STATE OF WISCONSIN CIRCUIT COURT BRANCH 16 DANE COUNTY

JAMES B. DAILEY DBA BUCK'S MADISON SQUARE GARDEN TAVERN, Plaintiff vs. EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON Defendant	DECISION AND ORDER Case No. 06CV1931

On February 6, 2006, Michael Nichols went to Buck's Tavern with his friend Kelly. Flowers and his dog Precious. The bartender, Tammy Kasdorf, told him the dog was not allowed in the bar and refused to serve Nichols. Nichols receives SSI for several conditions including post traumatic stress disorder, social anxiety disorder and depression and he told Kasdorf that Precious was a service dog, permitted in the bar under the law. Kasdorf was unwilling to allow the dog to stay in the bar, and Nichols and Flowers left.[1] Nichols filed a complaint with the Madison Equal Opportunities Commission. Respondent James B. Dailey, d/b/a Buck's Madison Square Garden Tavern will be referred to as Buck's in this decision. The hearing examiner found that Buck's discriminated against Nichols on the basis of his disability and violated Madison General Ordinance § 3.23 when it failed to make a reasonable accommodation of the complainant's disabilities by refusing to allow Precious to remain on the premises. He awarded Nichols $5500 in damages and ordered Buck's to pay Nichols' attorney fees. On May 22, 2006, the Equal Opportunities Commission affirmed the Hearing Examiner's recommended Findings of Fact, Conclusions of Law and Order. Buck's then filed this certiorari action. Nichols filed a motion to intervene, which was granted. In Nichols' Brief in Opposition to Certiorari he argues that the court does not have jurisdiction to hear this matter because the Complaint seeks judicial review pursuant to Wis. Stat. § 68.13. I concur that review of the MEOC decision is not available under that statute section.[2] However the complaint says, "This is an action seeking a remedy available by certiorari pursuant to Wis. Stats. § 68.13 and § 3.23(10)(c) of the City of Madison General Ordinances ..." (Complaint ¶4). MGO § 3.23(10)(c)4. says:

> All orders of the Equal Opportunities commission shall be final administrative determinations and shall be subject to review in court as by law may be provided. Any party to the proceeding may seek judicial review thereof within thirty (30) days of service by mail of the final determination. In addition, written notice of any request for judicial review shall be given by the party seeking review to all parties who appeared at the proceeding, with said notice to be sent by first class mail to each party's last known address.

Plaintiff's reference to certiorari and to MG0 § 3.23(10)(c) is sufficient to give notice that this is a common law certiorari action. Therefore the court has jurisdiction over this matter.

STANDARD OF REVIEW ON CERTIORARI

The Court's review in a certiorari is limited to: (1) whether the Commission kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. The meaning of these tests was explained in State ex rel. Ruthenberg v. Annuity and Pension Bd., 89 Wis.2d 463, 472-73 (1979):

The first question requires the trial court to determine whether the Board acted within the scope of its powers. The second requires the trial court to review the Board's procedure in light of the applicable statutes and due process requirements. As to the third question, it is established that a Board decision is arbitrary and represents its will if it has acted without a rational basis or the exercise of discretion. The fourth question has

been compared to the substantial evidence test under Chapter 227, Stats. In a review of a decision on a writ of certiorari there is a presumption that the Board acted according to law and the official decision is correct and the weight and credibility of the evidence cannot be assessed. (Internal citations omitted).

This standard will be applied in this decision.

Equal Opportunities Ordinance

MGO §3.23(5)(a) prohibits the denial of "the full and equal enjoyment of any public place of accommodation ... because of ... handicap...." The ordinance defines discrimination as including:

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

DISCUSSION

Plaintiff does not contend the Commission exceeded its jurisdiction. Plaintiff does contend the decision should be reversed under the other three tests but does not make clear in its brief which argument it believes fits under which of the four certiorari tests. I have done my best to translate the arguments made into objections based on the four tests.

Plaintiff's first argument is entitled "The Commission Correctly Found that Precious was not a Service Animal." In fact, the Conclusion of Law in the MEOC decision on this topic goes further than that heading suggests, saying, "Despite the fact that Precious does not meet the ADA definition of service animal, a dog need not necessarily be a service animal under the strict meaning of the ADA to qualify as a reasonable accommodation under MGO § 3.23." (Conclusion of Law ¶ 6.) Plaintiff contends this conclusion was incorrect and argues that, because Precious was not a service animal, allowing her to remain in the bar was not a reasonable accommodation. Plaintiff argues that the Commission's decision conflicts with MGO § 7.08(6)(o). Plaintiff also argues that the Commission's decision is preempted by state law and that the Commission's interpretation of the Equal Opportunities Ordinance is unconstitutional. These arguments might be considered under either of two of the certiorari standards:

> In a certiorari proceeding a litigant may argue that his or her constitutional right to equal protection has been violated in an effort to establish that a municipal determination was not made according to law or is unreasonable, arbitrary and oppressive.

Hanlon v. Town of Milton, 2000 WI 61 ¶ 14. I will consider them under the test related to arbitrariness.

In addition to the arguments that MEOC does not comply with the law, Buck's argues that Nichols was not denied access because of his disability. I will construe this as an argument that the evidence does not reasonably support the conclusion reached. Similarly, plaintiff argues that Nichols failed to prove entitlement to compensatory damages. Again I will construe this as an argument that the evidence is insufficient to support the conclusion reached.

1. Was the decision of MEOC arbitrary, oppressive or unreasonable, representing its will and not its judgment?

   An "arbitrary" action or decision is one that is either so unreasonable as to be without a rational basis, or one that is the result of an unconsidered, willful or irrational choice of conduct, a decision that has abandoned the "sifting and winnowing" process so essential to reasoned and reasonable decisionmaking.

Nelson Bros. Furniture Comp. v. WDOR; 152 Wis. 2d 746, 757 (Ct: App: 1989).

Petitioner contends the Commission's decision is not in accord with applicable law because (a) allowing Precious, a non-service animal, to remain in the bar was not a reasonable accommodation; (b) allowing Precious to remain in the bar was not necessary because Nichols was with a friend; (c) the Commission's decision conflicts with MGO § 7.08(6)(o); (d) the Commission's decision is pre-empted by state law and (e) the Commission's decision is unconstitutional.

Reasonable Accommodation

As set forth above, a business must make a "reasonable modification of policies, practices or procedures" to accommodate a person with a disability. MG0 § 3.23(5)(a). Was a modification to the "no animals" policy reasonable under the circumstances of this case?

> No party disputes the relevant Finding of Fact reached by MEOC:
>
> ¶ 11. Complainant has a certificate that identifies Precious as a certified service animal. Complainant obtained the certificate from a dog trainer after a cursory inspection and payment of a fee. Precious has not completed any significant training from a professorial dog trainer and does not demonstrate any significant special training other than ordinary obedient behavior.

The Commission made this Conclusion of Law:

> ¶ 6. Despite the fact that Precious does not meet the ADA definition of a service animal, a dog need not necessarily be a service animal under the strict meaning of the ADA to qualify as a reasonable accommodation under MGO 3.23.

