

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUAN "JOHN" BOCARDO,

Petitioner,

vs.

Case No. 15-6147

WALT DISNEY PARKS AND RESORTS
US, INC.,

Respondent.

RECOMMENDED ORDER

This case was heard on January 15, 2016, by video teleconferencing at sites in Orlando and Tallahassee, Florida, by D. R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Geoffrey E. Parmer, Esquire
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Tampa, Florida 33602-5146

For Respondent: Jeremy M. White, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Walt Disney Parks and Resorts US, Inc. (Disney), a place of public accommodation,

violated section 760.08, Florida Statutes, by denying Petitioner, a handicapped individual, access to its property because his service animal was unleashed.

PRELIMINARY STATEMENT

On or about February 3, 2015, Petitioner filed a Public Accommodation Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (FCHR) alleging that he is a handicapped individual with a service dog and was denied entrance to Disney's theme parks on four occasions in 2014 because his service dog was unleashed. On August 26, 2015, the FCHR issued a Notice of Determination: Reasonable Cause. On September 29, 2015, a Petition for Relief was filed, and the case was transmitted by FCHR to DOAH requesting that a formal hearing be conducted. By Order dated January 14, 2016, Disney's Motion to Strike was granted, and three requests for relief not authorized by chapter 760 were stricken from the pleading.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of four witnesses. Petitioner's Exhibits 1, 4, 7, 11, 12, 14, 15, 19 through 21, the Epcot video in 24A, and 25B were accepted in evidence. To the extent his Exhibits 8, 9, and 23, all hearsay in nature, corroborate other competent evidence, they have been considered. Disney presented the testimony of four witnesses. Respondent's Exhibits 1 through 4 were accepted in evidence.

A two-volume Transcript of the hearing has been prepared. The parties filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. Disney is a public accommodation whose principal business activity consists of the ownership, operation, and management of theme entertainment parks, resorts, and related facilities located in the Orlando area. The theme parks include Magic Kingdom Park, Epcot, Animal Kingdom Park, and Hollywood Studios.

2. Petitioner is a 50-year-old male who resides in Winter Garden. In 2004, while living in Illinois, Petitioner was severely injured when a large truck rear-ended his motor vehicle. In 2007, he was declared permanently disabled due to leg and spinal injuries suffered in the accident. As a result of these injuries, he walks only short distances with the aid of a walking device or cane. For longer distances, he normally uses a motorized scooter.

3. Petitioner moved to Florida around 2012 to escape the cold weather in Illinois. He testified that he and his family have always enjoyed visiting Disney theme parks and other non-Disney tourist attractions in the area, and this was one of the primary reasons he moved to the Orlando area. Until this

dispute arose, he was a Disney Annual Passholder, which allowed him multiple admissions to the theme parks at a discounted rate. Although Petitioner says he used the pass to access the theme parks on numerous occasions, other than those at issue in this case, there is no credible evidence that he was allowed to enter the parks with an unleashed service animal on any occasion.

B. The Service Animal

4. In early 2013, Petitioner decided to acquire a service animal to assist him while ambulating inside and outside his home. He purchased Lily, an eight-week-old, female Dogo Argentino, which is a large, white muscular dog developed in Argentina primarily for the purpose of big-game hunting. A strong, powerful dog with a large bite, it is one of the deadliest breeds in the world and is banned in some European countries.

5. Lily resembles a pit bull in appearance and weighs almost 100 pounds. In contrast, a mature male Dogo Argentino weighs around 150 pounds, but does not look like a pit bull. Petitioner testified that he wanted his service animal to look like a pit bull, so he chose a female even though a male is easier to train.

6. Although purchased in early 2013, Lily did not begin service training until April 2014, or one month before Petitioner's first claim of discrimination at the Epcot theme

park. Petitioner selected Southland Dog Training (Southland) as Lily's trainer. Lily was the first Dogo Argentino Southland had trained to be a service animal. Not surprisingly, Southland has an indemnity provision in its training agreements to protect itself from liability in the event a dog that has gone through the training program ends up harming someone. And even though Lily was given training on interacting safely with children in a crowded setting, and never exhibited aggression during its training sessions, Southland does not guarantee the dog will not harm someone. In fact, Southland's owner admitted that "[a]ny and every dog has the propensity to be aggressive, it's in their genes[,] " and "[a]ny breed of dog can be aggressive."

