

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBYN COHEN,)
)
 Petitioner,)
)
 vs.) Case No. 10-1665
)
 CARNIVAL CRUISE LINES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida, on July 30, 2010. Petitioner, her counsel, and one of her witnesses appeared in Tallahassee, and Respondent's corporate representative, counsel, in-house counsel, and witnesses, as well as one witness for Petitioner, appeared in Miami.

APPEARANCES

For Petitioner: Marcy I. Lahart, Esquire
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Gainesville, Florida 32609

For Respondent: Kara S. Nickel
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STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of discriminating against Petitioner, due to her handicap, in providing a public accommodation, in violation of Section 760.08, Florida Statutes.

PRELIMINARY STATEMENT

By Complaint of Discrimination dated September 22, 2009, Petitioner alleged that Respondent discriminated against her in providing a public accommodation by denying her the right to be accompanied by her service animal. The Complaint alleges that, on August 9, 2009, Petitioner had arrived at the terminal to board a Carnival cruise ship in Ft. Lauderdale, but was stopped by one of Respondent's employees and told she could not board with a dog. The Complaint alleges that Petitioner replied that her dog was a service animal for her disability. The Complaint alleges that the employee asked what the disability was and why she needed a service animal. The Complaint alleges that Petitioner produced a card identifying her service animal--a dog named "Rocky." The employee allegedly contacted a supervisor, who asked Petitioner to produce the documentation again. The Complaint alleges that Petitioner was denied travel with her service animal, but eventually boarded without the service dog, allowing her boyfriend to take the dog home.

On March 5, 2010, the Florida Commission on Human Relations entered a Notice of Determination: No Cause.

On March 15, 2010, Petitioner filed a Petition for Relief. The Petition alleges that Respondent violated the Florida Civil Rights Act of 1992, as amended, by failing to accommodate her and her service animal on a cruise, failing to notify her within ten days of why she was denied the public accommodation, and unlawfully requiring advance notice of a need for an accommodation. The Petition seeks a wide range of compensatory damages.

By Order on Motion to File First Amended Petition entered May 6, 2010, the Administrative Law Judge granted Petitioner leave to amend her grounds for liability to include a second denial of public accommodation at the first port reached by the cruise vessel after leaving Port Everglades, Key West. Even though the Complaint had not specifically pleaded this violation, there is a reasonable relationship between the pleaded allegations of acts and omissions at Port Everglades and the new allegations of similar acts and omissions at Key West, and the ensuing investigation should reasonably have addressed this matter. See Scholz v. RDV Sports, 710 So. 2d 618, 622 (Fla. 5th DCA 1998).

By Order on Respondent's Motion to Compel and Petitioner's Motion for Protective Order entered July 8, 2010, the Administrative Law Judge struck all claims for damages or other affirmative relief for medical expenses or medical bills,

pursuant to the limited relief authorized in administrative proceedings, as provided in Section 760.11(6), Florida Statutes, as contrasted to the broader relief, including specifically "compensatory damages," authorized in judicial actions, as provided in Section 760.11(5), Florida Statutes, and case law defining compensatory damages to include medical expenses. See, e.g., Stewart v. George W. Davis & Sons, Inc., 340 F. Supp. 643, 646 (N.D. Fla. 1972); Cooperative Leasing, Inc. v. Johnson, 872 So. 2d 956 (Fla. 2d DCA 2004). See also Florida Public Utilities Company v. Large, 493 So. 2d 491 (Fla. 4th DCA 1986) (Human Rights Act of 1977, which limited courts and administrative judges to "affirmative relief," did not authorize award of compensatory damages in the form of pain and suffering). Cf. Broward County v. LaRosa, 505 So. 2d 422 (Fla. 1987) (administrative agency may not constitutionally award nonquantifiable damages, such as for pain and suffering or humiliation); Laborers' International Union, Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989) (court questioned whether administrative agency could award front pay, which, though more quantifiable than damages for suffering, is "somewhat indefinite" because it is based on an "arbitrary" determination of duration of front pay).

On July 15, 2010, Respondent filed its stipulation that Petitioner is a person with a disability, within the meaning of

the Florida Civil Rights Act, and that Petitioner's dog, Rocky, is a service animal, within the meaning of Florida law. At the hearing, Respondent further stipulated that Rocky serves Petitioner's disability.