Buck's argues that because Precious was not a service animal, allowing her to remain in the bar was not a reasonable accommodation. Buck's relies on Prindable v. Assoc. of. Apt. Owners of Kalakaua, 304 F. Supp. 2d 1245 (D.C. Hawaii 2003). In that case, a disabled person sought permission to keep a dog in her dwelling. In a footnote the Court described the concern that without clearly defining "service animal" any pet would be considered an accommodation:

> FN25. Plaintiffs' counsel suggested canines (as a species) posses the ability to give unconditional love, which simply makes people feel better. Although this may well be true, counsel's reasoning permits no identifiable stopping point: every person with a handicap or illness that caused or brought about feelings of depression, anxiety or low self esteem would be entitled to the dog of their choice, without regard to individual training or ability. And if certain people liked cats, fish, reptiles or birds better than dogs, there would be no logical reason to deny an accommodation for these animals. The test would devolve from "individually trained to do work or perform tasks" to "of some comfort." The FHA-a sweeping enactment-is not quite so broad. Certainly, "some type of training is necessary to transform a pet into a service animal." In re Kenna Homes, 557 S.E.2d at 797.

Prindable at 1257. Based on this concern the Court held:

> In other words, if Einstein is not a proper service animal (as opposed to a pet) an exemption from article VI, § 11 for Einstein is not necessary to afford Prindable an equal opportunity to use and enjoy the dwelling.

Id.

Similarly, Buck's argues that if Precious is not a service animal, no accommodation needs to be made. Buck's says that to hold otherwise would render the definition of service animal superfluous. However this case is based on Madison General Ordnances that have no definition of service animal, so this argument is misplaced. There is no language in the ordinance that is rendered superfluous by the commission decision.

MEOC argues that the fact the ADA explicitly makes service animals a reasonable accommodation does not exclude other animals from being a reasonable accommodation under certain circumstances. It compares this to the law which says wheelchairs area reasonable accommodation but does not mean scooters or crutches

are not also a reasonable accommodation. MEOC relies on on Janush v. Charities Housing Development Corp., 169 F. Supp. 2d 1133 (N.D. CA 2000), a case in which a tenant wanted to keep two birds and two dogs in her apartment, despite a no-pets policy, and her doctor agreed the pets were necessary because of her severe mental illness. The court refused to grant summary judgment, saying:

> The legal basis for defendants' motion appears to be the assertion that California's definition of a "service dog" should be read into the federal statute to create a bright-line rule that accommodation of animals other than service dogs is per se unreasonable. *See* Cal. Civ.Code. § 54.1(b)(6)(C)(iii). Although the federal regulations specifically refer to accommodation of seeing-eye dogs, there is no indication that accommodation of other animals is per se unreasonable under the statute. In fact, the federal regulations provide a broad definition of service animals. "Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability ...." 28 C.F.R. § 36.104. Even if plaintiff s animals do not qualify as service animals, defendants have not established that there is no duty to reasonably accommodate non-service animals. As plaintiff has adequately plead that she is handicapped, that defendants knew of her handicap, that accommodation of the handicap may be necessary and that defendants refused to make such accommodation, defendants' motion to dismiss is denied.

Id. at 1135-36. Similarly, under these facts, Nichols made a request that Precious be allowed to stay in the bar to assist him. MEOC was free to determine, in light of its expertise in these matters, that this was a request for a reasonable accommodation. As MEOC is charged with enforcement of the Equal Opportunities Ordinance, the definitions contained in the ADA do not have to be applied to the Madison ordinance.

Necessary

MGO § 3.23 requires a reasonable modification when it is necessary to afford services, to individuals with disabilities. Buck's argues that Precious was not "necessary" for Nichols to enjoy a drink at Buck's, because Nichols was accompanied by his friend Kelly Flowers and he testified that the presence of a friend had the same impact on reducing his social anxiety as the presence of his dog. Ignoring this testimony, Buck's argues, was reversible error. In certiorari parlance, this could be an argument that the Commission's action was arbitrary, or that the evidence was such that it was unreasonable to make the determination the Commission made.

MEOC takes issue with the argument that if another accommodation is available, use of dog is not necessary. It states that the element of necessity does not involve a comparison of competing accommodations. Buck's has not disputed that Nichols has a disability and that an accommodation is necessary, for him to visit Buck's. Under these circumstances, it was proper for the Commission to conclude that Buck's should have granted the accommodation requested by Nichols unless doing so would fundamentally alter the nature of its business. MGO 3.23(6)(e)2. Acknowledging that it has permitted dogs to remain on the premises at other times, Buck's has not attempted to show a fundamental alteration.

Conflict with MGO § 7.08(6)(o).

> MGO § 7.08(6)(o) says:
>
> No birds or animals shall be allowed in any area used for the conduct of eating and drinking establishment operations except guide dogs accompanying blind persons may be permitted in dining areas.

Clearly this section, standing alone, would prohibit Nichols from, bringing Precious into a bar. Buck's relies on the following language regarding construction of apparently conflicting statutory provisions:

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmionized if possible; but if there is any conflict, the latter will prevail.

State v. Amato; 126 Wis. 2d 212, 217 (1985). Buck's argues that the prohibition on animals except guide dogs for the blind is explicit and specific. The Madison Equal Opportunities ordinance generally prohibits

discrimination in public accommodations and requires a reasonable accommodation. Buck's argues the specific language relating to animals in eating and drinking establishments should prevail. While recognizing that the Americans with Disabilities Act would preempt MGO § 7.08(6)(o), Buck's points out that MEOC is charged only with enforcement of Madison's Equal Opportunities Ordinance.

Interestingly, the City Attorney representing MEOC argues that MGO § 7.08(6)(o) is a "legal nullity." (Defendant's Brief, p. 13). This is because the Health Code conflicts with the ADA's requirements of access for service animals. Local provisions that provide lesser protections or that conflict with the ADA are preempted by it. U.S. v. AMC Entertainment, Inc., 232 F. Supp. 2d 1092, 1118 (C.D. Cal. 2002). The Madison Health Code ordinance contains a severability clause that provides for the automatic voiding of separate and distinct unconstitutional or unlawful provisions of that ordinance.[3] The ADA deals with the question of local ordinances that do not provide the same level of protection for persons with disabilities:

> Relationship to other laws
> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. §,12201(b). Although local ordinances that provide greater protection are not preempted by the ADA, local ordinances that provide less protection are preempted by the ADA. In U.S. v. AMC Entertainment, Inc., 232 F.Supp.2d 1092 (C.D. Cal. 2002), patrons who used wheelchairs complained that a movie theater had locations for them only in the first row of seating in front of the screen, and not in the elevated stadium seating further back in the theater. One of the defenses raised by the theater was that its conduct was privileged in that it was undertaken pursuant to the terms of the applicable laws, regulations, orders and approvals relating to building construction and/or public health and safety. The Court rejected this defense and held that "[a]ny local laws that permit the building or alteration of structures that afford less protection to the disabled are preempted by the ADA." *Id.* at 1118.

Therefore, because the definition of animals permitted in restaurants to assist those with disabilities contained in MGO s. 7.08(6)(o) is more restrictive than the definition contained in the ADA, that provision of the Madison ordinances is preempted by the ADA and cannot be relied upon to justify the conduct of Buck's in this instance.

This ordinance also conflicts with Wis. Stat. § 106.52(3)(am)4, which requires a place of public accommodation to allow a disabled customer to be accompanied by a service animal and defines service animal as:

> 106.52(1)(fm) "Service animal" means a guide dog, signal dog, or other animal that is individually trained or is being trained to do work or perform tasks for the benefit, of a person with a disability, including the work or task of guiding a person with impaired vision, alerting a person with impaired hearing to intruders or sound, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

Because the state has entered the field of regulating what dogs are allowed in places of public accommodation a "municipalit[y] may not make regulation inconsistent therewith' "because "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." DeRosso Landfill Co. Inc. v. City of Oak Creek, 200 Wis.2d 642, 651 (1996) (citations omitted). If a municipality does so, the ordinance is void. *Id.*

Because MGO § 7.08(6)(o) is preempted by both the ADA and by Wis. Stat. § 106.52(3)(am)4, it was reasonable for MEOC to ignore its language when construing its discrimination ordinance.

