

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAVIER A. MUNIZ-PAGAN,

Petitioner,

vs.

Case No. 17-2653

UNIVERSAL CITY DEVELOPMENT
PARTNERS, d/b/a UNIVERSAL
STUDIOS ORLANDO,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Orlando and Tallahassee, Florida, on August 25, 2017, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Javier A. Muniz-Pagan, pro se
4038 Montara Court
Orlando, Florida 32817

For Respondent: J. Lester Kaney, Esquire
Law Office of J. Lester Kaney
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STATEMENT OF THE ISSUE

Whether Respondent, a place of public accommodation, violated section 760.08, Florida Statutes, by denying Petitioner, a

handicapped individual, access to its amusement park ride queues due to Petitioner's use of an electric wheelchair.

PRELIMINARY STATEMENT

On or about October 10, 2016, Javier A. Muniz-Pagan (Petitioner) filed a public accommodation complaint of discrimination (Complaint) with the Florida Commission on Human Relations (FCHR) alleging that he is a handicapped individual and was denied access to amusement park attraction queues owned and operated by Universal City Development Partners, d/b/a Universal Studios Orlando (Universal Studios/Respondent). On April 7, 2017, the FCHR issued a Notice of Determination: No Reasonable Cause. On May 8, 2017, a Petition for Relief was filed, and the case was transmitted by FCHR to the Division of Administrative Hearings for final hearing.

At the final hearing, Petitioner testified on his own behalf and called no other witnesses. Marian Adams was the only witness to testify on behalf of Respondent. Petitioner's Exhibits A through D were admitted into evidence. Respondent's Exhibits A through E were admitted in evidence.

A Transcript of the final hearing was filed on September 7, 2017. Neither party filed a proposed recommended order.

FINDINGS OF FACT

1. Universal Studios is a public accommodation whose principal business activity consists of the ownership, operation,

and management of entertainment parks, resorts, and related facilities located in the Orlando, Florida, area.

2. Petitioner is a 33-year-old disabled male who uses an electric wheelchair for personal mobility.^{1/} On or about October 10, 2016, Petitioner filed a charge of discrimination and claimed therein that "Universal Studios did not allow [his] electric wheelchair to enter in line for attraction[s] or restaurant[s]."

3. According to the patron attendance log maintained by Universal Studios, Petitioner was admitted to the theme park on July 9 and 11, 2016, and these are the only dates when Petitioner entered the theme park during the 12-month period preceding the filing of the charge of discrimination.^{2/}

4. On the dates in question, Petitioner was denied access to the following attractions: Skull Island: Reign of Kong; E.T. Adventure; Jurassic Park River Adventure; and Dudley Do-Right's Ripsaw Falls. According to Petitioner, "[i]n every single ride that I tried to enter, I was told power wheelchairs cannot be accommodated on the line because if they lose power, it could be a safety hazard." In other words, Petitioner was not allowed to join the queues for the designated attractions. Furthermore, according to Petitioner, Respondent makes the attraction queue a part of the entertainment experience and he believes that he should have the full benefit of the experience.

5. Petitioner was given the option of accessing each attraction by transferring to a park-provided manual wheelchair but he refused to do so because the manual chair, when equipped with his personal seat cushion, does not provide the necessary level of support and stability that he prefers. Furthermore, Petitioner testified that he is unable to tolerate sitting in the type of wheelchair offered him by Respondent because the chair has a soft, unsupported seat surface which, after a period of extended use (i.e., attraction queue wait times), causes him to experience physical pain. Petitioner does, however, own a manual wheelchair and there is no evidence that Petitioner's disability prevents him from using a manual wheelchair under certain circumstances.

6. For the convenience of its patrons, Respondent publishes a Rider's Guide for Rider Safety and Guests with Disabilities (Rider's Guide). The Rider's Guide provides, in part, as follows:

With the exception of the Hogwarts Express, none of the ride vehicles or attraction queues at Universal Orlando will accommodate Electric Convenience Vehicles (ECVs) or motorized wheelchairs. At those rides which can accommodate manual wheelchairs, guests may transfer from their . . . motorized wheelchair into a manual wheelchair that is provided at each location. If you cannot transfer to a manual wheelchair, please see an attendant.

7. Respondent's General Operating Procedure 8.3, Guests with Disabilities, provides that "[s]ome attractions are . . . completely wheelchair accessible, meaning the Guest would not have to transfer."^{3/} Operating Procedure 8.3 also notes, however, that "[e]lectric wheelchairs and ECV's cannot be accommodated on any ride vehicles at Universal Orlando."

8. Respondent's Operating Procedure 8.3 and its Rider's Guide, make clear that Respondent provides unrestricted access to its attraction queues for patrons operating manual wheelchairs, and offers no access to its attraction queues for patrons operating electric wheelchairs. The operating procedure and Rider's Guide also demonstrate that Respondent considers electric wheelchairs and ECVs the same for purposes of barring access to its attraction queues.

9. Marian Adams is senior manager of guest safety and American with Disabilities Act (ADA) compliance for Respondent. Ms. Adams testified that Respondent is concerned about the safety of all guests, and when considering the large number of guests that wait in attraction queues, and their close proximity to each other, Respondent decided to restrict the use of motorized wheelchairs and other electric convenience vehicles. Ms. Adams also testified that because of the close proximity of guests to one another in its attraction queues, "if for some reason the operator of [a] powered mobility device were to take a turn

indirectly [sic] or travel the powered mobility device faster than the crowds are moving, then it causes a safety concern for not only the surrounding guests, but for the operator of the device.”

10. Regarding the issue of attraction access, Ms. Adams testified that in instances where a guest refuses or is unable to transfer to a manual wheelchair, employees are instructed to contact “a team captain or a supervisor” who will meet with the guest, explain Respondent’s policy regarding powered mobility devices, and offer the guest an alternative accommodation of using the exit ramp to access the attraction. While it is true that the Rider’s Guide instructs patrons who cannot transfer to a manual wheelchair to “please see an attendant,” there is nothing in the Rider’s Guide which indicates that patrons who fit into this classification can access attractions by using an attraction’s exit ramp.

11. Petitioner testified that Respondent’s employees never offered exit ramp access as an accommodation, but instead simply told him that he would not be able to use his electric wheelchair in the attraction queue. Petitioner’s testimony is consistent with Respondent’s policy of not allowing motorized/electric wheelchairs in attraction queues. The evidence, however, is inconclusive regarding whether Petitioner was offered the

opportunity to speak with a team captain or supervisor regarding his issues of attraction queue access.

CONCLUSIONS OF LAW

12. Petitioner has the burden of proving, by a preponderance of the evidence, that Respondent unlawfully denied his right to access amusement park ride queues as a result of his use of an electric wheelchair. See § 120.57(1)(j), Fla. Stat. (2016).^{4/}

13. Section 760.08 provides, in part, that all persons “are entitled to the full and equal enjoyment of the . . . facilities . . . of any place of public accommodation without discrimination or segregation on the ground of . . . [a] handicap[.]” Petitioner is an individual with a handicap and Respondent is a “place of public accommodation.”^{5/}

14. 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).

15. Title III of the ADA (Title III) provides, in part, that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases

to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a) (1990). Congress directed the Department of Justice to promulgate regulations applicable to facilities covered by Title III. Id. § 12186(b). “As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department’s views are entitled to deference.” Bragdon v. Abbott, 524 U.S. 624, 646, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998).

16. Title 28 C.F.R. § 36.302(a), which is part of a series of regulations promulgated by the Department of Justice, provides as follows:

General. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

17. Title 28 C.F.R. § 36.311(a) provides as follows:

Use of wheelchairs and manually-powered mobility aids. A public accommodation shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

18. Title 28 C.F.R. § 36.104 defines a wheelchair as “a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion.” Accordingly, the word “wheelchairs,” as used in 28 C.F.R. § 36.311(a), “incorporates both the power-driven and manually-operated varieties.” Collins v. New Orleans Home for Incurables, CIVIL ACTION NO: 15-1468 SECTION: "J"(1), 2016 U.S. Dist. LEXIS 143235, at *10 (E.D. La. Oct. 14, 2016). See also Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices, U.S. Department of Justice (Jan. 2014).

19. To establish a prima facie case in a typical public accommodation case, a claimant must prove 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. 2d 1308, 1322 (S.D. Fla. 2004); Fahim v. Marriott Hotel Servs., 551 F.3d 344, 349 (5th Cir. 2008), and cases cited therein. Petitioner has established a prima facie case.

20. Respondent defends against Petitioner’s claim of discrimination on the grounds that legitimate safety concerns

justify denying Petitioner's use of a power-driven wheelchair while attempting to access its attraction queues. Respondent's defense suffers from a fatal flaw in that Respondent treats a power-driven wheelchair as if it is the type of device covered by 28 C.F.R. § 36.311(b), which provides, in part, as follows:

Use of other power-driven mobility devices. A public accommodation shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public accommodation can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b).

Because a power-driven wheelchair is specifically covered by 28 C.F.R. § 36.311(a), the "legitimate safety requirements" considerations are inapplicable because power-driven wheelchairs are not included within the definition of "other power-driven mobility devices."

21. As previously noted, power-driven and manually operated wheelchairs are synonymous for purposes of Title III, and, in accordance with 28 C.F.R. § 36.311(a), a covered entity can avoid making reasonable modification of its policies, practices, or procedures to accommodate such devices only in instances where the covered entity "can demonstrate that making the modifications would fundamentally alter the nature of the goods, services,

facilities, privileges, advantages, or accommodations" that it offers. See PGA Tour, Inc. v. Martin, 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001) (The use of a golf cart did not fundamentally alter the nature of the PGA Tour, which requires golfers to walk). Respondent offered no evidence that would support a finding that allowing power-driven wheelchairs in its attraction queues would fundamentally alter the services, facilities, privileges, advantages, or accommodations that it provides to its patrons.

22. "Public accommodations must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience." Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135 (9th Cir. 2012) (citing Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 128-29, 125 S. Ct. 2169, 162 L. Ed. 2d 97 (2005)). In the absence of evidence that it would fundamentally alter the nature of its services to allow attraction queue access to patrons who operate power-driven wheelchairs, Respondent's practice of directing such patrons to the exit ramp seems to be the practical equivalent of telling these patrons "to go around to the back." Such a practice seems inconsistent with 28 C.F.R. § 36.311(a), which requires that disabled individuals who use wheelchairs, either power-driven or manually operated, be allowed access to "any areas open to pedestrian use."

23. Having considered all of the evidence of record, it is reasonable to conclude that Petitioner was the victim of unlawful discrimination.

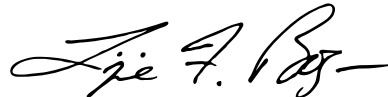
RECOMMENDATION

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:

1. Finding that Universal City Development Partners, d/b/a Universal Studios Orlando, subjected Javier A. Muniz-Pagan to unlawful discrimination in violation of the Florida Civil Rights Act of 1992 by refusing to allow him to use his power-driven wheelchair in attraction queues at its theme park; and

2. Prohibiting any future acts of discrimination by Universal City Development Partners, d/b/a Universal Studios Orlando.

DONE AND ENTERED this 6th day of October, 2017, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of October, 2017.

ENDNOTES

^{1/} Petitioner testified that he suffers from a degenerative disorder that causes limited mobility of his upper left extremity "and no movement at all of [his] lower left extremity." Respondent does not challenge Petitioner's claim of disability. Also, the words "electric wheelchair," "motorized wheelchair," and "power-driven wheelchair" are used interchangeably throughout this Recommended Order.

^{2/} September 23, 2016, is the date when Petitioner signed the charge of discrimination, and October 10, 2016, is the date that the same was stamped filed by the Florida Commission on Human Relations. Respondent's user log shows that Petitioner entered the park on October 2, 2016, but this visit is not included in the analysis of the instant dispute because Petitioner, in the charge of discrimination, identified July 2016 as the "date most recent discrimination took place." Additionally, Petitioner complains of events (e.g., restaurant access) occurring prior to October 2015. Because these events were more than 365 days prior to the date of filing the instant charge of discrimination, the same are not considered. Section 760.11(1) provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation"

^{3/} The Rider's Guide, with the exception of Hogwarts Express, segregates the attractions into two groups. The first group includes attractions that "are capable of allowing guests to remain in their standard (manual) wheelchair throughout," and the second group includes attractions that "have been designed to easily accommodate those transferring from their wheelchair to the ride vehicle."

^{4/} All subsequent references to Florida Statutes will be to 2016, unless otherwise indicated.

^{5/} Section 760.02(11) defines "public accommodations" to include "places of exhibition or entertainment." Respondent is included within this definition.

COPIES FURNISHED:

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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.