

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
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MADISON, WISCONSIN

Stephen Bottila 2718 Pheasant Ridge Trl Madison WI 53713 <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> McDonalds 2402 S Park St Madison WI 53713 <p style="text-align:center">Respondent</p>	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 20073203
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The above-captioned matter came before Hearing Examiner Clifford E. Blackwell, III, for a hearing on the merits of the complaint at 9:00 a.m. on May 14, 2009 in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., in the City of Madison. The Complainant, Stephen M. Bottila, appeared in person and without counsel. The Respondent, Missoula Mac, Inc., appeared by its corporate representative, Jeanette Apland, and by its attorney, Jeffrey Younger of Lee, Kilkelly, Paulson and Younger, S.C.

Based upon the record in this matter, including the hearing, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an adult male resident of the City of Madison.
2. The Respondent is a business that owns and operates a number of McDonald's restaurant franchises in the State of Wisconsin including several within the City of Madison. One restaurant is located at 2402 S. Park Street within the City of Madison.
3. The Complainant is an individual with epilepsy. Though he takes medication he still experiences seizures. The Complainant's condition prevents him from holding certain types of employment, particularly those positions involving the operation of motor vehicles or heavy equipment. He finds it difficult to maintain employment due to the problems associated with the random nature of his seizure disorder.
4. The Complainant receives assistance from the Social Security Administration under the Retirement Survivorship Disability Insurance (RSDI) program. This assistance would be converted to Supplemental Security Income (SSI) should the Complainant be employed.
5. The Complainant is able to function more fully with the assistance of a dog named Justice. Justice detects and is able to identify the onset of some seizures and alerts the Complainant by placing his (Justice's) head in the Complainant's lap. In this manner, Justice serves the Complainant as a seizure alert dog. This is a learned ability on the part of Justice and was not the result of specific training.
6. Justice may also serve as a seizure response dog. At the end of some seizures, the Complainant observes that Justice attempts to show affection and care for the Complainant and to occasionally act in a protective manner.
7. On or about November 5, 2007, the Complainant accompanied three friends to the McDonald's located at 2402 S. Park Street owned by the Respondent so that his friends could meet with a potential landlord to sign a

lease. His friends were going to meet their potential landlord at the restaurant. The Complainant was accompanied by Justice.

8. The Complainant and Justice entered the restaurant during the dinner rush between 6:00 and 7:00 p.m. The Complainant and Justice were observed entering the restaurant by Randy Johnson, the second assistant manager who was the manager in charge of the restaurant at the time.

9. The Complainant and Justice went to the counter to order a milk shake. Once served, the Complainant and Justice took a seat in a booth adjacent to the booth occupied by his friends.

10. After the Complainant had been seated for several minutes, he was approached by Johnson. Johnson is a moderately dark skinned African American of slight build and medium height.

11. Johnson approached the Complainant to inform him that dogs that are not service animals are prohibited in the restaurant. Johnson did not identify the Complainant as an individual with a disability. Johnson also had concerns about the Complainant's dog because to Johnson, Justice appeared to be unusually thin, did not appear healthy and did not appear well cared for. Johnson did not identify Justice as a service dog as Justice was not wearing any visible indication of his status. Neither did Justice have any harness or other gear.

12. The Complainant informed Johnson that Justice was a service dog and that the Respondent would need to accommodate the Complainant's disability. Johnson doubted the Complainant's explanation due to Johnson's personal observation of the Complainant and Justice. However, Johnson indicated that he would consult with his supervisor.

13. Johnson left the Complainant at the booth and went to the manager's office to call his supervisor, the Area Manager, Teresa Peterson. In November of 2007, Peterson's area of responsibility included the restaurant at 2402 S. Park Street. The Manager's Office was located in an area not observable from where the Complainant sat.

14. Johnson explained to Peterson his observation of the Complainant and Justice and explained his reservations about the status of Justice as a service dog. Peterson directed Johnson to return to the Complainant and reiterate that if the Complainant's dog was not a service dog that the dog would have to be removed from the restaurant. Peterson emphasized that under no circumstance was the Complainant to be told that he had to leave the restaurant.

15. Johnson returned to the Complainant's booth and informed the Complainant of the information provided by Peterson. Johnson returned to his duties, trusting that the Complainant would "do the right thing."

16. The Complainant took Justice and sat at a seat outside the restaurant. Johnson observed the Complainant's departure.

17. The Respondent maintains a large volume of policies and procedures at each restaurant location. These procedures include a description of how to properly interact with customers who are accompanied by a service animal.