State Law Preemption

Buck's relies on Wis. Admin. Code § HFS 196 Appendix, known as the Wisconsin Food Code, Chapter 6, § 501.115(A) which says:

(A) Except as specified in ¶¶ (B) and (C), live animals may not be allowed on the PREMISES of a FOOD ESTABLISHMENT.

(B) *Live animals may be allowed in the following situations if the contamination of FOOD; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLE-SERVICE and SINGLE-USE ARTICLES can not result:*

(3) *In areas that are not used for FOOD PREPARATION and that are usually open for customers, such as dining and sales areas, SERVICE ANIMALS that are controlled by the disabled EMPLOYEE or PERSON, if a health or safety HAZARD will not result from the presence or activities of the SERVICE ANIMAL;*

In the definition section of this Code, service animal is defined as follows:

> (83) "Service animal" means an animal such as a guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability.

If regulation of an area is a matter of statewide concern, the court must examine whether local municipalities are preempted from legislation in the same area. I will assume maintaining sanitation standards in restaurants is a matter of statewide concern and move to the next step.

Four factors are used to guide the analysis:

> (1) whether the legislature has expressly withdrawn the power of municipalities to act;
> (2) whether the ordinance logically conflicts with the state legislation;
> (3) whether the ordinance defeats the purpose of the state legislation; or
> (4) whether the ordinance goes against the spirit of the state legislation.

Anchor Sav. & Loan Assn v. EOC, 120 Wis.2d 391, 397, 355 N.W.2d 234 (1984). Buck's argues that the interpretation of the Madison Equal Opportunities Ordinance used in this decision directly conflicts with the definition of service animal set forth in the Wisconsin Food Code and with the code's prohibition of other animals being in a restaurant.

Although MEOC found that "Precious has not completed any significant training from a professional dog trainer and does not demonstrate any significant special training other than ordinary obedient behavior," it also concluded that "Precious provides Complainant with a therapeutic or service function that relates to his condition." (Finding of Fact ¶ 11; Conclusion of Law ¶ 7.) This is not an irrational or arbitrary conclusion. Based on this conclusion, Precious could be considered an "animal individually trained to provide assistance to an individual with a disability." Thus the decision of MEOC in this matter did not conflict with the state regulation defining service dog. Therefore MGO § 3.23 is not preempted by state law.

Unconstitutionality

Buck's argues the ordinance is unconstitutionally vague in that it fails to give sufficient notice of what conduct is prohibited. Buck's complains that the ordinance does not define when animals are a reasonable accommodation and that it is not fair for a business to face a financial damage award when it has to make snap decisions without adequate guidance.

"Statutes are presumed constitutional and the challenger bears the burden of proving the statute's unconstitutionality beyond a reasonable doubt." *Joseph E.G.,* 2001. WI App 29, ¶5, 240 Wis.2d 481, 623 N.W.2d 137. In City of Madison v. Baumann, 162 Wis. 2d 660 (1991), the court considered whether an ordinance prohibiting unreasonable noise was void for vagueness and concluded:

> We conclude that the word, "reasonably," saves the ordinance from the infirmity of vagueness. The reasonable-person standard is one that has been relied upon in all branches of the law for generations. It permeates our negligence law. In the opinion cited above, Landry v. Daley, the reference to the provisions that save the ordinance are those that give "reasonable" notice of what is prohibited conduct. While it is argued that the terms, "reasonable" or "unreasonable," only have meaning in context, *i.e.,* egress or ingress to a place which is being protected or in propinquity to a school, "reasonable" is always conceptual. The reasonable person is a reasonable person in the circumstances. It is what is "[f]it and appropriate to the end in view." *Black's Law Dictionary* (rev. 4th ed.), p. 1431. In the instant case, the circumstances are adequately spelled out. They are simply what a reasonable person would conclude would disturb

> the peace and quiet of the vicinity. The test for a possible violator is simply the time honored and time validated reasonable person test, *i.e.,* what effect will my conduct-singing or playing-have upon persons in the vicinity under the circumstances.

Id. at 677-78.

Nichols points out that the Madison Equal Opportunity Ordinance has a broad remedial purpose and should be construed liberally to advance the intended remedy. City of Milwaukee v. Kilgore, 193 Wis. 2d 168, 187 (1995). It is easy to understand why an ordinance requiring accommodations of those with disabilities cannot be overly specific. There are many types of disabilities: manipulatory disabilities, mobility disabilities, lack of stamina or endurance, hearing impairments, communication disorders, vision impairments, mental illness, mental retardation, dementia. Opening the Courthouse Door - An ADA Access Guide for State Courts, ABA Commission on Mental and Physical Disability law, 1992. There axe as many types of public accommodations. Rather than attempt the impossible task of specifying what type of accommodation is required under this myriad of circumstances, disability laws generally require business owners to do what is reasonable to accommodate the patron, but tell them they need not go so far as to fundamentally alter the nature of the business in order to accommodate a disabled patron. It would come as no surprise to Buck's that allowing a dog to accompany a disabled person might be a reasonable accommodation. What made the call difficult, under the circumstances of this case, was that Kasdorf might not have understood the nature of Nichols' disability or whether Precious was an appropriate accommodation in light of that disability. Nichols testified that he told Kasdorf he was disabled and that Precious was a service animal (Tr. p. 45) and Flowers testified that Nichols said he was disabled in response to a suggestion that he did not appear visually to be disabled (Tr. p. 65). Nichols offered to clarify these issues, both by offering to show her "the law" and by offering to show the certificate he had saying that Precious was a service animal. Kasdorf did not look at either document and failed to engage in any conversation with him on these issues or to take any other steps to determine whether it was reasonable to allow the dog to stay to accommodate Nichols' disability. Buck's has failed to meet the burden of establishing that the ordinance at issue is unconstitutional.

2. Was the evidence such that MEOC might reasonably make the order or determination in question?

Buck's argues that Nichols was not denied access because of his disability and that he failed to prove entitlement to damages. These are questions about the sufficiency of the evidence. On certiorari review, the weight and credibility of the evidence cannot be assessed. If any reasonable view of the evidence would sustain the findings of the Commission, the findings are conclusive. See *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis.2d 468, 476 (1976).

Discrimination for Disability

Buck's argues that it had no intention of discriminating against Nichols, as it has accommodated disabled persons with dogs in the past. Buck's states that Nichols did not ask for a reasonable accommodation, but instead only said he said his service dog could go anywhere with him, and that he did not offer information about the work the dog was trained to perform. Buck's argues that the denial of service was not related to Nichols' disability.

There is no intent element in the ordinance. Discrimination is defined simply as the failure to make a reasonable accommodation for a disability (unless to do so would fundamentally alter the services). The evidence shows that Nichol s said he was disabled. Kasdorf did not testify and Steinhauer did not recall if Nichols mentioned any impairments. (Tr. p. 82). It was reasonable for MEOC to find that Buck's was on notice of Nichols' disability and requested accommodation. (Conclusion of Law ¶4). The communication between Nichols and Kasdorf could have gone better, but it is unfair to place all the blame for that on Nichols. He offered to show a copy of the law and a certificate for Precious and those offers were rejected by Kasdorf.

