



## SUMMARY OF ARGUMENT

Amici appreciate the opportunity to submit this brief in support of the position of the Appellant, Janelle McDonald. Ms. McDonald was denied an accommodation necessary to permit the safe use of her service dog at work. This brief discusses the critical importance of service animals to persons with disabilities and provides an analysis of the permitted use of such animals as a reasonable accommodation to permit persons with disabilities to obtain and succeed at employment.

The district court concluded in this case that Ms. McDonald's employer was not required to install runners on the slippery floor of her workplace so that Ms. McDonald's service dog could traverse those floors without falling – not because doing so would be unreasonable, but because it would constitute an accommodation for the dog rather than for Ms. McDonald's disability. The district court's analysis was in error. The proper analysis is whether the installation of the runners constituted a reasonable accommodation so that Ms. McDonald could use her service dog to assist her in the workplace. The accommodation was not for the benefit of Ms. McDonald's dog; it was for the benefit of Ms. McDonald and was required under disability discrimination laws.

**A. SERVICE AND SUPPORT ANIMALS ARE CRITICAL TO THE  
INTEGRATION OF PERSONS WITH PHYSICAL OR MENTAL DISABILITIES  
INTO THE WORKPLACE AND OUR SOCIETY IN GENERAL**

During the last several decades, service animals trained to help persons with disabilities have appeared with increasing frequency in a variety of social settings.<sup>1</sup> This reflects a recognition that service animals play a critically important role in assisting individuals with a wide variety of disabilities to participate in daily activities. The classic, historic use of such animals is the trained guide dog leading a person with visual impairments. Another commonly recognized use for such service animals is to alert hearing impaired persons to aural stimuli. Yet another use for service animals is to assist persons with severe physical disabilities by bringing them items or providing them with stabilizing support.<sup>2</sup> Service animals are also used by individuals with seizure disorders to alert the animal's owner of impending seizures.<sup>3</sup>

Besides these well-known roles in assisting visually and hearing impaired and other physically disabled persons, a more recent and increasingly frequent use for

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<sup>1</sup>Susan L. Duncan, *APIC State-of-the-Art Report: The implications of service animals in health care settings*, 28 Am. J. Infection Control 170 (2000), reproduced at <http://www.psychdog.org/news/Duncan.pdf>. APIC is the Association for Professionals in Infection Control and Epidemiology, Inc..

<sup>2</sup> Stewart Nordensson and Lydia Kelley, *Teamwork II: A Dog Training Manual for People with Disabilities* (1998) TOP DOG Publications, Tucson, AZ.

<sup>3</sup> Liz Rudy, *Service Dogs for People with Seizure Disorders*, *Alert*, National Service Dog Center Newsletter Vol. 6, No. 4 (1995), reproduced at <http://www.deltasociety.org/ServiceArticlesSeizure.htm>.

service animals is to assist persons with emotional or other psychiatric disabilities.<sup>4</sup> According to the International Association of Assistance Dog Partners, there are over 9,000 service dogs used in the United States by persons who are neither deaf nor blind.<sup>5</sup> Janelle McDonald's service dog Bess is such an animal. Bess assists Ms. McDonald by...*[plaintiff's attorney will complete this sentence]*.

The United States Justice Department's regulations implementing the Americans with Disabilities Act define a "service animal" as any animal individually trained to do work or perform tasks for the benefit of a person with a disability. 28 C.F.R. ' 36.104. A service animal is not considered a pet because it is specially trained to help a person overcome the limitations caused by his or her disability. Service animals work for their handlers (the persons with disabilities who rely on the animals for help, sometimes referred to as "partners") and usually have little, if any,

