



Maine Human Rights Commission
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INVESTIGATOR'S REPORT

January 28, 2013

PA11-0237

██████████ (Presque Isle)

v.

██████████ (Augusta)

I. Complainant's Charge:

Complainant ██████████ is blind. He has alleged that he was unlawfully discriminated against in access to a place of public accommodation because of his physical disability in violation of rights accorded him under the Maine Human Rights Act.

II. Respondent's Answer:

Respondent ██████████ ██████████) has taken the position that it was acting in conformity with the instructions from the Department of Health. A fair reading of the charge fails to articulate a claim that Mr. ██████████ was denied the benefits of any services or otherwise discriminated against.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: November 16, 2010.
- 2) Date complaint filed with the Maine Human Rights Commission: March 23, 2011.
- 3) ██████████ is a restaurant and a "public accommodation" under the Maine Human Rights Act.
- 4) Complainant is represented by ██████████. Respondent is represented by ██████████.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution Conference. Based on this review, the complaint has been identified for a shortened Investigator's Report, which summarizes the allegations and denials in relationship to the applicable law but does not fully explore the factual issues presented. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of reasonable grounds or no reasonable grounds in this case.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:

- a) Complainant [REDACTED] LSW, is a Rehabilitation Counselor II for the State of Maine Department of Labor. He is employed by the Division for the Blind and Visually Impaired.
 - b) Respondent [REDACTED] is a restaurant in Augusta.
 - c) Important third parties: Service Animal, Golden Retriever, Flash; Personal Assistant, JM; Manager/Owner, JL; Female Server, RC; Male Staff Person, XX.
 - d) Complainant [REDACTED] is blind. He has alleged that he was unlawfully discriminated against in access to a place of public accommodation because of his physical disability in violation of rights accorded him under the Maine Human Rights Act. Respondent [REDACTED] has taken the position that it was acting in conformity with the instructions from the Department of Health and that a fair reading of the charge fails to articulate a claim that Mr. [REDACTED] was denied the benefits of any services or otherwise discriminated against.
- 2) A summary of the issues from Mr. [REDACTED]'s perspective is offered here:
- a) I am pursuing this charge of discrimination on the basis that [REDACTED] discriminated against me because of my disability in violation of the Americans with Disabilities Act and the Maine Human Rights Act.
 - b) I am blind and as such am substantially limited in the major life activity of seeing. I have a record of disabilities and [REDACTED] regarded me as having disabilities. I have a Golden Retriever named "Flash" who is individually trained to guide me while I am walking and moving around. Flash is a "service animal" as defined by the Maine Human Rights Act and the Americans with Disabilities Act. At all times material to this Charge of Discrimination, I used Flash to assist me with walking and getting around. At all times relevant to this Charge of Discrimination, Flash was necessary to afford me the goods, services, facilities, privileges, advantages and accommodations available from [REDACTED].
 - c) On or about Tuesday, November 16, 2010, I attended a Department of Labor conference at the Augusta Civic Center, Augusta, Maine. After the conference, I went to [REDACTED] for dinner with Personal Assistant. A also had Flash with me to assist me with getting around. Personal Assistant and I were met at the door of [REDACTED] by a hostess who asked how many for dinner. Then Male Staff Person approached and had an exchange with the hostess which sounded like a reprimand, but was in Chinese so I am not sure what was said. Male Staff Person told me that because of the dog, we had to sit in a separate area, which was at the back of the lobby away from the main dining area.
 - d) I told Male Staff Person that Flash is a seeing-eye dog and is allowed to go anywhere I go. I said that I should be able to go into the regular dining room with Flash. Personal Assistant said that it's a federal law. He disregarded this and kept saying "no, no, no." He then led us to our separate area. We were the only ones in this area, while all other diners were seated in the main dining room. When I walked up to the buffet tables guided by Flash and with Personal Assistant, Male Staff Person followed us. Each time I went up to the buffet and everywhere I walked, there was a woman with a bucket on wheels following right behind me, mopping. As more people came into

the restaurant to eat, they were seated in the main dining area. No one else was seated in our area and we remained segregated from others.

- e) We ate, paid our bill and left and the whole time we were segregated, followed and watched by [REDACTED] staff.
 - f) I was embarrassed and humiliated to be treated in this manner.
 - g) I believe that [REDACTED] discriminated against me in ways including but not limited to the following:
 - i. it refused, discriminated against, withheld from me and denied me full and equal enjoyment to the accommodations, advantages, facilities, goods, services or privileges offered by its place of business because of my physical disability;
 - ii. it discriminated against me in the price, terms or conditions upon which access to its accommodation, advantages, facilities, goods, services and privileges depends;
 - iii. it failed to make reasonable modifications in policies, practices or procedures that were necessary to afford me its goods, services, facilities, privileges, advantages or accommodations;
 - iv. it subjected me, as a person with a disability, to separation or segregation;
 - v. it denied me, as a person with a disability, the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation;
 - vi. it afforded me, on the basis of physical disability, with a good , service, facility, privilege, advantage of accommodation that is not equal to that afforded to other individuals;
 - vii. it provided me, on the basis of my physical disability, a good, service, facility, privilege, advantage or accommodation that is different or separate from that provided to other individuals;
 - viii. it failed to afford the goods, services, facilities, privileges, advantages, and accommodations to me, as an individual with a disability, in the most integrated setting.
- 3) [REDACTED] offers the following in support of its position:
- a) [REDACTED] acknowledges many of the facts as alleged in Mr. [REDACTED] Charge. He did come to the restaurant on the date stated; he was accompanied by a friend/associate as well as his service animal, which he identified as such; his party was seated in one of the restaurant's dining rooms that was not crowded; and at some point in time when he and his service dog were at or in the vicinity of the buffet, an employee did mop up behind the dog (to minimize the chance of fur/dander from getting into the food). But the allegation that the actions of the restaurant employees was intended to or in fact served to deny Mr. [REDACTED] free and equal access to all of the restaurant's services/facilities – or was intended to or was in fact discriminatory – is strongly denied.
 - b) According to the waitress who greeted Mr. [REDACTED] party when they entered the restaurant, Female Server, she asked Mr. [REDACTED] if it was okay with him if she seated them in an area of the restaurant that was "less crowded" – in response to which he agreed without apparent objection. [REDACTED] asserts that this was consistent with instructions [REDACTED] had received

approximately two years earlier from the Department of Health for dealing with this exact situation.

4) Further investigation revealed the following:

- a) (Issues and Resolution Conference) Personal Assistant stated that this was absolutely humiliating for both Mr. [REDACTED] and for her. She said that they were mortified because other guests and staff in the restaurant were staring at them and at Flash as though there was something wrong with them. She said that they were not asked if they cared to sit there; Female Server did not ask Mr. [REDACTED] if he was okay with that placement. Male Staff Person stood in front of them with arms crossed and never took his eyes off them as a woman followed them with a yellow industrial bucket filled with hot soapy water, washing the floor behind them.
- b) Manager/Owner stated that while all of this was allegedly going on, she was in the kitchen so she didn't observe any of it. She also said that since this incident, she has changed the policy and that now, people with service animals can sit wherever they want to sit.
- c) [REDACTED] asserted that the actions of the staff were consistent with instructions the restaurant had received approximately two years earlier from the Maine State Department of Health for dealing with this exact situation.
- d) (Issues and Resolution Conference) On the day before the conference, [REDACTED] submitted a letter from a guest which stated:

I have a very young service dog "[REDACTED]." My meal was great. They were very considerate and allowed our group of mine have a choice of seating. My dog is trained to stay quietly under my chair and is not allowed to have any food or be around the buffet. Thank you for a wonderful evening as the first night of a family get together.

[REDACTED] did not know when this note was written.

V. Analysis:

1. The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Service Animal

2. The Maine Human Rights Act ("MHRA"), in relevant part, makes the following unlawful public accommodations discrimination:

For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to refuse to permit the use of a service animal or otherwise

discriminate against an individual with a physical or mental disability who uses a service animal at the public accommodation unless it is shown by defense that the service animal poses a direct threat to the health or safety of others or the use of the service animal would result in substantial physical damage to the property of others or would substantially interfere with the reasonable enjoyment of the public accommodation by others. The use of a service animal may not be conditioned on the payment of a fee or security deposit, although the individual with a physical or mental disability is liable for any damage done to the premises or facilities by such a service animal. 5 M.R.S.A. § 4592(8).

3. "Service animal" is defined, in relevant part, as follows:

[A] 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 such work or tasks include, but are not limited to, assisting an individual who is totally or partially blind with navigation and other tasks, alerting an individual who is deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting an individual to the presence of allergens, retrieving items such as medicine or a telephone, providing physical support and assistance with balance and stability to an individual with a mobility disability and helping a person with a psychiatric or neurological disability 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. 5 M.R.S.A. §4553(9-E)(B).

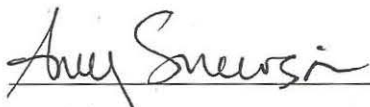
4. The term "direct threat" "means a significant risk to the health or safety of others that can not be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services." 5 M.R.S.A. §4592.
5. "[E]ntities operating places of public accommodation that are concerned with the safety risks posed by a disabled individual must determine whether that individual constitutes a direct threat. When making such a determination, a public accommodation entity must not base its calculus on stereotypes or generalizations about the effects of a disability but rather must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence." *Fitzpatrick v. Town of Falmouth*, 2005 ME 97, ¶28, 879 A.2d 21, 29 (citations and quotations omitted). "The relevant factors that the entity providing the place of public accommodation must weigh and balance are the nature, duration, and severity of the risk and the probability that the potential injury will actually occur." *Id.* at ¶29, 879 A.2d at 29.

6. In determining whether Respondent has established a "direct threat" defense, the focus is on whether Respondent's threat evaluation was objectively reasonable. *See Doe v. Deer Mountain Day Camp, Inc.*, 682 F.Supp.2d 324, 346-347 (S.D.N.Y. 2010). It is not, however, enough that Respondent simply acted in good faith. *See Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S.Ct. 2196, 2210 (1998).
7. Moreover, "[u]nder the [MHRA], when an entity providing a place of public accommodation identifies a disabled individual as posing significant risk to the health and safety of others, it . . . must ascertain whether any modification to its policies, or whether providing any auxiliary services, will eliminate the significant risk that it has identified." *Fitzpatrick*, 2005 ME 97, ¶29, 879 A.2d at 29.
8. To establish a claim pursuant to the public entity provisions of the MHRA, Complainant must establish that "(1) he is a qualified individual with a disability; (2) he was excluded from participating in or denied the benefits of the public entity's services, programs, or activities, or otherwise discriminated against; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Scott v. Androscoggin County Jail*, 2004 ME 143, ¶ 17, 866 A.2d 88, 93.
9. Here, Mr. [REDACTED] was segregated and placed in an area of a restaurant where people were walking by, where no other guests were seated and where Mr. [REDACTED] and Personal Assistant were made to feel humiliated and embarrassed. The word used by Personal Assistant was "mortified." As she described the experience, Male Staff Person's body language was hostile, there was a person instructed to clean up behind them as though there was something wrong with them and other patrons were staring, possibly trying to determine why such close monitoring and janitorial attention was required.
10. In the final analysis, one must determine whether or not Mr. [REDACTED] was denied full and equal enjoyment to the services and privileges offered guests as they enter [REDACTED] for a meal.
11. Discrimination based upon disability in access to a place of public accommodation is found.

VI. Recommendation:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- a. There are **Reasonable Grounds** to believe that Respondent [REDACTED] discriminated against [REDACTED] on the basis of disability; and
- b. Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Amy M. Sneirson, Executive Director



Michèle Dion, Investigator