Because the evidence shows that Nichols had a disability and communicated that he wanted his dog in the bar as an accommodation for that disability, Buck's refusal to grant the request was discrimination as defined by the ordinance.

Damages

Buck's argues that the Commission was not permitted to award damages for emotional distress unless the testimony demonstrated an extreme and disabling emotional response to the incident. See *Hicks v. Nunnery,* 2002 WI App 87, ¶25. The testimony showed that Nichols was angry, embarrassed and livid. (Tr. p. 13). In addition, testimony showed there were several issues contributing to Nichols' emotional distress after this incident. (Tr. p. 36). Plaintiff also points out areas of the testimony that tend to tarnish Nichols' credibility.

Nichols responds that the case law on which Buck's relies applies to tort actions, not discrimination actions. The Madison ordinance specifically authorizes this type of damage award:

> If, after hearing, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the respondent as will redress the injury done to complainant in violation of this ordinance, bring respondent into compliance with its provisions and generally effectuate the purpose of this ordinance. Such remedies may include, but are not limited to, out of pocket expenses, economic and noneconomic damages including damages for emotional injuries.

MGO §3.23(10)(c)B.b. Damages for emotional distress are permitted in other types of discrimination actions. See U.S. v. Balistrieri, 981 F. 2d 916 (7th Cir. 1992) (Awarded damages for emotional distress for individuals discriminated against in housing.)

Buck's also argues that the amount of damages is not supported by the evidence. The award of $5500 is certainly not an amount that is extremely large or disproportionate to the circumstances. There was evidence of Nichols' embarrassment at being refused service in the bar, and continued distress and anger for a period of time thereafter. Because there is evidence supporting the award of damages, this court is not free to modify that award.

CONCLUSION

MEOC's order must be upheld because the plaintiff has failed to establish that the order was arbitrary and has failed to show that there was, no evidence to support the Findings and Conclusions reached by the Commission. Therefore MEOC's decision is affirmed.

Any request for an award of attorney's fees should be filed, together with documentation, no later than April 16, 2007, and any objection should be filed by April 27, 2007.

Dated: March 30, 2007

By the Court:

Sarah B. O'Brien
Circuit Court Judge

[1]The record contains evidence that an off-duty Dane County Sheriff's Deputy, Rick Steinhauer, who was a customer in the bar, intervened and voiced his opinion that Kasdorf did not have to allow Nichols to stay in the bar with the dog. Steinhauer was not an agent of the bar and did not have any official reason to involve himself in the dispute. Buck's, through its bartender Kasdorf, is responsible for what occurred. Under these circumstances it was the obligation of the on-duty bartender to make appropriate decisions for the bar, regardless of any opinions voiced by other customers.

[2]Wis. Stat. § 68.02 provides for certiorari review of the following determinations: "(1) The grantor denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license; (2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03(5); (3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant; (4) The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court." Contrary to its arguments, Buck's has not had a license revoked or suspended and has not had a sanction or penalty, imposed, both of which are defined by Black's Law Dictionary as punishments. Money damages are intended to make the victim whole, not to punish. MEOC is permitted to impose penalties only for housing discrimination, and, in cases of housing discrimination only, may initiate a court action seeking punitive damages. MGO §3.23(10)(c)5.

[3]MG0 § 7.08(13) Unconstitutionality Clause. Should any section, subsection, sentence, paragraph, clause or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Michael James Nichols 109 Washburn Apt 204 Deerfield WI 53531 Complainant vs. Buck's Madison Square Garden Tavern 802 Regent St Madison WI 53715 Respondent	COMMISSION'S DECISION AND FINAL ORDER Case No. 20033011

BACKGROUND

On February 11, 2003, the Complainant, Michael J. Nichols, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Buck's Madison Square Garden Tavern, discriminated against him on the basis of his disabilities when it refused to serve him in a public place of accommodation or amusement while his dog, Precious was present. The Complainant was told that he would be served if the dog were taken outside. The Complainant asserted that Precious was trained and was an accommodation for his disabilities.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred. Efforts to conciliate the complaint failed and the complaint was assigned to the Hearing Examiner for a public hearing on the merits of the complaint.

Prior to hearing on the complaint, the Respondent filed a motion challenging the subject matter jurisdiction of the Commission over the complaint. On October 14, 2003, the Hearing Examiner dismissed the Respondent's motion finding that the Commission had jurisdiction over the complaint. The Respondent's motion was premised on the notion that the Equal Opportunities Ordinance was preempted by other provisions of the Madison General Ordinances and state law relating to the use of service animals and public places of accommodation, especially those that prepare and serve food. The Hearing Examiner determined that any apparent conflict had to be resolved in favor of the Equal Opportunities Ordinances because of the ordinance's broader scope and more recent adoption.

A public hearing was held and on November 8, 2005, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and Order determining that the Respondent had violated the Equal Opportunities Ordinance by refusing the Complainant's request to permit his dog to remain with him as an accommodation of his disabilities. The Hearing Examiner made a recommended order including a requirement that the Respondent "cease and desist" from further discrimination, not retaliate against anyone participating in the hearing, payment of $5,500.00 for emotional distress and payment of the Complainant's costs and attorney's fees.

The Respondent timely appealed the Hearing Examiner Recommended Findings of Fact, Conclusions of Law and Order. Subsequent to the opportunity to submit additional written argument, the Commission met on May 11, 2006 to consider the Respondent's appeal. Commissioners Bayrd, Brandon, Howe, Morrison, Poliarco, Ross, Selkowe, Smith, Solomon, and Zipperer deliberated and Commissioners Enemuoh-Trammell and McDonell recused themselves from this matter.

DECISION

The Commission after review of the record and the briefs of the parties, adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated November 8, 2005.

The Commission finds that the Hearing Examiner's analysis of the Respondent's arguments relating to preemption to be correct. It would result in a nullification of the accommodation requirements of the ordinance to give the service animal provisions predominance.

The Commission finds the lack of public guidance on the distinction between service animals and animals used as accommodations for disabilities to be discouraging. To limit the universe of possible accommodations only to service animals as contended by the Respondent fails to give effect to the broad mandate to reasonably accommodate the disabilities of all individuals. Under the guidance that is currently limited to service animals, animals could only be accommodations for a narrow range of physical disabilities. This is clearly contrary to the broader scope and purpose of the ordinance and other laws protecting those with disabilities.

The concern that any animal can be a reasonable accommodation is incorrect under the approach utilized by the Hearing Examiner. There must be a demonstration of some degree of training to assure public safety and a positive remedial effect attributable to the animal to be used as an accommodation. Under this approach, service animals are clearly reasonable accommodations, but there is room for others to be considered also.

Given this approach, the Commission finds that Precious was a reasonable accommodation of the Complainant's emotional/mental disabilities. On this record, there was no real doubt that the Complainant was a person with a disability.

While the Commission had some questions about whether the award of damages in this matter was sufficient, it was not an issue presented for review. The Commission will take no action with regard to damages other than to indicate that the Complainant's response to this appeal should be included in a petition for costs and fees.

ORDER

For the forgoing reasons, the Commission affirms the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. The Respondent's appeal is dismissed.

Joining in the Commission's Decision are Commissioners Howe, Morrison, Poliarco, Ross, Smith and Zipperer. Opposing the Commission's decision are Commissioners Bayrd, Brandon, Selkowe and Solomon. Commissioners Enemuoh-Trammell and McDonell took no part in this matter.

Signed and dated this 22nd day of May, 2006.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Michael James Nichols 109 Washburn # 204 Deerfield, WI 53531 Complainant vs.	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 20033011

Buck's Madison Square Garden Tavern 802 Regent Street Madison, WI 53715 Respondent	

This matter came before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III on March 17, 2004. The Complainant, Michael Nichols, appeared in person and by Attorney T. Christopher Kelly of Kelly and Habermehl, S.C. The Respondent, Buck's Madison Square Garden, appeared by its owner, James Daily, and by Attorney Matthew J. Fleming of Murphy Desmond, S.C. Based upon the evidence presented, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Michael J. Nichols, is an adult resident of the State of Wisconsin.

2. The Respondent, Buck's Madison Square Garden Tavern (Buck's) is a Madison restaurant and tavern business owned by James Daily. Buck's is open to the public at 802 Regent Street, Madison, WI 53715.

3. Complainant has been diagnosed with various conditions including bipolar disorder, posttraumatic stress disorder, and social anxiety disorder. As a result, he receives Supplemental Security Income (SSI) payments.

4. Complainant receives counseling and treatment from Merle Bailey, a licensed clinical social worker at the Dane County Mental Health Center for posttraumatic stress disorder, social anxiety, and depression. The records of Ann Anderson of Counseling Associates reach much the same diagnoses as Bailey.

5. In the case of Complainant, posttraumatic stress disorder, social anxiety disorder, and depression interfere with his ability to work and engage in social interactions with others. He is prone to anxiety, frustration, anger, acting out, and a reluctance to go out in public and interact with others.

6. Complainant has held sporadic odd jobs, such as assisting a friend on a job site.

7. Complainant has a degree in general liberal studies from New Mexico State University. He attained this degree despite his mental and emotional conditions.

8. On February 6, 2003, Complainant entered Buck's with his friend, Kelly Flowers, and his dog, Precious. Flowers ordered a drink and was served by bartender Tammy Kasdorf. Complainant ordered a drink and was not served. Kasdorf told him that the dog was not allowed in the bar.

9. Bar patron Rick Steinhauer, a Dane County Sheriff Deputy, approached Complainant, asking if this was a seeing-eye dog. Complainant replied that Precious is a service animal, meaning that it can go anywhere he goes. Steinhauer asked for an explanation of the term service animal. Complainant repeated that this was his service animal, allowed to go anywhere open to the public. Steinhauer told Complainant that based on his experience, the dog would have to go. Kasdorf told Complainant that he would not be served with the dog present. Complainant offered to show a copy of the ADA and documentation for his dog. Steinhauer and Kasdorf did not look at these items. Complainant and Flowers left.

10. Complainant and the dog (Precious) had been asked to leave the bar about one month prior when they visited Buck's and the dog was not kept on its leash and acted disruptively in the bar.

11. Complainant has a certificate that identifies Precious as a certified service animal. Complainant obtained the certificate from a dog trainer after a cursory inspection and payment of a fee. Precious has not completed any significant training from a professional dog trainer and does not demonstrate any significant special training other than ordinary obedient behavior.

12. Being asked to leave caused Complainant emotional distress. Dealing with the process of filing and litigating his discrimination complaint against Buck's also has caused Complainant recurrent emotional

distress. Complainant continues to seek treatment, including counseling from Bailey as well as the care of his physician to deal with his conditions and the repercussions of the incident and complaint process.

13. Complainant generally is more calm and assured with Precious by his side. Having a friend, such as Kelly Flowers present has a similar effect. Complainant is more able to engage in social interactions in public with Precious and/or Flowers or another friend present.

14. Complainant's therapist, Merle Bailey, has not utilized Precious or other animals as a significant part of Complainant's ongoing treatment and therapy. Bailey believes that Precious provides therapeutic benefits to Complainant. Bailey also believes that Precious has a generally positive effect on Complainant. Although none of Complainant's medical records suggest that Precious is a part of Complainant's medical treatment, it is clear that Precious assists Complainant in overcoming his disabilities.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant has been diagnosed with posttraumatic stress disorder, depression, and social anxiety disorder, which inhibit the major life activities of working and engaging in normal social interactions.

2. Complainant receives SSI payments and is disabled. He is a member of the protected class disabled or handicapped.

3. Buck's, the Respondent, is a business in Madison. It is a place of public accommodation within the meaning of MGO 3.23.

4. Complainant requested a modification to Buck's usual practice of not allowing animals on the premises in order to accommodate his disability. Complainant asked Buck's to permit his dog to remain with him on the premises. Complainant's request, and offer to show supporting documents were sufficient to put Buck's on notice of Complainant's disability and requested accommodation.

5. Buck's refusal to serve Complainant when Precious was present denied Complainant's requested accommodation.

6. Despite the fact that Precious does not meet the ADA definition of a service animal, a dog need not necessarily be a service animal under the strict meaning of the ADA to qualify as a reasonable accommodation under MGO 3.23.

7. Precious provides Complainant with a therapeutic or service function that relates to his condition.

8. Complainant has demonstrated a medical need for the requested accommodation.

9. Complainant has carried the burden of demonstrating that the requested accommodation is generally reasonable.

10. Bucks discriminated against Complainant on the basis of his handicap/disability when it denied Complainant's requested accommodation. Therefore, Buck's violated MGO 3.23.

RECOMMENDED ORDER

It is hereby ordered:

1. Respondent is ordered to cease and desist from its violation of MGO 3.23.

2. Respondent is ordered to not retaliate against Complainant or any other person for their exercise of rights protected by the ordinance.

3. Respondent is ordered to pay $5,500, to compensate Complainant for emotional distress stemming from Respondent's discrimination against Complainant. This amount shall be paid within 30 days from the date upon which this order becomes final.

4. Respondent shall pay Complainant his costs and fees, including a reasonable attorney's fee, connected with the pursuit of this complaint. Complainant shall file a petition with the commission setting forth his costs and fees no later than 15 days of the date upon which this order becomes final. Respondent shall have 15 days in which to file an objection to the Complainant's petition

MEMORANDUM DECISION

Complainant Michael J. Nichols suffers from various mental and emotional conditions including bipolar disorder, posttraumatic stress disorder, and social anxiety disorder. As a result, he receives SSI payments. Numerous social workers, counselors, and physicians have diagnosed and treated Complainant for these conditions. Currently, Complainant receives counseling and treatment from Merle Bailey, a licensed clinical social worker at the Dane County Mental Health Center for posttraumatic stress disorder, social anxiety, and depression. In determining if Complainant is disabled for the purposes of this complaint, the relevant Madison ordinance reads as follows:

Disability means, with respect to the person,

> (1) A disability, with respect to a person is a condition that limits one or more of such person's major life activities; or
> (2) A record of having such impairment
> (4) The term also includes the term "handicap" as used in local, state and federal statutory, administrative or judicial case law
> Madison Government Ordinance 3.23 (m)

Complainant is an ongoing recipient of SSI disability payments. Therefore, a major federal bureau has determined that for their purposes, Complainant is disabled and unable to work. This alone would very often be enough to find that Complainant is disabled for the purposes of MGO 3.23. Complainant's lengthy medical history, including evaluations from Merle Bailey, shows strong evidence of a set of conditions, which create a significant impairment. He is unable to remain focused on a task, has anger issues, frustrates easily, is prone to exaggerations, and is very nervous and uncomfortable in unfamiliar situations or around unfamiliar people. Complainant has worked very sporadically as an assistant to a friend of his, and in a very informal role with no clear remuneration. Taken as a whole, Complainant's medical and counseling records, along with Complainant's own testimony and work record show a pattern of considerable impairment of the ability to work due to his mental and emotional conditions. The ability to work and earn a living is a major life activity

The issue of to what extent "work" and one's limitations represent major life functions is still open to dispute. The case law at the federal level tends to require an absolute limitation on broad categories of employment or effort. At the state level, however, the requirement is that one must be limited from specific work or employment. These differences stem, at least in part, from differences in the languages of federal and Wisconsin law.

While the ordinance more closely tracks the language of the ADA, the intent of the Common Council more likely follows the more expansive approach of the Fair Employment Act and cases decided under that law.

In the present case, these distinctions are probably unimportant. The record indicates that for the most part, the Complainant is entirely unable to hold meaningful employment as a result of his disabilities. The testimony about his occasional work with his friend, Rick Flowers, does nothing to counteract a finding that the Complainant is unable to work due to his disabilities. Helping a friend occasionally with skills that one possesses hardly represents being able to hold full time or even part time employment.

The testimony of the Respondent relating to seeing the Complainant at "work" is less than convincing and falls short of either creating an appearance of a lack of credibility on the part of the Complainant or affirmatively challenging the conclusion that the Complainant is disabled and unable to perform work.

Complainant's conditions also substantially impede his ability to interact in normal social situations. He tends to feel uneasy and spends a lot of time in his own home. Complainant feels much more comfortable in public when accompanied by his dog Precious and/or his friends, such as Kelly Flowers. The ability to go out in public and interact with others, to socialize, is also a major life activity. Complainant's mental and emotional impairments substantially limit his social interactions. Therefore, Complainant's lengthy medical records, the determination of Social Security, and the evidence presented that shows a substantial impairment of the major

life activities of working and socializing are sufficient to demonstrate that Complainant is disabled within the meaning of MGO 3.23, and therefore a member of a protected class (disabled/handicapped) under the ordinance.

In addition to his sporadic and informal employment, which do nothing to diminish the finding that he is generally unable to work, Complainant has earned a degree in general liberal studies from New Mexico State University. While this is indicative of a certain intellectual aptitude, when taken in context of the entire record, Complainant is still disabled under MGO 3.23. Similarly, although Complainant does have friends, including Flowers, his records and history, when taken as a whole, demonstrate a variety of conditions, which substantially affect his ability to socialize and interact in public. Indeed, the record tends to show a high degree of dependence on these friends as well as Precious.

Buck's Madison Square Garden Tavern (Buck's) is a Madison restaurant and tavern business owned by James Daily. Buck's is open to the public at 802 Regent Street. As a Madison restaurant and tavern open to the general public, it is a public place of accommodation as defined by MGO 3.23 (2)(tt) and is covered by the ordinance.

Complainant went to Buck's on February 6, 2003 with his dog Precious and with friend Kelly Flowers. Flowers ordered a drink and bartender Tammy Kasdorf served her. Complainant ordered a drink and was not served. Kasdorf told him that the dog was not allowed in the bar.

Bar patron Rick Steinhauer, a Dane County Sheriff Deputy, and apparently a friend of Kasdorf, approached Complainant, asking if this was a seeing-eye dog. Complainant replied that Precious is a service animal, meaning that it can go anywhere he goes. Steinhauer asked for an explanation of the term service animal. Complainant repeated that this was his service animal, allowed to go anywhere open to the public. Steinhauer told Complainant that based on his thirty years of law enforcement experience, the dog would have to go. Kasdorf told Complainant that he would not be served with the dog present. Complainant offered to show a copy of the ADA and documentation for his dog. Steinhauer and Kasdorf did not look at these items. Complainant and Flowers left. While the exchange between Complainant, Kasdorf, and Steinhauer became a bit contentious, it did not escalate beyond a relatively polite exchange.

This is a case of first impression for the Commission and likely elsewhere. The Hearing Examiner's research finds no case law on point beyond Johnson v. Gambrinus Co. 116 F. 3d 1052 (C.A.5 Tex., 1997), and from the framework of that case, the Hearing Examiner attempts to fashion an analysis of the burdens facing the parties in the present case.

The plaintiff will bear the burden of proving that a requested modification was reasonable. In Johnson, which dealt with a service animal as reasonable accommodation for a visually impaired person attempting to take a brewery tour, the court allocated the burden of proof in proving reasonableness.

The plaintiff has the burden of proving that a modification was requested and that the requested modification is reasonable. The plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, reasonable in the run of cases. While the defendant may introduce evidence indicating that the plaintiff's requested modification is not reasonable in the run of cases, the plaintiff bears the ultimate burden of proof on the issue... If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation. The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation. Id. at 1059.

While Johnson dealt with a service animal, the same burden allocation and reasoning can be used for a case when the animal is not technically a service animal. So to begin, Complainant will need to make a showing that allowing Precious in the bar is generally reasonable. Although designation of an animal as a service animal is quite helpful in showing that its presence is reasonable in a general sense, the lack of service animal status does not preclude a finding of reasonableness. The analysis will be fact specific considering the effectiveness of the modification in light of the disability as well of the cost of the modification, which ought not outweigh the benefit. Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir., 1995).

Though it is a matter of dispute in the record whether the Respondent knew of the Complainant's disability, the Hearing Examiner has little trouble concluding that the Respondent knew that the Complainant was claiming to

have a disability and was requesting an accommodation based upon that disability. When Steinhauer approached the Complainant and Flowers initially, he inquired whether the Complainant's dog was a guide dog. This represents a clear indication that Steinhauer was aware that the Complainant was claiming to have a disability and was seeking an accommodation. Both the Complainant and Flowers testimony, taken as a whole, demonstrate that the Complainant had indicated that he had a disability and, perhaps not in so many words, was seeking an accommodation consisting of the presence of his dog.

Though Steinhauer had no official capacity at the Respondent's place of business, it is clear that he was acting with the knowledge and with the tacit approval of Kasdorf, the sole representative of the Respondent on the premises at the time of this incident. It was Steinhauer's determination that Precious had to leave because in Steinhauer's opinion Precious did not fit his notion of a service animal. Kasdorf clearly overheard and, by her actions, ratified Steinhauer's determination. Not only did she ratify Steinhauer's actions, she joined in by requiring the Complainant to take his dog outside if he wished to be served.

For purposes of this complaint alone, the Hearing Examiner will accept Steinhauer's testimony that he was only acting in the capacity of a friend of Kasdorf in intervening in the incident with the Complainant. However, it must be stated that Steinhauer may well have utilized his position as a Dane County Depeuty Sheriff to influence the Complainant to leave the premises as a favor to a friend, Kasdorf.

It appears that even though Kasdorf did not take an active part in the conversation between Steinhauer and the Complainant, she was generally in a position to overhear the conversation and to keep Steinhauer from exercising authority normally granted to the Respondent to determine who might be served in its place of accommodation. Kasdorf in no way separated herself or the establishment from the actions of Steinhauer and by her actions and inaction has ratified them.

It seems clear that the Complainant attempted to show both Steinhauer and Kasdorf a copy of the ADA and to show the credentials he had for claiming Precious' status as a service animal. Both Kasdorf and Steinhauer declined to examine the materials presented by the Complainant.

It should be noted that Kasdorf did not appear to testify during the hearing of this matter. The Respondent named her as a witness and though it believed she would appear she did not at the time of hearing. The Hearing Examiner gave the Respondent additional time to produce Kasdorf and it did not. The actions of Kasdorf can only be inferred from the testimony of the witnesses who did appear to testify, Steinhauer, the Complainant and Flowers.

On this record, the Hearing Examiner concludes that the Respondent knew of the Complainant's claim to be a person with a disability who was seeking an accommodation to permit the presence of the Complainant's dog Precious. There is nothing in this record to indicate that either Kasdorf or Steinhauer doubted the Complainant's claim of a disability. Rather, it appears they may well have accepted it, but didn't feel they might need to permit Precious to stay as an accommodation of the Complainant's disability. Steinhauer, rather than inquiring into the Complainant's need for an accommodation, seems to have questioned whether Precious was the type of accommodation that the Respondent might have to acknowledge. It is clear to the Hearing Examiner that Kasdorf and Steinhauer accepted the Complainant's status as a person with a disability, but did not wish to accept Precious as an accommodation for the Complainant's disability.

This brings the Hearing Examiner to the central question of this dispute. Does the presence of Precious constitute a reasonable accommodation for the Complainant's disabilities? The ordinance is silent with respect to the specific topic of animals used to assist those with disabilities.

The parties both spend varying amounts of time discussing the Americans with Disabilities Act and its regulations relating to service animals. 28 CFR 36.104. This discussion, while interesting, fails to do more than to provide guidance to the Hearing Examiner. It must be noted that other than creating an obligation to accommodate a person with a disability, the ordinance sets no standards for accommodations for public places of accommodation or amusement.

The federal regulations focus on access to public places of accommodations or amusement by persons accompanied by service animals. There is also a similar provision of state law relating to service or guide animals. See the Hearing Examiner's Decision and Order on Motion to Dismiss in MEOC Case No. 20033011 dated October 14, 2003. The regulatory framework established in the federal regulations essentially finds that a service animal is one that is individually trained to perform work for the benefit of a person with a disability. In

this regard, the regulations set forth several examples of activities that can be undertaken by a service animal. All of the examples deal with individuals with sensory or physical disabilities. There is nothing in the federal regulation indicating how or if this test can be applied to persons with other non-physical disabilities. Given the breadth of the ADA, the Hearing Examiner must conclude that the CFR provisions dealing with service animals are but a sub-set of the ways in which animals may be used to accommodate an individual's disabilities. Given the specific language of the ordinance, the Hearing Examiner must extend the analysis of this matter beyond a discussion of the federal regulations. It must be said however, that if Precious did meet the definition of a service animal, as set forth in the federal regulations, there would be no additional analysis needed.

It does not appear, however, that Precious would qualify as a service animal under the federal regulations. It appears that Precious was individually trained by the Complainant. This training seems to be primarily limited to general obedience training. It does not appear, on this record, that Precious was individually trained to perform "work" for the benefit of the Complainant. There was testimony during the hearing about Precious' training to pick up items and return them to the Complainant and to perform other similar tasks. However, given the general nature of the Complainant's disabilities, the Hearing Examiner cannot find that Precious was individually trained to perform work related to the Complainant's disabilities and to reduce the impact of those disabilities upon the Complainant. In part, this is a result of the nature and type of the Complainant's disabilities. He need not have Precious replace a physical or sensory function for him. The regulations emphasis on physical disabilities create an erroneous impression for the public. Given the expansive scope of the ADA, the regulations concerning service animals must be intended as a subset of possible accommodations for people with disabilities.

This discussion of the scope is merely advisory in any event. The ordinance does not provide any such definition or limitation on the types of accommodations that a person with a disability may request. The regulations do provide some general guidance for the Hearing Examiner to follow in attempting to determine whether Precious' presence may be considered a reasonable accommodation of the Complainant's disability. Giving the regulations a broad reading, the Hearing Examiner finds that what seems to be most important to the framers are three general concepts. First, there must be some training of an animal. Presumably this is to assure control of the animal and to act as some limitation on how the animal may affect others. Second, the training must be part of or intended to provide a benefit to the person with disabilities. Third, that benefit must be somehow related or connected to the disability of the individual. These requirements seem directed towards assuring the safety and convenience of the public and providing some positive relief for the person with the disability from the limitations of his or her disability.

In the present case, there is support for a finding that Precious received training from the Complainant sufficient to help assure that Precious was well behaved and would not necessarily create a hazard for the public. The Complainant provided the training and the results of that training were certified by an independent party. While the Hearing Examiner may harbor some doubts about this certification process, the Respondent provided no testimony or evidence from which the Hearing Examiner might conclude that the certification represented a sham intended to circumvent the intent and purposes of the law. The record clearly establishes that neither Kasdorf nor Steinhauer on Kasdorf's behalf reviewed or examined the materials that the Complainant sought to provide them. Had they bothered to examine and question these documents, the Respondent's action might be more grounded in reasonableness. However, it seems clear that Kasdorf and Steinhauer had made up their minds on limited information and did not wish to be dissuaded from their decision.

Precious provides a benefit to the Complainant. Merle Bailey testified without contradiction that he had seen a marked improvement in the Complainant's abilities to travel in public and to participate in activities that would have been impossible for him prior to Precious' arrival. Bailey attributed this improvement to the close and interdependent relationship between Precious and the Complainant, which began and was strengthened through the Complainant's training of Precious. Precious' presence reduces the Complainant's aggressive tendencies and makes his personal interactions more smooth. Precious permits the Complainant to go into public situations and participate in activities that he would not normally be able to engage in.

Bailey did not testify that he had any professional training in the use of animals for therapeutic purposes, but did state that he had observed therapeutic benefits that he related directly to the Complainant's relationship with Precious. The Respondent did not present any testimony in rebuttal to that of Bailey and failed to disturb Bailey's professional opinion or credibility.

As touched upon above, the benefits provided by Precious for the Complainant are directly related to the Complainant's disabilities. The record reflects that the Complainant's post traumatic stress disorder, social anxiety disorder and depression all create conduct in the Complainant that is anti-social and makes it extremely difficult for the Complainant to engage in "normal" social contacts such as going out in public and enjoying social activities such as having a drink with friends. Bailey testified that he has observed a marked improvement in the Complainant's ability to engage in such social activities and conduct since Precious became a part of the Complainant's life. Bailey attributed these improvements to the close and interdependent relationship established and maintained between the Complainant and Precious.

On this record, the Hearing Examiner concludes that Precious' presence represents a reasonable accommodation for the Complainant's disabilities. The Respondent's refusal to permit the Complainant to partake in the benefits and services of its public place of accommodation or amusement while Precious was present violates the ordinance. Had Precious been disruptive on February 6, 2003 or had Precious somehow altered the fundamental nature of the activity or service, it might well be a different matter. However, nothing in this record indicates that such was the case.

The Hearing Examiner notes that the Respondent had wished to call Ms. Kasdorf as a witness at the time of trial. Ms. Kasdorf did not voluntarily appear and was not produced when the Respondent was given an opportunity to do so. The Hearing Examiner makes no particular findings from this failure to produce Kasdorf. However, Respondent's defense may have been helped if Kasdorf had been available to testify about the circumstances.

Steinhauer's testimony represented a seeming mix of motivations. On one hand, Mr. Steinhauer wished to present his remembrance of the events, but seemed clearly to distance himself from the impression that he had any official presence or connection with the Respondent. Steinhauer left the Hearing Examiner with the impression that he wanted to help his friends associated with the Respondent, but did not wish to jeopardize his employment with Dane County. This casts some doubts on Steinhauer's credibility and his participation in this case. The Hearing Examiner believes that Steinhauer wished to ease the circumstances and utilized his authority as a Dane County Deputy Sheriff to lend his words a weight they did not deserve. At the time of hearing, Steinhauer's testimony served only to place the Respondent in a somewhat less tenable position.

