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ATTORNEY GENERAL

February 9, 2015

The Honorable Larry A. Martin
Chairman, Senate Judiciary Committee
PO Box 142
Columbia, SC 29202

Dear Senator Martin:

This Office received your request for an opinion. You state in your letter:

I am writing you to ask for an opinion regarding the provisions of Section 43-33-20 as it relates to the rights of physically disabled persons to use public facilities and public spaces in South Carolina. This issue arises from an incident regarding a person with PTSD [post traumatic stress disorder]¹ who had a service animal who was asked to leave a restaurant. After the person filed a police report concerning her ejection from the restaurant, two issues with the statute were noted by law enforcement. The first is to whom the statute applies. The second is to what establishments does the statute apply. Since violations of Section 44-33-20 are criminal, I believe there may be a reticence in enforcing the law until its provisions are clear so that law enforcement feels confident in acting. . .

Unfortunately, there seems to have been much confusion about whether this person and their dog were allowed in this restaurant, or whether this

¹ PTSD has been described as follows:

Following a severe trauma, any type of psychiatric illness may develop. One type of syndrome which may develop following a serious trauma has been identified and diagnosed as post-traumatic stress disorder, or PTSD. PTSD is the designation assigned to a group of certain identifiable symptoms in the current edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-III-R). It is a mental disturbance that originates in response to an overwhelming encounter with the possibility of violent death. PTSD symptoms may impair an individual's ability to cope, and they may interfere with the individual's routine activities and disrupt family harmony.

49 Am. Jur. Proof of Facts 2d 73 (1987).

restaurant was a private place of business that was allowed to admit or deny admittance to whomever they desired. . . .

You appear to be asking whether a person with PTSD is a “handicapped person” pursuant to section 43-33-20(c) and whether a restaurant is included in “places of public accommodation” pursuant to section 43-33-20(b). We will answer accordingly.

LAW/ANALYSIS:

Section 43-33-20 of the South Carolina Code addresses the rights of handicapped persons and their assistance dogs to use public facilities and accommodations and it provides:

- (a) The blind, the visually handicapped, and the otherwise physically disabled have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public facilities, and other public places;
- (b) The blind, the visually handicapped, and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons;
- (c) Every handicapped person has the right to be accompanied by an assistance dog, especially trained for the purpose, in any of the places listed in item (b) of this section without being required to pay an extra charge for the assistance dog. Each handicapped person is liable for any damage done to the premises or facilities by the dog.
- (d) Every person who is a trainer of an assistance or guide dog, while engaged in the training of an assistance or guide dog, has the same rights and privileges with respect to access to public facilities and accommodations as blind and disabled persons, including the right to be accompanied by an assistance or guide dog or assistance or guide dog in training, in any of the places listed in item (b) of this section without being required to pay an extra charge for the assistance dog. A person who uses premises or facilities accommodations accompanied by a dog under the authority of this item is liable for any damage done to the premises or facilities by the dog.

S.C. Code Ann. § 43-33-20 (1976 Code, as amended).

I. Public Accommodations

The question we will address first is whether a restaurant is included in “places of public accommodation” pursuant to section 43-33-20(b). The Legislature has not provided a definition of what “places of public accommodation” are in section 43-33-20. In a prior opinion, we discussed some principles of statutory construction and they are as follows:

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). “[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute’s operation.” Harris v. Anderson County Sheriffs Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). “If a statute’s language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning.” Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 472 (2007). “[S]tatutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable.” State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). “[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention.” State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011). Where the plain language of a statute is ambiguous or “lends itself to two equally logical interpretations,” a court may look beyond the borders of the act itself to determine the Legislature’s intent. Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001).

Op. S.C. Atty. Gen., September 18, 2013, (2013 WL 5494616).