18. The Respondent's managers, including both Johnson and Peterson, have received some training that includes issues around the use of service animals and the proper procedures for interacting with customers requiring accommodation of a disability.

19. As the Area Manager, Peterson is much more familiar with Respondent's policies and procedures than store managers or first or second assistant managers. It is for this reason that lower level managers are encouraged to contact their area managers with difficult questions.

CONCLUSIONS OF LAW

1. The Complainant is a person with a disability within the meaning of the Equal Opportunities Ordinance.

2. The Complainant's dog, Justice, provides a reasonable accommodation for the Complainant's disability.

3. The Respondent did not fail to reasonably accommodate the Complainant's disability on or about November 5, 2007 at the Respondent's restaurant located at 2402 S. Park Street.
4. The Respondent did not violate the Equal Opportunities Ordinance.

ORDER

The complaint is hereby dismissed. The parties shall bear their own costs and fees.

MEMORANDUM DECISION

At various times during the processing of this complaint, it appeared that the issue at the time of hearing might be whether the Complainant had a disability or whether his dog, Justice, was a service animal or a reasonable accommodation for his disability. However, by the time of hearing, the issue really had been transformed into one of the general burden of proof to be carried by the Complainant.

In its post-hearing brief, the Respondent does argue that the Complainant failed to carry his burden of proof regarding whether Justice could be considered a service dog or at least a reasonable accommodation for the Complainant's seizure disorder. As the general issue of the burden of proof is dispositive of the claims in this matter, the Hearing Examiner will address Justice's suitability as a reasonable accommodation later in this memorandum.

At hearing, the Respondent did not challenge whether the Complainant had a disability. What became clear at hearing was the substantial difference between the Complainant's version of events on or about November 5, 2007 and that of the Respondent.

The Respondent operates numerous McDonald's restaurants under franchise in the southern Wisconsin area. This includes several within the City of Madison, including the one in question in this complaint located at 2402 S. Park Street.

The Complainant has been a returning customer at the restaurant in question. He was served prior to the events of November 5, 2007 and has been served subsequent to that date. He has, for the most part, been accompanied by his dog, Justice.

On or about November 5, 2007, the Complainant accompanied friends who were going to meet a potential landlord and to sign a lease. The Complainant was accompanied by Justice. This meeting occurred during the Respondent's dinner rush period between 6:00 p.m. and 7:00 p.m.

The Complainant's friends sat at one booth and the Complainant and Justice sat at an adjacent booth. The Complainant didn't want to take up space that his friends might need.

The Complainant and Justice went to the counter to order a beverage. The Complainant asserts that the Respondent's manager, Randy Johnson, approached him and demanded to know why he had a dog in the restaurant or something to that effect. The Complainant also contends that Johnson directed him to leave unless the Complainant produced evidence of his disability and Justice's training as a service dog.

The Respondent denies that Johnson approached the Complainant at the counter. Instead, the Respondent asserts that Johnson's initial contact with the Complainant occurred at the Complainant's booth after the Complainant had placed his order and received his drink.

Johnson testified that he could not have confronted the Complainant at the counter because the restaurant was busy during the dinner rush and Johnson was occupied with restaurant operations. Johnson additionally states that it is not the Respondent's policy to engage customers in a manner that would be disruptive or draw attention to a problem.

Johnson testified that he initially approached the Complainant at the booth in which the Complainant was sitting. Johnson did not immediately assume that Justice was a service dog because of the lack of a harness or

other identifying material. Additionally, Johnson's observation of Justice caused him to be concerned as Justice appeared thin and not particularly well cared for.

Johnson testified that he informed the Complainant that his dog would have to leave unless it was a service dog. The Complainant identified Justice as a service dog. Though Johnson did not find the Complainant's identification of Justice as a service dog to be credible, Johnson indicated that he would contact his supervisor for further instructions.

Johnson stated at hearing that he in fact contacted his Area Manager, Teresa Peterson, for further instructions.

Both Johnson and Peterson testified that Johnson expressed his doubts about the Complainant's identification of Justice as a service dog. However, they both testified that Johnson was instructed to tell the Complainant that only service dogs were permitted on the premises and that if Justice was not a service dog, Justice would have to leave. Peterson stressed to Johnson that the Complainant was not to be told that he (the Complainant) would have to leave.

Johnson testified that he returned to the Complainant's booth and reiterated that if Justice was not a service dog, Justice would have to leave. Johnson left the Complainant's booth trusting that the Complainant would do what was right. Johnson observed that the Complainant and Justice left shortly after his discussion.