At the hearing, Petitioner called four witnesses and offered into evidence no exhibits. Respondent called three witnesses and offered into evidence three exhibits: Respondent Exhibits 2, 3, and 10, which were admitted.

The court reporter filed the Transcript on August 23, 2010. The parties filed Proposed Recommended Orders on September 17, 2010.

FINDINGS OF FACT

1. Petitioner suffers from a panic disorder for which she requires the assistance of a service animal. Her service animal is a 40-pound German Shepherd mix named "Rocky." Rocky enables Petitioner to overcome certain specific disabilities associated with her condition, but she does not always require Rocky's assistance.

2. In the summer of 2009, Petitioner's mother organized a family vacation in the form of a Caribbean cruise on a vessel operated by Respondent. She selected a cruise departing Port Everglades on August 9, 2009. The group included Petitioner's father, Petitioner's sister, her fiancé, and others. The first port of call for the cruise after departing Fort Lauderdale was

Key West, after which the vessel would sail to various ports under the jurisdiction of other countries.

3. On the morning of the departure, Petitioner's then-boyfriend John McCarthy drove her and Rocky from Key Biscayne, where they live in the same condominium building. Mr. McCarthy proved to be a useful witness. He and Petitioner are no longer in a relationship. Mr. McCarthy portrayed the events largely in agreement with Petitioner's version of events, although his reliability is somewhat undermined by the fact that he and Petitioner have discussed many times what exactly took place on that day. However, he displayed a spirited independence from Petitioner, as when he described her decision to file this "lawsuit" as "ridiculous," and, more importantly, admitted that, while in the terminal, he was unsure whether Petitioner wanted to take Rocky with her on the cruise. Much, but not all, of his testimony has been credited.

4. Leaving Key Biscayne that morning, Petitioner did not, in fact, intend to have Rocky accompany her on the cruise. Among other possible reasons, Petitioner's mother had asked her not to bring Rocky, and Petitioner had acceded to her mother's wish. It was Petitioner's intent only for Rocky to see her off.

5. Without incident, Petitioner, Mr. McCarthy, and Rocky left the car at the cruise terminal parking area and made their

way into the cruise lobby. The trio entered the lobby amidst swarms of embarking and disembarking passengers.

6. Respondent hosts on its cruises many passengers with disabilities, including some passengers with service animals. Two Carnival managers described Respondent's policies for accommodating disabled passengers. The Guest Access Support manager, Kay Strawderman, explained the process by which persons purchasing cruise tickets are directed to complete a form that provides information about disabilities or special needs.

7. If a passenger is bringing a service animal, Respondent informs the passenger that he or she must contact the U.S. Department of Agriculture for current regulations, by port, governing animals, such as requirements for vaccination records. These regulations are imposed by the countries visited by the vessel and may be enforced even if the animal does not leave the ship. Neither Respondent nor the U.S. government has the authority to permit any deviations from these foreign laws.

8. Using the information provided in the completed forms, the Guest Access Support department compiles a list of special-needs passengers, including passengers who will be bringing service animals. The Guest Access Support department sends this list to the Guest Logistics department.

9. Assigned to the terminal and in direct contact with passengers, Guest Logistics employees ensure the efficient

boarding and exiting of the vessels and movement through the terminal. The Guest Logistics manager, Doris Enamorado, testified that her employees use the special-needs lists to ensure that special-needs passengers and, if applicable, their service animals are directed to special boarding areas, so they can board without any delay.

10. Ms. Strawderman and Ms. Enamorado both considered the question of what they would do if a special-needs passenger failed to fill out and return the forms, but arrived at the terminal seeking to board with her service animal. The question is hypothetical because this has never previously happened, including on the day in question.

11. Ms. Strawderman insisted that, if a special-needs passenger failed to return the forms, Respondent would not deny boarding. Ms. Enamorado added that, if one of her employees encountered a passenger with an animal in the terminal seeking to board, the employee would determine if the animal were a service animal, including how it services the disability, and then examine the vaccination records, without which a service animal may not sail due to the requirements of the laws of foreign countries.

12. Shortly after they entered the terminal, Petitioner, Mr. McCarthy, and Rocky were approached by a Carnival employee named "Alex." Respondent invites the inference that Petitioner

spontaneously exploded into anger and hysterics. At the hearing, Petitioner displayed a tendency toward combativeness, but none toward spontaneous anger or hysterics. More likely, Alex, upon encountering Petitioner, Mr. McArthur, and a dog in a crowded terminal, momentarily failed to display the composure and dedication to service of Respondent's managerial employees who testified at the hearing.

13. Mr. McCarthy's testimony is especially useful at this point and is largely credited. Approaching Petitioner, Alex abruptly informed her that Rocky could not proceed. It is likely that Alex assumed that Rocky was a mere pet, as he does not wear a special cape or harness and Petitioner does not bear any obvious indication of a disability.

14. Petitioner replied that Rocky was a service dog, and he was present only to see her off on the cruise. Alex replied that Petitioner did not appear to suffer from a disability. As Mr. McCarthy aptly notes, "the fight was on."

15. Each side called for reinforcements. Petitioner spoke on her cellphone with her sister and mother. Alex summoned his supervisor, who joined the fray. Mr. McCarthy and Rocky wisely stood to the side.

16. By now, Petitioner was crying out of control. In this condition, she could not reliably report on what she said to Respondent's employees or what they said to her. Mr. McCarthy

seems to have been unable to hear much of what the parties were saying to each other. Respondent's employees report that their behavior was impeccable. Regardless, there is no reliable evidence that Petitioner ever demanded that Rocky, her service animal, board the vessel with her.

17. Much evidence suggests that Petitioner never intended to take Rocky on the cruise. As far as Petitioner's mother or Mr. McArthur knew, Rocky was staying home. Petitioner herself had failed to pack any food for Rocky, nor did she at any time instruct Mr. McArthur to drive to a nearby store to obtain any. No evidence suggests that Petitioner had brought with her any proof of Rocky's vaccinations, which might be required by the various countries that they were visiting. Once on board, Petitioner did not even demand that Respondent allow Rocky to board in Key West.

18. To convince her daughter to board the vessel, Petitioner's mother said that Rocky could join them in Key West. Even after the vessel had sailed, Petitioner, still agitated, spoke constantly with Mr. McCarthy until the vessel sailed out of cellphone range. She directed him to drive Rocky to Key West to join her on the cruise, but Mr. McCarthy, citing a bad back and the fact that his birthday was the next day, declined to do so, instead taking Rocky to South Beach the following day. Mr. McCarthy's testimony suggested a boyfriend who was unwilling

to cater to his girlfriend's capricious decision to make an issue with Rocky, not a boyfriend who was unwilling to help right a wrong that his girlfriend had suffered.

19. At some point prior to arriving in Key West, Petitioner realized that Mr. McCarthy had no intention of driving Rocky to Key West. Rather than disembark in Key West, as she wanted, Petitioner acceded to her mother's exhortations and remained on board, but she was very unhappy for the remainder of the cruise.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 760.11(4)(b) and (6), Fla. Stat. (2009).

21. Section 760.08, Florida Statutes, provides:

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 this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.

22. Section 760.02(11), Florida Statutes, defines "public accommodations" as:

"Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or

entertainment, and other covered establishments. . . .

23. A cruise ship is a public accommodation. Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 129, 125 S. Ct. 2169, 2177 (2005) (cruise ship is public accommodation under Americans with Disabilities Act). By stipulation, Petitioner is a person with a handicap, and Rocky services her disability.

24. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, prohibits discrimination in places of public accommodation, in identical language as that found in Section 760.08, Florida Statutes, except for the omission of certain protected classes, including handicap. Due to the lack of Title II cases, federal courts routinely find guidance in the law of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, including the law of the shifting burdens of production of evidence. See Fahim v. Marriott Hotel Services, 551 F.3d 344, 349 (5th Cir. 2008).

25. Therefore, the Title II plaintiff must prove a prima facie case of discrimination by proving membership in a protected class, an attempt to contract for services of a public accommodation, a denial of those services, and the provision of these services to similarly situated persons not in the protected class. Id. at 350. Following proof of a prima facie case of discrimination, the defendant would have an opportunity

to show a legitimate business purpose for its acts or omissions, and the plaintiff would then have an opportunity to show that the legitimate business purpose was pretextual. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973)).

26. Here, Petitioner has failed to prove a prima facie case. She has failed to prove that she was denied any services for which she contracted. Obviously, Respondent did not deny Petitioner the opportunity to take the cruise. Moreover, because the evidence fails to establish that Petitioner asked for her service animal to accompany her on the cruise, Petitioner failed to prove that Respondent denied her the opportunity to take the cruise with her service animal.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's amended petition.

DONE AND ENTERED this 21st day of September, 2010, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.