In the past, we have reviewed statutes which are similar in nature in order to determine meaning and the intent of the Legislature. “We also recognize that statutes which relate to the same subject matter or to the same legislative scheme should be construed together and in harmony.” Op. S.C. Atty. Gen., Footnote, 1, July 18, 1991, (1991 WL 633013) (quoting Fidelity and Casualty Insurance Company of New York v. Nationwide Insurance Company, 278 S.C. 332, 295 S.E.2d 783 (1982); Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1956)). “It is well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result.” Op. S.C. Atty. Gen., June 3, 2014 (2014 WL 2757537) (quoting Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)). “Different statutes in pari materia, though enacted at different times, and not referring to each other must be construed together as one system and as explanatory of each other.” Op. S.C. Atty. Gen., October 9, 2002 (2002 WL 31728844) (quoting Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934)).

The Public Accommodations Act, S.C. Code Ann. § 45-9-10 et seq., has language very similar to section 43-33-20 and it states:

(A) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in Article 1 of this chapter, without discrimination or segregation on the ground of race, color, religion, or national origin.

(B) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this chapter if discrimination or segregation by it is supported by state action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station. . .

(C) "Supported by state action" means the licensing or permitting of any establishment or any agent of an establishment listed above, subject to the exclusion provided in Section 45-9-20², which has or must have a license or permit from the State, its agencies, or local governmental entities to lawfully operate.

S.C. Code Ann. § 45-9-10 (1976 Code, as amended) (emphasis added).

Although it pertains to race, color, religion, or national origin instead of handicap or disability, section 45-9-10 closely parallels section 43-33-20 because they both deal with the same subject matter, discrimination against a certain type of person in public places. The Legislature chose to define "place of public accommodation" in sections 45-9-10(b) and (c) and not in section 43-33-20. In view of the obvious close parallel between the two statutes, however, we believe that both of the statutes are governed by the same definition of "place of public accommodation." Therefore, our opinion is that the Legislature intended the definition of "place of public accommodation" under both statutes to include a restaurant which is licensed by the State, its agencies, or by local governmental entities.

² S.C. Code Ann. § 45-9-20 (1976 Code, as amended) provides that "[t]he provisions of this chapter do not apply to a private club or other establishment not in fact open to the general public. . ."

II. Handicapped Person and PTSD

Your next question is whether a person with PTSD is a “handicapped person” pursuant to section 43-33-20(c). Section 43-33-20 does not explain who qualifies as a “handicapped person.” Therefore, we must review other provisions of law.

Section 2-7-35 is of assistance in determining who is a “handicapped person” and it provides:

Wherever the term “handicapped person” appears in the laws of this State, unless it is stated to the contrary, it shall mean a person who:

- (1) Has a physical or mental impairment which substantially limits one or more major life activities including, but not limited to caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;
- (2) Meets any other definition prescribed by federal law or regulation for use by agencies of state government which serve handicapped persons.

S.C. Code Ann. § 2-7-35 (1976 Code, as amended).

We are unable to find any law in South Carolina addressing whether a person who suffers from PTSD is a “handicapped person.” Since section 2-7-35 permits us to review federal law, we look to the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 et seq. (1990), for guidance in interpreting our South Carolina law.

To provide you with some background, “[t]he ADA is meant to protect and prevent discrimination against individuals with disabilities.” See Agee v. U.S., 72 Fed.Cl. 284 (July 28, 2006) (quoting Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1105 (Fed.Cir.1996)). The ADA prohibits discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute, public services, programs, and activities, which are part of Title II, and public accommodations and services operated by private entities, which are covered by title III. See Agee, *supra*; Holbert v. Greenville Technical College, 2012 WL 2923248 (D.S.C. 2012).

Title III of the ADA appears to be most applicable to the scenario you presented regarding the person with PTSD and her service dog in a restaurant. Title III prohibits discrimination by public accommodations operated by private entities and it provides:

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) (1990).

The definition of “public accommodation” in Title III parallels the definition in our South Carolina “Public Accommodations Act.” 42 U.S.C. § 12181(7) (1990) of Title III provides the following:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink. . . .