At the time of hearing, the Complainant did not call any witnesses. Though he had identified his friends as potential witnesses, none of them appeared at the time of hearing.

At the time of hearing, the Complainant testified about the events of November 5, 2007. The Respondent produced the testimony of Johnson as to the same events. Concerning what happened during the discussions between the Complainant and Johnson, no witnesses testified.

In a discrimination case, the Complainant always bears the ultimate burden of proof as to all elements of the prima facie claim. McDonnell Douglas v. Green 411 U.S. 792 (1973); Texas Dept. of Community Affairs, v. Burdine, 450 U.S. 248 (1981). This assignment of the burden of proof is as applicable to the claim in this complaint as in any other. In short, it is up to the Complainant to demonstrate by the greater weight of the credible evidence that his version of events is more likely than Respondent's version.

In the present matter, it is the Complainant's burden to convince the Hearing Examiner that his version of events is more likely than that of Johnson's. If the Hearing Examiner either finds Johnson to be more credible or determines that neither the Complainant nor Johnson is more credible than the other, the Complainant fails to carry his burden of proof. If the Complainant fails to carry his burden of proof, his complaint must be dismissed.

The Hearing Examiner does not doubt the Complainant's sincerity in bringing this claim. However, the Complainant's testimony was sometimes vague, contradictory and lacked external support. That the Complainant and Johnson had at least two discussions about service dogs and whether Justice could stay seem not to be in doubt. That Johnson ordered the Complainant to produce documentation of the Complainant's disability or Justice's training or ordered the Complainant to leave is not supported by the record as a whole.

At hearing, the Complainant admitted that he might not have all the facts entirely clear. This was born out as contradictions between his hearing testimony and that given during his deposition. At one point, he identified Johnson as a White man. It is clear from the record that Johnson is an African American.

The Respondent suggests that the Complainant may have been recalling different events at different restaurants and that his testimony represents an amalgam of his past experiences. The Hearing Examiner is not prepared to make such a determination. It is sufficient for this purpose to indicate that as between the Complainant and Johnson, Johnson's testimony was more credible.

Johnson's testimony reflected a reasonable explanation for his version of events, i.e., that he would not have confronted the Complainant at the counter because of the press of other duties during the rush period. Equally,

Peterson's testimony serves to bolster Johnson's testimony about the content of his statements to the Complainant.

In finding that Johnson's testimony was generally more credible than that of the Complainant, the Hearing Examiner does not intend to indicate that Johnson's testimony did not raise questions in the Hearing Examiner's mind. When questioned by all sides about his doubts concerning Justice's status as a service dog, Johnson equivocated and need to be pushed into an answer. It seems from Johnson's reaction to the Complainant's questioning that Johnson and the Complainant do not particularly like each other. That some degree of animosity might exist between the Complainant and Johnson does not overcome the weight of testimony supporting Johnson's version of events. Johnson's testimony is consistent with the operation of a busy restaurant within the experience of the Hearing Examiner. Johnson's testimony is also corroborated to a great degree by that of Peterson.

On this record, the Hearing Examiner finds that Johnson approached the Complainant at the Complainant's booth. Additionally, Johnson did not require the Complainant to produce evidence of his disability or the training of Justice to be a service dog. Given the record as a whole, the Hearing Examiner concludes that Johnson did not order either the Complainant or his dog from the restaurant.

The Respondent challenges whether Justice is either a service dog or represents, at least, a reasonable accommodation of the Complainant's seizure disorder. In making this challenge, the Respondent refers to the Commission's decision in Nichols v. Buck's Madison Square Garden Tavern, Case No. 20033011 (Comm. Dec. 5/22/06, other citations omitted). In that case, the Commission adopted the Hearing Examiner's formulation of a test for determining whether an animal represents a reasonable accommodation for a non-physical disability. Essentially, the Hearing Examiner determined that in order to be a reasonable accommodation, the animal must be reasonably trained to assure public safety and serve the purpose of reducing or improving the condition or affects of the Complainant's disability. The training required of an animal really goes to the requirement for assuring public safety, not to ameliorate the Complainant's disability.

There must be credible, preferably professional testimony, about the positive effect of the animal on the disability of the Complainant. In the Nichols case, that testimony was provided by the Complainant and by his counselor, Merle Bailey. Bailey verified that the presence of Nichols's dog helped him to overcome the anti-social symptoms of his mental illness.

In the present matter, the Respondent contends that Justice cannot be a reasonable accommodation for the Complainant's seizure disorder because only the Complainant testified about Justice's actions. Justice's actions were not the result of special training and that on one occasion, Justice did not behave as the Complainant indicated he should. In the Hearing Examiner's mind, the Respondent misses the mark in several key ways. It must be stressed that the outcome of this case does not rest up on resolution of this issue, but the issue deserves clarification.