7. A dog's propensity to be aggressive was also confirmed by Disney's canine expert, Bob Gailey, a professional police dog and civilian dog trainer who has trained between 20,000 and 30,000 dogs over a 65-year career, including Dogo Argentinos, and conducts seminars on dog training and safety issues. He explained that no amount of training can guarantee that a dog will not bite someone with or without provocation. For obvious safety reasons, he emphasized that service animals must be kept on a leash while in crowded public areas, such as a Disney theme park. Mr. Gailey noted that "freakish incidents" can and do occur, and that even trained dogs, such as Lily, need to be on a leash to protect the safety of others. In fact, Mr. Gailey

pointed out that he has been bitten around 100 times by trained dogs, without any provocation, including some whose owners say they have never bitten anyone. He added that due to a Dogo's large bite, it could "definitely" kill a child. Thus, Disney has a real and legitimate safety concern, and not one based on mere speculation, that allowing unleashed service animals on its property poses a potential safety threat to other guests, especially children. To address this concern, Disney has adopted a policy for service animals, described below.

8. Lily has been trained to perform the following tasks: open doors; push handicap buttons; retrieve items; and pull Petitioner out of a body of water. However, Petitioner can perform some of these tasks on his own, such as pushing handicap buttons and picking up items. Petitioner contends that forcing him to keep Lily on a leash or harness at all times could result in the leash becoming tangled in the scooter's wheels. However, Mr. Gailey established that besides being trained to perform all functions on a leash, service animals can be taught how to avoid getting their leashes tangled up with the wheels. Being leashed or tethered will not interfere with Lily performing her assigned tasks.

C. Petitioner's Limitations

9. Petitioner has had multiple surgeries related to his accident, the last one on his left shoulder on February 2, 2010.

At a follow-up appointment, Petitioner's surgeon noted that he "has full range of motion, minimal pain at the end ranges of forward flexion [and] 4+/5 strength in all planes"

Pet'r Ex. 21, at 00484. In plainer terms, this means that he has nearly normal strength and full range of motion in his left shoulder, with minimal pain. Petitioner does not dispute the doctor's findings. Although his right shoulder and arm are not at normal strength for an adult male, there are no serious medical issues with either, and Petitioner acknowledged that there are no physical limitations in using them. In fact, Petitioner uses his right arm to drive and steer his motorized scooter.

10. When walking short distances, Petitioner uses a cane with his right arm, sometimes with Lily, other times without her. When Lily accompanies him, she provides balance and stability on his left side. When riding in his motorized scooter accompanied by Lily, Petitioner normally steers with one hand and grips a leash or harness attached to Lily with his other hand. The dog usually walks in front, or to the side, of the scooter. However, when the dog is in the follow position off-leash, Petitioner cannot see Lily and thus is unable to control her, even if she is wearing an electronic collar. As the Southland trainer explained, if the owner cannot see the dog, then they do not know what the dog is doing. Petitioner

admits that he cannot maintain control of his service animal at all times without holding a leash or harness.

11. In both his Petition for Relief and testimony at hearing, Petitioner acknowledged that except for "an extended period of time," his disability does not prevent him from being able to hold and use a leash or harness on Lily. This was confirmed by his wife. Despite the injury to his left shoulder, he has held and used a leash or harness with that arm. The greater weight of evidence supports a finding that Petitioner is able to hold a leash with his hand, at least for short or moderate periods of time, or that a leash can be easily tethered to his wrist or a mobility device on the scooter. A contention that the leash may become entangled in the scooter's wheels has been rejected for the reasons stated in Finding of Fact 8.

D. Disney's Policy on Service Animals

12. Disney theme parks are typically crowded and noisy. On any given day, tens of thousands of guests, including large numbers of young children, frequent the parks.

13. Service animals are routinely granted access to the theme parks. However, Disney park rules provide that "[s]ervice animals must be under the control of the owner at all times and should remain on a leash or in a harness." Resp. Ex. 1, p. 2. The requirement is not just that the dog wear a harness, but rather that the harness is being used. For the reasons

expressed above, there are legitimate safety concerns that underpin this rule.

14. State and federal law require that a visitor seeking entrance to a public accommodation with a service animal must have the animal on a leash, harness, 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 one of those restraints would interfere with the animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control, such as voice control, signals, or other effective means. See § 413.08(3)(a), Fla. Stat.; 28 C.F.R. § 36.302(c)(4). Disney contends that its policy conforms to both state and federal law.

E. The Charges

15. The Complaint, filed on February 3, 2015, alleges that on May 4, 2014, Petitioner was denied admission to Epcot because his dog was unleashed; on August 27, 2014, he was asked to leave Downtown Disney because Lily was unleashed; on October 9, 2014, he was denied admission to Magic Kingdom because Lily was unleashed; and on December 5, 2014, he was denied admission to Animal Kingdom due to Lily being unleashed. However, no evidence was presented concerning the visit to Magic Kingdom in October 2014, and that charge has been disregarded. The testimony concerning Petitioner's other three visits to the

theme parks is sharply in dispute. The undersigned has accepted as being the most credible the following version of events.

i. Epcot Visit in May 2014

16. On May 4, 2014, Petitioner visited Epcot with his wife, daughter, and service animal. As Petitioner entered the International Gateway in his motorized scooter, Lily was unleashed and sitting near the bag check area in front of the park, which was around ten or 15 feet from Petitioner.