(emphasis added).

However, we are attempting to determine who is a handicapped person. The ADA defines a handicap or a disability as follows:

The term “disability” means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

42 U.S.C. § 12102(1) (1990).³

³ The definition of “disability” set forth in the ADA applies to all titles of the ADA. Widomski v. State University of New York (SUNY) at Orange, 748 F.3d 471 (N.Y. 2014). The Widomski Court pointed out that the ADA Amendments Act of 2008, Pub.L. 110-325, 122 Stat. 3353 (2008), modified the definition of a “perceived disability,” which is section 12102(1)(C) of the ADA, after the events in the case occurred. That is not applicable to this opinion, however.

For the purposes of your question, we will focus on ADA section 12102(1)(A), which is referred to as the “actual disability” prong and which is similar to our South Carolina section 2-7-35(1). Section 12102(2) defines “major life activities” as:

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C. § 12102(2) (1990).

A legal treatise explains Congress’s definition of “disability” in the ADA as follows:

“[i]n developing the definition of “disability” under the ADA, Congress . . . decided not to list all possible disabilities in the statute. Congress chose instead to let the agencies responsible for implementing the ADA list several impairments as examples in their regulations. This approach focuses on the disabling effect of the condition rather than the specific diagnosis. In addition, it does not preclude impairing conditions or diseases that may be identified in the future.”

33 Am. Jur. Proof of Facts 3d 1.

Congress required the Department of Justice to issue regulations regarding Title III. See 42 U.S.C. § 12186(b). In DiLorenzo v. Costco Wholesale Corp., 515 F.Supp.2d 1187 (W.D. Wash. 2007), the District Court in Washington stated that the Department of Justice’s views are “entitled to deference” because it is the “agency directed by Congress to issue implementing regulations, to render technical assistance, and to enforce Title III in court.” The Department of Justice issued the following regulation regarding disability under Title III:

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1) The phrase physical or mental impairment means--

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. . .

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R 36.104.

We now look to see whether or not PTSD is a disability under the ADA. "Under the ADA, an individual's disability must be determined on a case-by-case basis." Evola v. City of Franklin, Tenn., 18 F.Supp.3d 935 (M.D. Tenn. 2014) (quoting Sebest v. Campbell City School Dist. Bd. of Educ., 94 Fed.Appx. 320, 326–27 (6th Cir.2004)). According to the case law, PTSD is an impairment. "There is no doubt PTSD is a psychiatric impairment which may qualify for disability status under the ADA if the impairment substantially limits a person's major life activities or is regarded by the employer as doing so." Sherback v. Wright Automotive Group, 987 F.Supp. 433 (W.D. Penn. 1997) (quoting Hatfield v. Quantum Chemical Corp., 920 F.Supp. 108 (S.D.Tex.1996); Coaker v. Home Nursing Services, Inc.,

1996 WL 316739 (S.D.Ala.1996)). “[W]e must assume that Rohan's [the Plaintiff's] depression and PTSD are mental impairments within the meaning of the ADA.” Cf. *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 467 n. 3 (4th Cir.1999) (recognizing depression as an impairment); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050 (5th Cir.1998) (recognizing PTSD as an impairment). *Rohan v. Networks Presentations, LLC*, 375 F.3d 266 (4th Cir. 2004).

