



Maine Human Rights Commission

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INVESTIGATOR'S REPORT MHRC Case Number: PA15-0574 January 26 2017

Greg Scheuer (Portland)

v.

Nordica Theatre¹ (Freeport)

I. Summary of Case:

Complainant Greg Scheuer is deaf and requires an auxiliary aid (*i.e.* closed caption technology) in order to receive a film's audio information while attending a film presentation at a cinema. Respondent is a company that operates a movie theater in Freeport, Maine. Complainant attempted to view a film at the theater owned by Respondent and requested the use of closed captioning technology. Respondent stated it had no closed captioning for use, that it was waiting to provide the requested equipment until the U.S. Department of Justice issued final rules on the subject, and that providing such auxiliary aids would be an undue financial burden on Respondent. The Investigator conducted a preliminary investigation, which included reviewing all documents submitted by the parties and issuing written requests for additional information. Based upon this information, the Investigator recommends that the Commission find that there are reasonable grounds to believe that Respondent unlawfully denied Complainant services by failing to provide auxiliary aids and services.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: July 5, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 16, 2015.
- 3) Respondent is believed to have at least 15 employees and is subject to the Maine Human Rights Act ("MHRA"), Americans with Disabilities Act ("ADA"), as well as state and federal employment regulations.
- 4) Complainant is represented by Kristin Aiello, Esq. Respondent is represented by Joseph H. Matzkin, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of his claim:

¹ Complainant listed Respondent's name as "Nordica Theatre"; Respondent provided that its legal name is "Berenson Freeport Theatre, LLC." Because Complainant has not amended his complaint to use Respondent's legal name, the name used by Complainant has been retained.

Complainant is disabled² and Respondent is a movie theater.³ During a movie, Complainant needs to use closed captioning technology to read the dialogue as it is spoken, and to “hear” with his eyes. Complainant requested that Respondent provide closed captioning technology so that he could access the movies Respondent was showing. Respondent denied his request. Complainant has not been able to access the movies at Respondent’s location in Freeport.

2) Respondent provided the following in support of its position:

Respondent determined that the cost of implementing the requested technology would be approximately \$7,500.00. Respondent’s overall financial resources are limited to the profits generated at the Freeport location, which varies from year to year. Respondent recently operated at a net loss and does not have any other financial resources (i.e. loans, additional capital, etc.) available for its use. Further, Respondent stated its desire to wait for the U.S. Department of Justice (“DOJ”) to promulgate a final rule on the requirements for providing closed movie captioning and audio descriptions in movie theaters.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and information generally available to the public:

- a) Complainant has a disability as defined by the MHRA.
- b) Respondent operates a movie theater with six auditoriums on behalf of an owner. Respondent has entered into an agreement with a third party (“Management Company”) for the management of this theater.
- c) Respondent is affiliated with a network of thirteen movie theaters throughout New England, which share a joint website advertising their locations and services.
- d) Complainant requested use of a closed captioning aid at the movie theater owned by Respondent. The cost of the requested aid is approximately \$7,500, as represented by Respondent.
- e) Respondent did not (and continues not to) provide the requested auxiliary aid or an equivalent auxiliary aid for patrons who cannot hear.
- f) Respondent had a gross revenue of \$247,607 for the first two quarters of 2016. Respondent had expenses of \$267,262 for the same period, with a net loss of \$19,655 for the first half of 2016. During this period, Respondent spent \$26,597 for “maintenance and repairs”. Also during this period, Respondent spent \$45,000 for “management fees”.

IV. Analysis:

- 1) The MHRA provides that the Commission or its delegated investigator “shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 Maine Revised Statutes (“M.R.S.”) § 4612(1)(B). The

² Complainant suffers from [REDACTED], which is a *per se* disability (disability without regard to severity) under the MHRA.

³ The MHRA and the Commission’s Regulations specifically identify movie theaters as “places of public accommodations” in the definition of the term. 5 M.R.S. § 4553(8)(C); Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.01.