17. A main entrance cast member is a Disney employee trained on park rules who observes guests entering the park. A cast member noticed that Lily was off-leash, which was against park rules, and stopped Petitioner, informing him that he must have the dog on a leash before entering the park. Petitioner refused to do so. Petitioner's contention that the cast member had a belligerent and hostile attitude during the encounter is not credited. Even assuming arguendo this is true, treating a guest in a rude and hostile manner does not equate to discrimination by the public accommodation. See, e.g., Lizardo v. Denny's, Inc., 270 F. 3d 94, 102 (2d Cir. 2001).

18. While Petitioner spoke with a second cast member, Lily was unleashed and untethered, approximately ten to 15 feet away from him near a half-wall by the entrance to the park.

19. During the 30-minute encounter, there was little, if any, attention being paid to Lily, who had no physical tether to prevent her from wandering off.

20. A cast member then contacted Jim Beeson, Epcot's Operations Manager, who arrived to speak with Petitioner and apologized for the delay in having to walk from another area of the park. Petitioner informed Mr. Beeson that he was unable to hold a leash and needed to have his service dog untethered.

21. During his conversation with Petitioner, Mr. Beeson observed Petitioner talking with his hands and did not see any indication that Petitioner was unable to hold a leash. He also observed that there was no leash on Lily, unlike any service dog he had encountered while working at Disney.

22. Mr. Beeson further observed that Lily was not always by Petitioner's side, she tried to get up and wander off several times during the conversation, and she did not respond to voice commands. In fact, Mr. Beeson noticed that Petitioner's wife continually had to push the dog back so that it would not leave. Based on his 33 years of experience at Disney, which includes observing numerous guests with service animals, Mr. Beeson concluded that Petitioner could not maintain control over his dog with voice and hand signals.

23. At no time during the interaction did Lily perform any tasks for Petitioner. In Mr. Beeson's opinion, he questioned whether Lily was even qualified as a service animal.

24. After speaking with Mr. Beeson for approximately 30 minutes, Petitioner decided to leave the park. Disney did not deny Petitioner access to the park on account of his disability, or simply because of Lily's breed. Nor was he treated differently than any other guest with a service animal. Rather, Disney's action was motivated solely by concerns for the safety of the other guests. Had he agreed to place a leash on Lily, Petitioner would have been admitted to the park.

ii. Downtown Disney Visit in August 2014

25. On August 27, 2014, a guest notified a Downtown Disney security cast member of concerns about a large, unleashed dog on the property, which turned out to be Lily. Security control radioed the duty manager, Dan McManus, who arrived on the scene less than ten minutes later. When he arrived, Mr. McManus saw Petitioner, accompanied by his wife, speaking with the security cast member.

26. Petitioner told Mr. McManus that he was unable to hold a leash due to his disability. According to Mr. McManus, he did not see any indication that Petitioner was unable to hold a leash, as he observed Petitioner waving a large binder and

flipping through pages of what he claimed were American with Disabilities Act (ADA) guidelines.

27. Mr. McManus is familiar with ADA guidelines as he frequently encounters guests with service animals on the property. He noted that during his seven years at Downtown Disney, he has observed service animals of all different shapes and sizes on the property. However, Mr. McManus explained that these service animals are always on a leash or tether, and that if a guest is in a wheelchair or electric scooter, the guest may hold a leash, the leash may be tethered or attached to the scooter or wheelchair, or another member of the party may hold the leash for the guest. Petitioner refused to comply with any of those options.

28. Mr. McManus again informed Petitioner that Disney's policy required that service animals be on a leash. He noticed that Lily was wearing some sort of a shock collar, but did not recall the dog wearing a harness. At no time during the interaction did Lily perform any tasks for Petitioner, who had informed Mr. McManus that Lily helps open doors for him.

29. Before Mr. McManus arrived, Petitioner telephoned the Orange County Sheriff's Office and requested that a deputy sheriff be sent to the theme park, presumably to observe the encounter. Petitioner's conversation with Mr. McManus ended when two deputy sheriffs arrived on the property. At that

point, Mr. McManus went back to his office to check with the Services for Guests with Disabilities Department to inquire whether an electronic collar would satisfy the leash requirement for service dogs. He was told to adhere to the Disney policy and require that the dog be on a leash. Before Mr. McManus returned, Petitioner departed the premises.