PTSD must be more than an impairment to qualify as a disability under the ADA, though. See *Pinchot v. Mahoning County Sheriff's Dep't*, 843 N.E.2d 1238 (Ohio Ct. App. 2005) (quoting *Hamilton v. Southwestern Bell Tel. Co.* (C.A.5 1998), 136 F.3d 1047)) (“It has been held that PTSD with impairment, standing alone, is not necessarily a disability contemplated by the ADA.”). The PTSD must substantially limit one or more major life activities. Based on the differing facts of each case, some courts have held that PTSD is a disability under the ADA while others have held otherwise. See *Rohan*, supra (depression and PTSD did not limit a major life activity); *Sherback*, supra (genuine issue of material fact as to whether plaintiff is disabled as a result of PTSD, within the meaning of the ADA); *Pinchot*, supra (Pinchot [plaintiff] is not disabled as defined under R.C. Chapter 4112 [Ohio law] and the ADA).⁴

In conclusion, the ADA does not provide a definite answer as to whether a person with PTSD is a “handicapped person” since each case is decided on an individual basis. As discussed earlier, Congress intended the focus to be on the disabling effect of PTSD and other conditions rather than the specific diagnosis.

III. Service Animals

It is understood that restaurant owners, managers, and employees in South Carolina need guidance on how to handle the person with PTSD and her service animal in the scenario you provided. Accordingly, this Office will examine the law on service animals. As stated above, section 43-33-20(c) provides:

(c) Every handicapped person has the right to be accompanied by an assistance dog, especially trained for the purpose, in any of the places listed in item (b) of this section without being required to pay an extra charge for the assistance dog. Each handicapped person is liable for any damage done to the premises or facilities by the dog.

S.C. Code Ann. § 43-33-20(c), supra.

“Assistance dog” is not defined by South Carolina law. However, there is evidence to suggest that an “assistance dog” equates with a “service animal” under South Carolina law. “It is well settled that the

⁴ The events in *Pinchot* and *Sherback* occurred prior to the ADA Amendments Act of 2008, Pub.L.No. 110-325, 112 Stat. 3353 (2008), which expanded the coverage of the ADA. See *Evola*, supra ([a]fter a [sic] court decisions construing the term “disability” too restrictive, in 2008 Congress passed the ADA Amendments Act (“ADAAA”) that requires the term “disability” to be construed broadly.)) The courts may rule differently if these cases were heard today.

title or caption of an act may be considered to aid in the construction of a statute and to show the intent of the Legislature.” Op. S.C. Att’y. Gen., July 25, 2014 (2014 WL 3886690) (quoting Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972). University of S.C. v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966)). The title to Act No. 147 of 1987 provides:

An Act to Amend Sections 43-33-20 and 43-33-70, Code of Laws of South Carolina, 1976, Relating to the Rights of Blind and Other Physically Disabled Persons to Equal Access to Public Accommodations and Housing, so as to Extend the Rights Allowed Blind and Deaf Persons with Guide Dogs to All Handicapped Persons Requiring Assistance Dogs; and to Amend Section 43-33-30, Relating to the Duties of Drivers in Approaching Persons with White Canes or Guide Dogs, so as to Extend the Provisions to Include Assistance Dogs Accompanying Any Handicapped Person.

Act Number 147 states that the rights allowed blind and deaf persons with guide dogs will be extended to all handicapped persons requiring assistance dogs. Section 47-3-920 defines a “guide dog” as “a dog that is trained for the purpose of guiding blind persons or a dog trained for the purpose of assisting hearing impaired persons.” S.C. Code Ann. § 47-3-920(1) (1976 Code, as amended). So, a “guide dog” can not assist all handicapped people since it only assists blind and deaf people. However, a “service animal” is “an animal that is trained for the purposes of assisting or accommodating the sensory, mental, or physical disability of a disabled person” (see S.C. Code Ann. § 47-3-920(4) (1976 Code, as amended)) and therefore can assist all handicapped people. Therefore, our determination is that an assistance dog and a service animal have the same duties; to assist all handicapped people.

This is supported by S.C. Code Ann. Regs. 61-25, section 1-201.10 (112) (1976 Code, as amended), dealing with retail food establishments, which defines a “service animal” as “an animal such as a guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability per the *Americans for Disabilities Act*.”

The South Carolina Code of Regulations permits a service animal to enter a retail food establishment under certain circumstances. The regulation provides:

(A) Except as specified in (B) and (C) of this section, live animals may not be allowed on the premises of a retail food establishment.

(B) Live animals may be allowed in the following situations if the contamination of food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles can not result. . .

(3) In areas that are not used for food preparation and that are usually open for customers, such as dining and sales areas, service animals as defined by the *Americans with Disabilities Act* that are controlled by the disabled employee or person, if a health or safety hazard will not

result from the presence or activities of the service animal. . . .

S.C. Code of Regulations R. 61-25, section 6-501.115 (1976 Code, as amended).

Therefore, restaurant owners and managers have a duty under South Carolina law to admit service animals to the premises if it will not endanger the health or safety of the general public.

Since South Carolina law does not provide any more guidance, we will now examine the ADA for assistance. The Department of Justice issued a regulation in which it defined "service animal" as follows:

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. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. 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 (emphasis added).

For purposes of implementing the ADA, the Department of Justice has additionally provided the following regarding the definition of service animals:

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. . .

United States Department of Justice, ADA Requirements: Service Animals (July 2011), available at www.ada.gov/service_animals_2010.htm (emphasis added).

28 C.F.R. Pt. 36, App. A elucidates on the tasks that service animals provide for disabled people who have mental illnesses. It explains:

It is the Department's view that an animal that is trained to "ground" a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event. . .

The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding individuals to take medicine, providing safety checks or room searches for individuals with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations. . .

(emphasis added).

The ADA makes it clear that a service animal can be used to assist a person with PTSD. But the service animal can not be used for emotional support purposes. Instead, the service animal must recognize when the person with PTSD needs assistance and perform work or tasks directly related to the PTSD.

Courts have been given the difficult responsibility of determining whether or not dogs are service animals. The most helpful cases are Stamm v. N.Y.C. Transit Authority, 2011 WL 1315935 (E.D.N.Y. 2011); Miller v. Ladd, *supra*; and Delaney v. Cherokee Health Systems, 2012 WL 5986349 (E.D. Tenn. 2012).

In Stamm, the plaintiff, who claimed she suffered from PTSD and major depressive disorder, argued that her dogs were service dogs and not emotional support animals. She claimed that her service dogs were able to alert her when she began to disassociate and assist her "in staying in the present." She said that one of the dogs was trained to alert her by pawing her leg upon sensing that she was emotionally upset

and that the pawing refocused her and kept her from disassociating. As a result, she rarely had flashbacks while using a service dog. She said that she trained all three of her dogs to mitigate her posttraumatic stress disorder by ignoring her triggers in a way that virtually eliminated her flashbacks. The court reasoned that this evidence may be sufficient to establish that the tasks which these dogs had been trained to perform fit within the category of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effect.

In Miller, the Court ruled that a restaurant patron who suffered from a variety of conditions, including anxiety disorder and post traumatic stress disorder, had sufficient evidence to present a genuine issue as to whether her dog qualified as a service animal. The patron testified at her deposition that she researched service animals before obtaining a service dog and had selected her dog from the shelter after the shelter staff had helped her identify the animal most suited to service work. She further testified that she began training the dog as soon as she got her, obtained professional help to train the dog, and began training the dog to alert her when the patron was starting or having a panic attack and that the dog alerted her to her anxiety attacks and sleep attacks.

In Delaney, the Court dismissed the plaintiff's complaint. The Court reasoned that the plaintiff did not allege any particular function that her alleged service dog provided and did not allege that the dog was trained to do anything for the plaintiff at all. The court noted that the plaintiff alleged the dog mitigated her condition but both the condition and the dog's role in mitigating the condition was unclear.

The Department of Justice has stated in a regulation that service animals must be allowed in certain areas of a public accommodation. However, the regulation provided certain responsibilities for both the disabled person and the public accommodation and it explained when a service animal can be required to leave the premises. The regulation provides:

(c) Service animals—

(1) General. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.⁵

(2) Exceptions. 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.