Commission interprets the “reasonable grounds” standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Auxiliary Aids and Services Claim⁴

- 2) The MHRA defines unlawful public accommodations discrimination to include, “[a] failure to take steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless, in the case of a private entity, the private entity can demonstrate that taking those steps would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden.” 5 M.R.S. § 4592(1)(C). The Commission’s Accessibility Regulations require that a public accommodation “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with physical or mental disabilities.” Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.17(C).
- 3) The term “auxiliary aids and services” includes: “closed caption decoders; open and closed captioning, including real-time captioning; . . . accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.” Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.17(B)(1).
- 4) The term “undue burden” means “an action requiring undue financial or administrative hardship.” The Commission’s Regulations list a number of factors to consider in determining whether providing a requested accommodation would be an undue hardship, including, but not limited to: the nature and cost of the accommodation; the overall financial resources of the covered entity; all resources available to meet the cost of the requested accommodation; the extent to which resources have been spent on accessibility in the past; the extent to which resources have been spent on improving inaccessible features; the availability of technology/equipment and good faith efforts to explore less expensive options or spread the cost over time; and whether the accommodation would result in a fundamental change in the nature of the public accommodation. “Undue burden is a higher standard than ‘readily achievable’ and requires a greater level of effort on the part of the public accommodation.” Me. Hum. Rights Comm’n Reg. Ch. 7, § 7.01.
- 5) There are no disputes between the parties regarding the following: that Complainant has a disability; that Respondent is a public accommodation; and, that Respondent did not provide the requested auxiliary aid and service. The sole issue is whether Respondent met its burden to demonstrate that providing the requested auxiliary aid and service would result in an undue burden.
- 6) In the final analysis, Respondent has not met its burden of showing that providing the requested auxiliary aid and service would result in an undue burden, with reasoning as follows:
 - a) The cost of the auxiliary aid requested (\$7,500) is relatively small compared to other expenses regularly incurred by Respondent. By way of comparison, the cost of the requested auxiliary aid is equal to the cost of a *single month* of fees that Respondent paid to Management Company.
 - b) Respondent’s revenue for the first six months of 2016 was \$247,607. Respondent failed to provide any

⁴ The Complainant’s request for use of an auxiliary aid is also a request for a reasonable accommodation to a policy or practice. Because there is no dispute of material facts concerning the events described in the Complaint and ‘undue burden’ is a defense to a reasonable accommodation claim, the outcome would be the same under either analysis. Thus, if analyzed as a reasonable accommodation claim, there would also be a finding of reasonable grounds.

historical or seasonal context to this data. Moreover, it is apparent that Respondent devoted approximately \$4,500 each month to maintenance and repairs during this period. Respondent's failure to budget for unexpected expenses such as the requested auxiliary aid is not sufficient to support an undue burden defense.

- c) The information provided by Respondent about its overall financial resources was grossly inadequate. Notably, Respondent is organized as a limited liability company, but failed to disclose financial information related to the resources of its members, including any distributions taken by the members of Respondent. Despite Respondent's assertion that it does not have loans, investment or capital resources available to it, Respondent failed to explain how it continues to operate with a net negative monthly cash flow. Further, although Respondent asserted that it is the *operator* of the theater (rather than the *owner*) it failed to identify the owner, or any financial resources that may be available to the owner.
 - d) Respondent's assertion that it is not part of a chain or network of theaters is undercut by the content of its own website.⁵ Respondent failed to adequately explain its relationship to the twelve other movie theaters listed on its website.
 - e) Respondent provided only two pages of documentation, covering a period of six months, to support its defense. Respondent failed to provide countless documents that could have supported its defense, such as organizational documents, tax documents, account statements and other financial documents.
 - f) Respondent failed to explain how its desire to wait on the DOJ to promulgate a final ruling on closed captioning in movie theaters supports its undue burden defense to an accessibility mandate already set forth in the MHRA (and ADA). None of the factors considered in an undue burden analysis provide for such a "wait and see" period.⁶
- 7) Discrimination on the basis of disability for a public accommodation's failure to provide auxiliary aids and services in found.

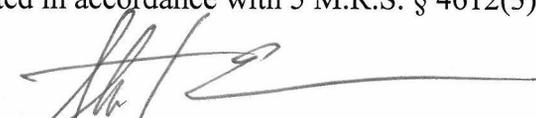
V. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

There are **Reasonable Grounds** to believe that Nordica Theatre discriminated against Greg Scheuer on the basis of disability by failing to provide required auxiliary aids and services in a place of public accommodation, and conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneirson, Executive Director



Stuart W. Evans, Investigator

⁵ Investigator's Note: The prior website utilized by Respondent, and quoted extensively in the reply submitted by Complainant, is no longer found online. The prior website contained a detailed list of amenities available at the theater operated by Respondent, including claims that the auditoriums are equipped with the latest digital and sound technology. This would tend not to support Respondent's position that it has limited financial resources.

⁶ In any event, DOJ published its final rule in December 2016.