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<sup>4</sup> See, e.g., Nan Shnitzler, *A New Leash On Life*, NEW ENGLAND PSYCHOLOGIST (December 2006) reproduced at [http://www.masspsy.com/leading/0612\\_ne\\_dog.html](http://www.masspsy.com/leading/0612_ne_dog.html); Joan Esnayra, *Dogs at Work: Service Dogs for the Disabled*, THE RIDGEBACK REGISTER, Vol. 2, Issue 1 (1998), pp. 26-27 reproduced at [http://www.psychdog.org/news/Ridgeback\\_Register\\_January\\_1998.pdf](http://www.psychdog.org/news/Ridgeback_Register_January_1998.pdf); Dave Morton, *Dogs Can Help Alleviate Depression*, Voices of SAVE Newsletter (Fall 2005) reproduced at [http://www.save.org/files/1/Docs\\_from\\_old\\_site/voices\\_2005\\_fall.pdf](http://www.save.org/files/1/Docs_from_old_site/voices_2005_fall.pdf); Kristin Burrows, *Service Dogs for Children with Autism Spectrum Disorder: Benefits, Challenges and Welfare Implications* (undated), reproduced at [http://nsd.on.ca/PDF/NSD\\_summary.pdf](http://nsd.on.ca/PDF/NSD_summary.pdf).

<sup>5</sup> Thomas Fields-Meyer and Susan Mandel, *Healing Hounds: Can dogs help people with mental-health problems get better?* (July 17, 2006), People Magazine, Vol. 66, No. 3, pp. 101-102 reproduced at [http://www.psychdog.org/news/PeopleMagazine\\_7\\_16\\_06.pdf](http://www.psychdog.org/news/PeopleMagazine_7_16_06.pdf).

contact with others.<sup>6</sup>

Many persons with disabilities can achieve greater functional independence with the help of service animals. Service animals help persons who have a wide variety of limitations caused by physical disabilities. Likewise, such service animals can provide psychiatric assistance and support needed to allow some persons with mental disabilities to obtain and retain employment. Psychiatric service dogs are an important form of assistance that may be used in combination with other measures such as ongoing medication and therapy.<sup>7</sup>

They may be trained, for example, to assist individuals with panic attacks, which carry with them the possibility of unconsciousness due to hyperventilation. Service dogs may be trained to interrupt this sequence of events. For persons with severe social anxiety, they can facilitate social interactions by providing a safe and familiar topic of conversation between the human handler and other persons s/he may encounter while out in public.

Studies have found that service dogs enhance independence in occupational performance areas and contribute to improvements in psychosocial functioning. In a clinical sense, service dogs are viewed as merely another type of assistive device,

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<sup>6</sup> Linda Boone Hunt, *Barking up the Right Tree: The Benefits of Service Animals*, ABILITY MAGAZINE (2007) reproduced at <http://www.abilitymagazine.com/current/animals.html>.

<sup>7</sup> Joan Esnayra, *Psychiatric Service Dogs*, VIRGINIA NEWS, PSYCHIATRIC SOCIETY OF VIRGINIA (Fall 2003), reproduced at <http://www.psychdog.org/news/Virginia.pdf>.

such as wheelchairs, walkers, and ramps. As one article notes:

Service dogs assist individuals with disabilities to achieve greater independence in a variety of performance areas including activities of daily living, home management, functional mobility, socialization, emergency alerting, and environmental control (Delta Society, 2000). In addition to increasing independence in these occupational performance areas, service dog ownership has also been shown to have significant psychosocial benefits, such as improved self-esteem, increased social interaction, decreased stress, and greater internal locus of control (Eddy, Hart, & Boltz, 1988; Mader & Hart, 1989; Valentine, Kiddoo, & LaFleur, 1993; Winkler, Fairnie, Gericevich, & Long, 1989).<sup>8</sup>

In one survey, 90 percent of service dog owners reported that they felt safer, less lonely, and more independent since acquiring their service dog.<sup>9</sup>

**B. SERVICE AND SUPPORT ANIMALS HAVE SUCCESSFULLY SERVED INDIVIDUALS WITH DISABILITIES WITHOUT DISRUPTING THEIR SURROUNDINGS**

As noted above, there is a difference between service animals and pets. Service animals are trained aides to their partners. They are trained to attend to the specific needs of their owners and to not be distracted by children, to jump on people, to chase cars or balls, or create other disruptions. These animals perform a

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<sup>8</sup> Mary Michelle Camp, *The Use of Service Dogs as an Adaptive Strategy*, WORKING DOGS (2005), reproduced at <http://workingdogs.com/doc0037.htm>.

<sup>9</sup> *Id.*

very different role from pets and are accustomed to the demands of working in public.<sup>10</sup>

**C. SERVICE AND SUPPORT ANIMALS SHOULD NOT BE HELD  
TO A DIFFERENT STANDARD THAN  
OTHER ACCOMMODATIONS USED BY INDIVIDUALS WITH DISABILITIES**

1. Service Animals are No Different from Assistive Devices Used to  
Accommodate Individuals with Disabilities

The State of Montana, by regulation, recognizes that service animals are in fact a form of assistive device of persons with emotional disabilities, to be treated no differently than specialized medical equipment and supplies. The State of Montana Medicaid Program has acknowledged this classification by expanding its reimbursement of assistive technology to include the purchase and upkeep of service dogs for individuals with severe disabling mental illness. Section 37-90-449, ARM (including service dogs among the types of medical supplies covered by Medicaid for individuals with mental illness).<sup>11</sup> This regulation reflects a recognition that the use of service animals is analogous to the use of a wheelchair, a walker, or a crutch.

Montana Medicaid regulations include service animals, as well as equipment needed to maintain them, in its coverage of medical equipment for individuals with mental illness. Section 37-90-449, ARM, authorizes Medicaid coverage for

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<sup>10</sup> See Esnayra, *Dogs at Work*, *supra* note 2, at 27.

<sup>11</sup> See also Camp, *The Use of Service Dogs as an Adaptive Strategy*, *supra* note 7.

“specialized medical equipment and supplies” for individuals with severe disabling mental illness. Explicitly included among such approved “specialized medical equipment and supplies” are service animals, defined as follows:

A service animal is an animal trained to undertake particular tasks on behalf of a recipient that the recipient cannot perform and that are necessary to meet the recipient’s needs for accessibility, independence, health, or safety.

Section 37-90-449(6), ARM. Also included among such specialized medical equipment and supplies are “supplies and care necessary to maintain a service animal,” 37-90-449(2)(b), (8), (9), ARM.

The goal of providing such specialized medical equipment and supplies is stated in the rule:

Specialized medical equipment and supplies is the provision of items of medical equipment and supplies to a recipient for the purpose of maintaining and improving the recipient’s ability to reside at home and to function in the community.

Section 37-90-449(1), ARM.

Thus, Montana law recognizes that the standards to be used in determining reasonable accommodations to a person needing a service dog are no different than that for a person needing, for example, a wheelchair.

2. Federal and State Law Require Employers to Make Reasonable Accommodations to Enable Employees with Disabilities to Maintain Employment

In passing the federal Americans with Disabilities Act (ADA), Congress expressly found that “discrimination against individuals with disabilities persists in such critical areas as employment[.]” 42 U.S.C. section 12101(a)(3). The ADA was designed to provide a clear mandate for the elimination of such discrimination. 42 U.S.C. section 12101(b). A critical part of Congress’s effort to eliminate such discrimination was to require affirmative assistance – in the form of “reasonable accommodations” to enable persons with disabilities to participate fully in our society.

Reasonable accommodations in the workplace may include:

(A) **making existing facilities used by employees readily accessible to and usable by individuals with disabilities;** and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, **acquisition or modification of equipment or devices**, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. section 12111(9) (emphasis added).

Montana state requirements mirror these federal provisions. It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a

person in compensation or in a term, condition, or privilege of employment because of . . . physical or mental disability. . . when the reasonable demands of the position do not require [a] physical or mental disability. . . distinction.

Section 49-2-303(1)(a), MCA.

(b) Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

Section 49-2-101(19)(b), MCA.

Failure to make such reasonable accommodations is discrimination on the basis of a physical or mental disability. Section 24.9.606(1), ARM. This regulation sets forth the standards for determining whether a requested accommodation is reasonable. An employer need not provide a requested accommodation if the employer can “demonstrate that the accommodation would impose an undue hardship on the operation of the business in question.” Section 24.9.606(1)(a), ARM. Montana law requires the same types of reasonable accommodations required by the ADA, including “making existing facilities used by employees readily accessible to and usable by individuals with physical or mental disabilities,” section 24.9.606(3)(a), ARM, and the “acquisition or modification of equipment or devices.” Section 24.9.606(3)(b), ARM.