⁵ The Department of Justice is pretty clear that the ADA trumps state law. "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." United States Department of Justice, ADA Requirements: Service Animals (July 2011), [supra](#).

(3) If an animal is properly excluded. 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.

(4) Animal under handler's control. A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).

(5) Care or supervision. A public accommodation is not responsible for the care or supervision of a service animal.

(6) Inquiries. A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained,⁶ or licensed as a service animal.

⁶ Congress does not require service animals to have any type of specific training under the ADA. Miller v. Ladd, 2010 WL 2867808 (N.D. Cal. 2010) explains:

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

Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).⁷

(7) Access to areas of a public accommodation. Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.

(8) Surcharges. A public accommodation shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal. . . .

28 C.F.R. 36.302(c).

The problem for owners, managers, and employees of restaurants is recognizing whether a dog is a service animal or is merely used for emotional support. In the fact pattern you provided regarding the person with PTSD and her service animal, the restaurant was allowed to ask whether the dog was used because of a disability and what work or task the dog performed. The restaurant could not ask the person with PTSD the nature of her disability nor could it ask for proof, such as documentation or a demonstration by the animal.

Furthermore, the restaurant had the right to ask the person with PTSD to remove the service animal from the premises if the person with PTSD did not control the dog by leash, voice control, signals, or other means or if the service animal was not housebroken. However, the restaurant still had the duty to provide

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).

⁷ The Department of Justice has also limited inquiries to the following: “[w]hen it is not obvious what service an animal provides. . . Staff cannot. . . ask that the dog demonstrate its ability to perform the work or task.” United States Department of Justice, ADA Requirements: Service Animals (July 2011), [supra](#).

the person with PTSD the opportunity to obtain food and service once the dog had been removed from the restaurant.

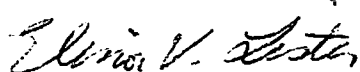
CONCLUSION:

In conclusion, this Office believes that the law is as follows:

1. Since section 43-33-20 and section 45-9-10 deal with the same subject matter, discrimination against a certain type of person in public places, both of the statutes are governed by the same definition of "place of public accommodation." Our opinion is that the Legislature intended the definition of "place of public accommodation" under both statutes to include a restaurant which is licensed by the State, its agencies, or by local governmental entities.
2. Neither South Carolina law nor the Americans with Disabilities Act ("ADA") provides a definite answer as to whether a person with PTSD is a "handicapped person." Under the ADA, each case is decided on an individual basis and Congress intended the focus to be on the disabling effect of PTSD and other conditions rather than the specific diagnosis.
3. Restaurant owners and managers have a duty under South Carolina law to admit service animals to the premises if it will not endanger the health or safety of the general public. However, the United States Department of Justice is clear under the ADA that "[e]stablishments that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises."
4. The ADA indicates that a service animal can be used to assist a person with PTSD.
5. In the fact pattern you provided regarding the person with PTSD and her service animal being asked to leave the restaurant, the restaurant was allowed to ask whether the dog was used because of a disability and what work or task the dog performed. The restaurant was not allowed to ask the person with PTSD the nature of her disability nor could it ask for proof, such as documentation or a demonstration by the animal. Furthermore, the restaurant had the right to ask the person with PTSD to remove the service animal from the premises if the person with PTSD did not control the dog by leash, voice control, signals, or other means or if the service animal was not housebroken. However, the restaurant still had the duty to provide the person with PTSD the opportunity to obtain food and service once the dog had been removed from the restaurant.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

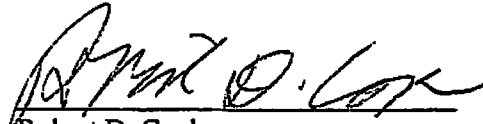
Sincerely,



Elinor V. Lister
Assistant Attorney General

The Honorable Larry A. Martin
Page 17
February 9, 2015

REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General