The Complainant testified about his observations of Justice's conduct and behavior and how he has come to rely on Justice's conduct to alert him to potential seizure activity. The Complainant testified that Justice's alertness to the Complainant's condition was apparently learned over time by Justice and was not the result of specialized training by the Complainant or a third party. Despite the lack of specialized training, Justice is able to relieve the Complainant of some of the problems surrounding his seizure disorder by alerting the Complainant to the imminent onset of some seizures.

The Complainant also testified, to a lesser degree, about Justice's assisting him in the post-seizure stages by showing attention and affection. The Complainant was considerably less certain about Justice's affect as a seizure response dog.

In determining whether Justice meets the requirements for being considered a reasonable accommodation for the Complainant's seizure disorder, the Hearing Examiner must find that Justice is not a service dog as that term is generally used. In this context, a service dog is one that has received specialized training and that the training is related to replacement of a lost function. In almost all circumstances, the term service dog is applied to cases of physical disabilities such as blindness, deafness or the loss of mobility. Such sensory or motor deficiencies are not in question in the present matter and were not present in the Nichols case.

With Justice not meeting the broader definition of service dog, the question becomes does Justice serve as a reasonable accommodation of the Complainant's seizure disorder? The key question in making this determination is does Justice, through some trait, skill or training, alleviate some important aspect of the Complainant's disability so as to allow the Complainant to perform those functions of daily living that his disorder might otherwise prevent? A subsidiary question is whether Justice, by his nature or training, is sufficiently safe so as not to pose a threat to public health or safety.

While it would be preferable for the Complainant to have provided some corroboration of Justice's positive impact on his ability to function in public settings, the Complainant's testimony on Justice's positive affect is sufficient to raise an inference that Justice serves the purpose of a reasonable accommodation. By raising this inference, the Complainant shifts the burden to the Respondent to rebut the inference. In this regard, the Respondent fails. The Respondent did not present any testimony countering the Complainant's about Justice's ability to warn him of the onset of a seizure. While the Respondent questioned the Complainant about Justice's lack of training and Justice's failure to warn the Complainant with 100% accuracy of the onset of a seizure, this fails to rebut the Complainant's testimony. The testimony of Tracy Shanad only creates doubt about Justice's effectiveness in responding to an existing seizure and did not deal with his ability to detect the onset of a seizure.

Though neither party should take the finding that Justice serves the purpose of reasonably accommodating the Complainant's seizure disorder by alerting the Complainant to the onset of some seizures for purposes of this case, a more extensively prepared and argued record might lead to a contrary conclusion. Had the Respondent presented some evidence concerning seizure dogs and their training or ability to rebut the testimony of the Complainant, the Complainant's testimony may well not have been enough to prevail on this point.

The Hearing Examiner, in this light, finds that the record presented by the Complainant on whether Justice accommodates his seizure disorder by acting as a seizure response dog fails to establish Justice as a reasonable accommodation in that regard. The Complainant's own testimony on Justice's activity was vague and subject to a lack of verification. As the Respondent points out, the Complainant while in the midst of a seizure, is unaware of his surroundings and has no credible or firsthand knowledge of Justice's service or lack of service to him. The Complainant's own testimony indicates that his observations are inconsistent and not well defined.

In summary, it was not seriously contested that the Complainant is a person with a disability. The record demonstrates that Justice reasonably accommodates the Complainant's seizure disorder by alerting him to the onset of some seizures to allow him time to prepare himself. The record does not establish that Justice serves as a reasonable accommodation of the Complainant's seizure disorder by acting a seizure response dog.

Despite the Complainant's having demonstrated that his seizure disorder is a disability and that Justice, in some respects, is a reasonable accommodation for that disability, the Complainant fails to establish that the Respondent denied him equal access to a public place of accommodation or amusement because of his disability or because of the presence of his dog Justice. The Respondent's policies and procedures relating to the presence of service animals or non-service animals appear to be appropriate in that they permit persons with an animal needed for an accommodation to remain on the premises. Nothing in this record demonstrates that the Respondent required the Complainant to verify his disability or to produce evidence of Justice's training as a service animal. Further, nothing in this record demonstrates that the Complainant was required to leave himself or to remove Justice from the Respondent's restaurant after the Complainant identified Justice as a service animal.

For the foregoing reasons, the complaint is dismissed.

Signed and dated this 27th day of July, 2009.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner