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Opinion No. 13-59

Admission of Service Dogs in Places of Public Accommodation

QUESTION

Does the federal Americans with Disabilities Act conflict with, and preempt, the provisions of Tenn. Code Ann. § 62-7-112 addressing the admission of service dogs to places of public accommodation?

OPINION

No.

ANALYSIS

The Americans with Disabilities Act ("ADA") provides that "[n]o 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." 42 U.S.C. § 12182(a). Discrimination includes "a failure [by an entity] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations being offered." 42 U.S.C. § 12182(b)(2)(A)(ii).[1]

Effective March, 15, 2011, the federal regulations related to the ADA were revised to address how a place of public accommodation must address the use of service animals[2] by an individual with a disability, stating in relevant part as follows:

[1] The terms "private entity" and "public accommodation" are defined at 42 U.S.C. § 12181.

[2] The term "service animal" is defined as:

> 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

(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.

(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.

(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, or licensed as a service animal.

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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 (2011).

> 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).
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> (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.
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> (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) (2011). *See generally* Jay M. Zitter, Annotation, *What Constitutes "Service Animal" and Accommodation Thereof, Under Americans with Disabilities Act (ADA)*, 75 A.L.R. Fed.2d 49 (2013).

The Tennessee General Assembly in 2013 amended the language of Tenn. Code Ann. § 62-7-112 for the purpose of making this statute consistent with the aforementioned federal regulations. Tenn. Pub. Acts, ch. 69 (2013) (the caption to Chapter 69 specifically states that this bill is intended "to amend Tennessee Code Annotated, Title 62, relative to consistency with the service animal control and inquiry provisions of the federal regulations implementing Title 111 of the Americans with Disabilities Act (ADA)"). Effective July 1, 2013, Tenn. Code Ann. § 62-7-112(a) now provides:

> (1) No proprietor, employee or other person in charge of any place of public accommodation, amusement or recreation, including, but not limited to, any inn, hotel, restaurant, eating house, barber shop, billiard parlor, store, public conveyance on land or water, theater, motion picture house, public educational institution or elevator, shall refuse to permit a blind, physically disabled or deaf or hard of hearing person to enter the place or to make use of the accommodations provided when the accommodations are available, for the reason that the blind, physically disabled or deaf or hard of hearing person is being led or accompanied by a dog guide. A dog guide shall be under the control of its handler. A place of public accommodation shall not require documentation, such as proof that the animal has been certified, trained or licensed as a dog guide.
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> (2) (A) No proprietor, employee or other person in charge of any place of public accommodation, amusement or recreation, including, but not limited to, any inn,

hotel, restaurant, eating house, barber shop, billiard parlor, store, public conveyance on land or water, theater, motion picture house, public educational institution or elevator, shall refuse to permit a dog guide trainer to enter such place or to make use of the accommodations provided in those places, when the accommodations are available, for the reason that the dog guide trainer is being led or accompanied by a dog guide in training; provided, that the dog guide in training, when led or accompanied by a dog guide trainer, is wearing a harness and is held on a leash by the dog guide trainer or, when led or accompanied by a dog guide trainer, is held on a leash by the dog guide trainer; and provided, further, that the dog guide trainer shall first have presented for inspection credentials issued by an accredited school for training dog guides.

(B)(i) For purposes of this section, "dog guide in training" includes dogs being raised for an accredited school for training dog guides; provided, however, that a dog being raised for that purpose is:

(a) Being held on a leash and is under the control of its raiser or trainer, who shall have available for inspection credentials from the accredited school for which the dog is being raised; and

(b) Wearing a collar, leash or other appropriate apparel or device that identifies the dog with the accredited school for which it is being raised.

(ii) "Dog guide in training" also includes the socialization process that occurs with the dog's trainer or raiser prior to the dog's advanced training; provided, that the socialization process is under the authorization of an accredited school.

(3) A place of public accommodation may ask a person to remove a dog guide or dog guide in training from the premises if:

(A) The dog guide or dog guide in training is out of control and its handler does not take effective action to control it; or

(B) The dog guide or dog guide in training is not housebroken.

Tenn. Pub. Acts, ch. 69 (2013).

The question posed is whether Tenn. Code Ann. § 62-7-112(a) has met its stated goal of being consistent with federal ADA requirements for the admission of service dogs by individuals with a disability into places of public accommodation. Any conflict between this State statute and the ADA could result in the partial or complete preemption of the State statute under the Supremacy Clause of the United Constitution. U.S. Const., art. VI, ¶ 2. The Tennessee Supreme

Court recently explained the concept of preemption and the judicial standards utilized to determine whether a state law is preempted by federal law:

> Article VI, paragraph 2 of the United States Constitution (the "Supremacy Clause") provides as follows:
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> > This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be *the supreme Law of the Land*; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*
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> (Emphasis added.) Pursuant to the Supremacy Clause, federal law sometimes pre-empts otherwise permissible state laws, rendering the state laws without force. . . . "When Congress legislates in an area within the federal domain, it may, if it chooses, take for itself all regulatory authority over the subject, share the task with the states, or adopt as federal policy the state scheme of regulations." *Narragansett Elec. Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358, 1361 (1977) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Courts have historically recognized both "express pre-emption" and "implied pre-emption." Express pre-emption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) . . . Even when there is no explicit textual reference to pre-empting state law, pre-emption may be implicit. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (quoting *English*, 496 U.S. at 78, 110 S.Ct. 2270) . . . Implied pre-emption typically falls into one of three categories: direct conflict pre-emption; "purposes and objectives" conflict pre-emption; and field pre-emption. Conflict pre-emption is based on the rule that "state law is pre-empted to the extent that it actually conflicts with federal law." *English*, 496 U.S. at 79, 110 S.Ct. 2270. Direct conflict pre-emption occurs when there is an inescapable contradiction between state and federal law—for example, "where it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). Even when there is no direct contradiction, however, state law may be pre-empted by federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Field pre-emption occurs when federal regulation of a field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S. at 230, 67 S.Ct. 1146. If the context and substance of the congressional enactments "indicate an intent to occupy a given

> field to the exclusion of state law," field pre-emption precludes intrusion by the state. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

Leggett v. Duke Energy Corp., 308 S.W.3d 843, 852-54 (Tenn. 2010). *See also Giggers v. Memphis Housing Auth.*, 363 S.W.3d 500, 504-05 (2012).

Courts, in conducting any preemption analysis, must begin "with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Leggett*, 308 S.W.3d at 854 (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008)). *See Pendleton v. Mills*, 73 S.W.3d 115, 127-28 (Tenn. Ct. App. 2002) (observing that that "the proper approach is to reconcile the federal and state law . . . rather than to seek out conflict where none clearly exists").

Applying these principles to Tenn. Code Ann. § 62-7-112(a) as amended by Chapter 69, no conflict exists between this statute and the ADA and its implementing regulations. Tenn. Code Ann. § 62-7-112(a) as amended became effective July 1, 2013 and eliminates the prior law's requirement that a disabled person operating a guide dog "shall first have presented for inspection credentials issued by an accredited school for training dog guides" before admittance to a place of public accommodation. *Compare* Tenn. Code Ann. § 62-7-112(a)(1)(A) (2001) *with* Tenn. Code Ann. § 62-7-112(a)(1). The statute now expressly prohibits such an inquiry: "A place of public accommodation shall not require documentation, such as proof that the animal has been certified, trained or licensed as a dog guide." Tenn. Code Ann. § 62-7-112(a)(1). The statute also deletes any requirement that the guide dog wear a harness and be held on a leash; instead, "[a] dog guide shall be under the control of its handler." *Compare* Tenn. Code Ann. § 62-7-112(a)(1)(2001) *with* Tenn. Code Ann. § 62-7-112(a)(1). These revisions to Tenn. Code Ann. § 67-7-112(a)(1) mirror the requirements for admission of guide dogs of disabled persons to places of public accommodation established by the federal ADA regulations. *Compare* Tenn. Code Ann. § 67-7-112(a)(1) *with* 28 C.F.R. § 36.302(c) (2011).

The provisions of Tenn. Code Ann. § 67-7-112(a)(2)(A) do state that a trainer bringing a dog guide in training to a place of public accommodation must, to be admitted, present "for inspection credentials issued by an accredited school for training dog guides." The ADA definition of service animals, set forth at 28 C.F.R. § 36.104 (2011), expressly states that the term service animals only includes dogs that are already "individually trained." A dog that is not yet trained thus is not covered by the ADA standards for how places of public accommodation must address the admission of service animals assisting disabled persons. Accordingly Tenn. Code Ann. § 67-7-112(a)(2)(A), which only affects the admission of "dogs in training," does not conflict with the ADA and its underlying regulations.

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