For purposes of determining whether a requested accommodation imposes an undue hardship on the employer, courts must consider, *inter alia*, the expense of the accommodation needed and the overall financial resources of the employer, number of persons employed, and other impacts on the operation of the employer. Section 24.9.606(5), ARM. Also relevant is whether the requested accommodation “would endanger the health or safety of any person.” Section 24.9.606(9), ARM. This Court has stated that:

An employer has an affirmative duty to make reasonable accommodations that are required by an otherwise qualified disabled person. In *Reeves*, we stated:

Montana law requires employers to reasonably accommodate their employees if the employees are disabled or are regarded as such, unless the accommodation would impose an undue hardship on the employer or endanger the health and safety of any person.

*Reeves*, & 40 (citing ' 49-2-101(19)(b), MCA). See also Rule 24.9.606, ARM. An employer=s duty to provide reasonable accommodations to disabled persons is an essential part of Montana=s anti-discrimination statutes. *Martinell*, 268 Mont. at 309-10, 886 P.2d at 432.

*Hafner v. Conoco, Inc.*, 1999 MT 68, & 36, 293 Mont. 542, 977 P.2d 330 (1999).

In light of these federal and state requirements, then, the proper analysis in this case is whether Ms. McDonald’s requested accommodation – the installation of runners on the tile floor of the Metcalf Building -- was necessary to allow her to do the essential functions of the job. If it was necessary, then the employer was required

to provide the requested accommodation unless it imposed an undue hardship on the employer or endangered the health and safety of any person.

3. The District Court Failed to Apply the Correct Analysis of Ms. McDonald's Reasonable Accommodation Claim

The district court did not follow the above-described analysis, but instead relied on an inapplicable federal regulation providing that places of public accommodation are not required to “supervise or care for a service animal” used by their patrons. 28 C.F.R. ' 36.302(c)(2).<sup>12</sup> The court's reliance on this regulation was wholly inappropriate, as the accommodation requested by Ms. McDonald -- installation of the runners on the slick floor of the building in which she worked – in no way called upon her employer to “supervise or care for” her service dog.

The district court was also incorrect in ruling that the requested accommodation was not necessary to accommodate Ms. McDonald but simply for the benefit of her dog. The service animal is simply an assistive device for Ms. McDonald. Section 37-90-449(6), ARM. Requiring the employer to install runners on the slick floor so her service animal can safely assist Ms. McDonald in the workplace is analogous to installing a ramp so that an employee using a wheelchair can enter an office building to go to her office. *See e.g.*, 42 U.S.C. section 12111(9); 24.9.606(3)(a), ARM

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<sup>12</sup> Like employers, places of public accommodation are generally required to permit the use of a service animal by individuals with disabilities. 28 C.F.R. Section 36.302(c)(1). The regulation relied on by the district court simply clarifies that a public accommodation need not supervise a service animal as part of its responsibility to permit the use of the animal.

(requiring covered entities to make “existing facilities used by employees readily accessible to and usable by individuals with physical or mental disabilities.”) Installing such a ramp is not accommodating the wheelchair; it is accommodating the person in her use of the wheelchair. The only reason that the service animal was in Ms. McDonald’s workplace was because Ms. McDonald required her to be there so that she could perform her job. Installing the runners is not accommodating the service animal; it is accommodating Ms. McDonald by enabling her to use a necessary assistive device to do her job.<sup>13</sup>

## **CONCLUSION**

Americans with disabilities have had a long struggle to overcome the discrimination they face in virtually every aspect of their lives. “[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. section 12101(a)(2).

We as a society have made strides in helping those among us with disabilities overcome these forms of discrimination. It is for our greater social good and benefit

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<sup>13</sup> Indeed, installing the runners posed no harm to any other person. To the contrary, the testimony indicated that several other persons had also slipped and fallen on the slippery tile floors in the Metcalf Building. Final Agency Decision, ¶¶ 9, 13, pp. 11-12.

that we undertake those reasonable adjustments (reasonable accommodations) to eliminate further remaining vestiges of unfair and unequal treatment.

The district's court ruling improperly denied Ms. McDonald the opportunity to participate on an equal footing in the workplace, and the application of its rationale to other situations would result in thousands of other individuals with disabilities being denied the reasonable accommodations they need to participate in employment and other aspects of society. The decision of the district court should be reversed and the decision of the Hearing Examiner reinstated.