorder or other cognitive disability (which cannot be asked), and cannot answer the question in a timely or reasonable way, it would be very difficult to assess whether the person is misrepresenting their pet as a service animal.

28 CFR § 36.302(c) provides the only exceptions when an entity required to provide a public accommodation may ask an individual with a disability to remove a service animal from the premises, if:

- (i) The animal is out of control and the animal's handler does not take effective action to control it; or
- (ii) The animal is not housebroken.

The officer in Lerma, asked whether the puppy was housebroken; the owner refused to answer the question, and was asked to leave the premises with her pet, and was informed of the right to return without the puppy.

Whatever the scenario, the encounter and inquiry would appear to happen at the public accommodation, and the inquiry of the owner of the pet or service animal would

necessarily be by either a staff member of the public entity or someone with law enforcement authority.

DHS reiterates the relevant portion of the Department of the Attorney General testimony submitted before the Senate Committee on Judiciary, SB2461, February 20, 2018,

"An investigator would have to prove that the animal was not trained to perform tasks to benefit an individual with a disability. An investigator's ability to investigate such an offense is limited by the Americans with Disabilities Act (ADA), which prohibits the following: (1) asking about the nature or extent of the owner's disability; (2) requiring proof that the animal has been certified, trained, or licensed as a service animal (28 C.F.R. 35.136(f)); (3) requiring the animal to wear an identifying vest or tag; and (4) asking the animal to demonstrate its ability to perform the task or work. Moreover, the ADA does not require service animals to be professionally trained. If the owner says he or she is training the animal personally, there is no way to prove otherwise. Finally, documentation that an animal is in fact, a service animal, has been deemed unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA."

Last year, following the enactment of Act 217 (2018), a short meeting with attendees from the Hawaii Civil Rights Commission, the Disability and Communication Access Board, the Department of Human Services, the Attorney General's Office, and the Honolulu Police Department, gathered to discuss how the law could be lawfully and practically enforced.

The representative from the Honolulu Police Department did describe that they would assess situations based upon other current law related to nuisance or assault if the dog were to attack.

There was a consensus that the law, as drafted, would be difficult to enforce, though it may serve as a deterrent.

From the DHS perspective, we have not received any complaints or requests to enforce the law since its enactment.

Again, DHS reiterates that a public outreach campaign may be the best way to educate places of public accommodations as well as the public as to the important work service animals do and why it is important for service animals to be able to assist their owners.

Thank you for the opportunity to provide comments on this measure.



HAWAI‘I CIVIL RIGHTS COMMISSION

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February 20, 2019
Room 16, 3:00 p.m.

To: The Honorable Senator Ruderman, Chair
Members of the Senate Committee on Human Services

The Honorable Rhoads, Chair
Members of the Senate Committee Judiciary

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.C.R. No. 9 and S.R. No. 8

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s 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. Art. I, Sec. 5.

S.C.R. No. 9 and S.R. No. 8 require the Department of Human Services (DHS), in consultation with the Hawai‘i Civil Rights Commission (HCRC) and the Disability and Communication Access Board (DCAB), to examine and report on implementation of Act 217, Leg. 2018, and for DHS “to issue guidance about misrepresentation of a service animal for use law enforcement and the business community.”

Act 217, enacted in 2018, amended HRS chapter 347 to establish a new civil penalty for “Misrepresentation of a service animal.” The penalty for a violation would be a fine of not less than \$100 and not more than \$250 for a first offense, and not less than \$500 for any subsequent offense. The statute requires that violation be proven by clear and convincing evidence. Act 217 provided no statutory enforcement mechanism, but the new civil penalty was placed under HRS chapter 347, under DHS jurisdiction.

At the time of enactment of Act 217, concerns were raised about the new state law encouraging inquiries prohibited under federal law, beyond the specific questions that a business or law enforcement agency are allowed to ask under the Americans with Disabilities Act (ADA). There were also concerns that that the creation of a new civil penalty would have a chilling effect on the exercise of rights by persons with disabilities.