30. Disney did not deny Petitioner access to the park on account of his disability or because of Lily's breed, and he was not treated differently than any other guest with a service animal. Had Petitioner used a leash or harness for Lily, he would not have been approached or stopped during his visit to Downtown Disney.

iii. Animal Kingdom Visit in December 2014

31. On December 5, 2014, Petitioner visited Animal Kingdom with his wife and mother. He was stopped at the front entrance because Lily was not leashed or tethered.

32. Larry Hetrick, a guest service manager at the park, was called over to speak to Petitioner. When Mr. Hetrick arrived, Petitioner was speaking with two security employees. No other Disney personnel were present. Petitioner's perceived fear that Disney personnel were "waiting" for him when he approached the park is unfounded.

33. Petitioner explained his interpretation of federal laws and civil cases to Mr. Hetrick but never said why Lily

could not be on a leash. Contrary to Petitioner's testimony, Mr. Hetrick did not tell him that Disney's policies superseded federal law, and he patiently listened to Petitioner's summary of the law while examining his paperwork. At no time during the encounter did Lily perform any service animal tasks.

34. Ten minutes later, the duty manager for Animal Kingdom arrived and the three spoke for another ten minutes or so. When Petitioner told them that he intended to file a legal action against Disney, the conversation ended. He was not told that he "had to leave the premises."

35. Disney did not deny Petitioner access to the park on account of his disability or because of Lily's breed. Moreover, he was not treated differently than any other guest with a service animal. Had Petitioner complied with Disney's policy, he would have been able to access the park.

CONCLUSIONS OF LAW

36. Petitioner has the burden of proving, by a preponderance of the evidence, that Disney unlawfully denied his right to access Disney property because his service animal was unleashed. See § 120.57(1)(j), Fla. Stat.

37. Section 760.08 provides in relevant part that all persons "shall be entitled to the full and equal enjoyment of the . . . facilities . . . of any place of public accommodation, as defined in this chapter, without discrimination or

segregation on the ground of . . . [a] handicap[.]" Petitioner is an individual with a disability and Disney is a "public accommodation." Although the term "service animal" is not defined in chapter 760, Lily is a service animal within the meaning of section 413.08(1)(d), as it is trained to perform tasks for an individual with a disability. Section 413.408 makes it unlawful for a public accommodation to deny the use of a service animal by an individual with a disability.

38. FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of chapter 760. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009).

39. To establish a prima facie case in a typical public accommodation case, a claimant must establish that (1) he is a member of a protected class (i.e., handicapped); (2) he attempted to afford himself of the full benefits and enjoyment of the public accommodation; (3) he was denied those benefits and enjoyments; and (4) that similarly-situated persons outside the protected class received full benefits and enjoyment, or were treated better. See Afkhami v. Carnival Corp., 305 F. Supp. 1308, 1322 (S.D. Fla. 2004); Fahim v. Marriott Resort Servs., 551 F. 3d 344, 349 (5th Cir. 2008), and cases cited therein. In this somewhat unusual case, however, the parties

have agreed that the case turns on whether Disney violated a federal ADA regulation, 28 C.F.R. § 36.302(c)(4), which reads in relevant part as follows:

(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).

40. In order to prevail, Petitioner must establish that due to his disability, he is unable to use a harness or leash on Lily, or the use of a harness or leash would interfere with Lily performing her tasks, in which case Lily must otherwise be under his control at all times through other means.

41. Petitioner has failed to establish that a violation of section 36.302(c)(4) occurred. First, the evidence shows that Petitioner has the physical ability to use a harness or leash, at least for short or moderate periods of time, or that the leash can be attached to his wrist or a mobility device. Alternatively, his wife can hold the leash, when needed. Second, the evidence shows that the use of a leash will not interfere with Lily performing her tasks. In fact, Lily was trained to perform those tasks while on leash. Finally, the

evidence shows that Petitioner does not have Lily under his control at all times. He admitted this at final hearing.

42. In sum, Petitioner is weighing the convenience of having his dog unleashed over the safety of Disney's guests, including children. The ADA does not require a public accommodation to permit an individual to enjoy its facilities when the individual poses a direct threat to the safety of others. See 28 C.F.R. § 36.208. Here, the evidence shows that Disney's policy to require all service animals to be on leash is based on legitimate safety concerns, and not speculation. A violation of section 760.08 and ADA requirements has not been proven.

43. For the foregoing reasons, the Petition for Relief should be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing, with prejudice, the Petition for Relief.

DONE AND ENTERED this 26th day of April, 2016, in
Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 26th day of April, 2016.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.