Under Title II and Title III of the ADA, when an individual with a service animal comes to a government office or a business with a service animal, if the individual's disability and the service the animal provides is not obvious, *only* two limited inquiries are allowed by law: 1) whether the dog is a service animal required because of a disability; and, 2) what work or task the dog has been trained to perform. Pursuant to U.S. Department of Justice guidance, no other inquiry or request for documentation or proof is allowed.

Conclusion

Enactment of Act 217 created a substantial and uncapped civil penalty for "misrepresentation of a service animal," but with concerns over enforcement and enforceability.

The new law penalizes the knowing false representations of a dog as a service dog. This has the potential chilling effect on the rights of persons with disabilities to exercise their right to request reasonable accommodation in the use of a service animal, under Title II and Title III of the ADA. It also potentially penalizes persons with disabilities who mistakenly characterize their (non-service) assistance animals as service animals.

State law should not encourage unlawful inquiries of persons who attempt to access government offices or businesses accompanied by a service animal, as is their right under the ADA, whether those inquiries are made by staff, agents, or third party proxies.

SCR-9

Submitted on: 2/19/2019 2:28:20 PM

Testimony for HMS on 2/20/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:



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DISABILITY AND COMMUNICATION ACCESS BOARD

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February 20, 2019

TESTIMONY TO THE SENATE COMMITTEES ON HUMAN SERVICES AND JUDICIARY

Senate Concurrent Resolution 9 and Senate Resolution 8 – Requesting the Department of Human Services to Examine the Implementation of Act 217, Session Laws of Hawaii 2018, Regarding Misrepresentation of Service Animals

The Disability and Communication Access Board (DCAB) offers comments on Senate Concurrent Resolution 9 and Senate Resolution 8 – Requesting the Department of Human Services to Examine the Implementation of Act 217, Session Laws of Hawaii 2018, Regarding Misrepresentation of Service Animals. While we would be willing to cooperate with any study, we do not believe that the resolutions are necessary.

The resolutions ask the Department of Human Services to conduct a study to examine the implementation of Act 217. Act 217 establishes a civil penalty for a person who knowingly misrepresents an animal as a service animal. It was known at the time of Act 217's passage that the ability to enforce Act 217 would be limited due to (1) the restricted nature of questions that can be asked of an individual to ascertain if an animal is, indeed, a service animal required because of a disability, and (2) the absence of any government registry or certification process. While the latter is supported by our agency in concept, it is not a viable solution because documentation cannot be required under the federal Americans with Disabilities Act (ADA).

Having noted the above, DCAB took the initiative to convene a group of stakeholders and also invited the police, at least from the City and County of Honolulu. We also took the initiative to query the four County Police Departments as to their procedures for implementing Act 217. Three of the Counties (excluding Maui) have responded and staff has also discussed the enforcement process in detail with the City and County of Honolulu. In all cases in the three Counties, the Police will respond to a community caller and initiate with a line of questioning that is consistent with the ADA. A determination as to whether to issue a citation or to refer the issue to the Prosecutor's Office is within the discretion of the police officer.

There are several points worth noting. The standard of "probable cause" is replaced by "clear and convincing evidence" which will make the issuance of a ticket much more difficult. Also, the Act does not make it illegal to have a so-called "fake service animal" but to "knowingly misrepresent a dog as a service animal." Thus, if a person has an emotional support animal and believes that the animal is truly a service animal because he/she believes that emotional support is a service, the person has not knowingly misrepresented the dog because the representation is consistent with their belief system. The standard of "knowing misrepresentation" goes to the state of mind of the person, not the status of the animal. One of the takeaways from this is a reminder that this is not a fake service dog law.

It is a law about knowingly misrepresenting a dog in order to gain access to a public accommodation or state/local government facility that would otherwise be denied because the establishment has a no pets policy. It is about the person's intent and action, not the dog.

We do believe that there is a benefit to a coordinated community education process, which could include the continuation of regular meetings between community stakeholders, particularly the Police Departments, human service agencies, people with disabilities, and civil rights or disability organizations, in addition with continued monitoring of how other states or municipalities have tried to address this issue.

Thank you for the opportunity to provide comments on these measures.

Respectfully submitted, .



FRANCINE WAI
Executive Director