The Complainant, though not the most gracious or friendly of witnesses, gave testimony in a reasonable and straight forward manner. The Respondent's efforts to create doubt about the Complainant's credibility are generally unsuccessful and are somewhat distasteful. There is not doubt that the Complainant's testimony lacks consistency from the beginning to the end. This is not entirely unusual for any witness. Given the Complainant's medical history and the nature of his disabilities, a degree of inconsistency is not unusual. Despite, this, the Complainant's testimony rings true.

The credibility of Complainant's testimony is bolstered by that of Kelly Flowers and Merle Bailey. While there are "Complainant" witnesses, nothing in their relationship or their testimony gives rise to any doubts about the basics of their credibility. Though a friend of the Complainant's, Flower stands to gain nothing from her testimony and no reason for bias was revealed during her appearance.

Bailey's testimony was delivered as a professional and was limited to his professional observations. He stood to gain nothing from his testimony.

Daley's appearance at the hearing was somewhat of a mystery. His testimony added little of substance and his statements that he does not discriminate can be seen as self-serving and without conviction. In general, Daley seemed confused and bewildered at hearing. He seemed to fail to understand how things had progressed to the stage of hearing. That would most likely be a matter for him to have discussed with counsel.

Having determined that the Respondent violated the ordinance when it failed or refused to make a reasonable accommodation of the Complainant's disabilities when it refused to permit his dog Precious to remain on the premises, the Hearing Examiner now must determine how to best make the Complainant whole again. It is the duty of the Hearing Examiner to recommend an order that will place the Complainant in at least the same position he would have been in had the discrimination not occurred.

First, the Hearing Examiner must assure that the Respondent's discrimination cease and not reoccur. To this end, the Hearing Examiner's order requires the Respondent to permit the Complainant to return to its place of business with Precious or any substantially similar replacement for Precious. As part of this order, the

Respondent is prohibited from retaliating against the Complainant for his exercise of rights protected by this ordinance and that protection is extended to anyone who assisted the Complainant with his pursuit of this matter.

In a claim of discrimination in employment or in housing, the Hearing Examiner would next seek to restore any economic losses caused by the act of discrimination. In a claim of discrimination in a public place of accommodation or amusement, there are rarely such economic damages. There are none stated in this record. For example, there is no testimony that the Complainant had to spend more money at a different bar or restaurant than he would have spent at the Respondent's bar.

The Hearing Examiner next moves to the issue of compensatory, non-economic damages. These damages are most notably for the emotional distress and humiliation or embarrassment caused by the act of discrimination. The Complainant testified about how badly his treatment at the hands of the Respondent made him feel. Flowers corroborated that this was a continuing theme of discussions in the relationship with the Complainant. Bailey also confirmed that the Complainant had suffered a certain increase in anxiety and unhappiness related to the Respondent's discrimination and its aftermath.

The Respondent asserts that the Complainant's claim for damages must fail because it does not meet the requirements to establish the torts of either negligent or intentional infliction of emotional distress. The Respondent also asserts that the measure of damages given the Complainant's complicated history of depression and emotional distress is impossible to properly assess. Finally, the Respondent contends that much of the continuing distress experienced by the Complainant is that attendant to the pursuit of any claim.

The Respondent's reliance upon the requirements of tort law is misplaced. In order to establish the nature and extent of emotional distress damages stemming from a claim of discrimination, one need rely only upon their own testimony. Chomicki v. Wettekind, 128 Wis. 2d 188 (Wis. Ct. App. 1985), Nelson v. Weight Loss Clinic of America, Inc et al., MEOC Case No. 20684 (Ex. Dec. 9/29/1989), The question is one of what damages will such testimony support. Generally a complainant's testimony alone, fails to be terribly convincing. Gardner v. Walmart Vision Center, MEOC Case No. 22637 (ex. Dec. 6/3/2001), Williams and Oden v. Sinah, et al. MEOC Case No. 1605 (Comm. Dec. 7/25/1997, Ex. Dec. 12/23/1996). It is when that testimony is supported by the credible testimony of others that awards for emotional distress become more than minimal. Leatherberry v. GTE Directory Sales, Inc., MEOC Case No. 21124, (Comm. Dec. 4/14/1993, Ex. Dec. 1/5/1993).

In the present case, the Complainant seeks substantial damages in order to compensate him for the Respondent's act of discrimination. The Complainant testified himself and supplemented his testimony with that of Flowers and Bailey. Despite this support in the record, the Hearing Examiner cannot find that this record supports the level of damages sought by the Complainant.

The Hearing Examiner in Leatherberry, supra. Awarded the Complainant $25,000 in damages to address her emotional distress. In Leatherberry, the Complainant had experienced a significant pattern of callous and explicitly discriminatory behavior from her employer over a protracted period of time. She had made a career with the Respondent in that case, only to have the employer limit her advancement and discriminate against her because of her choice of a partner/husband. The conduct was offensive, direct and long lasting.

In the present case, unlike Leatherberry, the Complainant has experienced one act of discrimination. There were no vulgar words or terms used. The Complainant had other options for public accommodation. In Leatherberry, the Complainant could not quickly change careers and employers. In the present case, the Complainant has many different bars to attend. Nothing in the record created any impression of the Respondent's place of accommodation or amusement as distinct or special from any other bar in Madison.

In another award of emotional distress damages, in Laitinen-Schultz v. TLC, Inc, MEOC Case No. 19982001 (Ex. Dec. 7/1/2003), the Hearing Examiner awarded the Complainant $15,000 in emotional distress damages. Again in this case, the Respondent's act of discrimination involved direct reference to the Complainant's disability and involved repeated actions over a period of time. The Complainant fails to point to any such pattern of discrimination or extreme conduct directed specifically at the Complainant.

In a case that is factually more similar to the present case, Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (Comm. Dec. 10/5/1994, Ex. Dec. 4/6/1994), the Hearing Examiner awarded a white male who had been excluded from a bar predominantly frequented by African Americans, $1,000 for his emotional distress. The Commission reduced that award to $750. In Steele v. Highlander Motor Inn, et al., MEOC Case No 3326

(Comm. Dec 8/31/1995, Ex. Dec. 3/24/1995), the Hearing Examiner awarded a prevailing Complainant in a denial of service claim brought under the public accommodation provisions emotional distress of $2,000. The Commission in affirming liability, reduced the damages for emotional distress to $600.

There is a great difference in these cases relating to the level of damages awarded for emotional distress. Much of the difference is attributed to the over all circumstances of the claim and the apparent distress of the Complainant in the case. In the present matter, the Hearing Examiner is more struck by the supporting testimony of Bailey and Flowers than that of the Complainant. The Hearing Examiner believes that the Complainant is not beyond expressions of self-interest in making claims about the damage he has suffered as a result of the discrimination that has occurred. However, Bailey and Flowers, while wishing to be supportive of a patient and friend, have no particular axe to grind in this matter. Both testified that the Complainant was bothered for a period of at least 6 months by memories of the incident. Bailey was unable to quantify this distress and admitted that it was but one of several stressors in the Complainant's life at the time. Flowers testified that the Complainant seemed to experience his distress mostly around times when something was happening in connection with the complaint that he had filed.

Taking the record as a whole, the Hearing Examiner concludes that while the Complainant has experienced some significant emotional distress, it cannot be solely attributable to the discrimination. Some of it has occurred as a result of other stressful factors in his life and much seems to be connected to the pursuit of this complaint. The Commission is not in a position to compensate a complainant for the distress engendered in pursuit of a complaint or in voluntary defense of his rights.

On this record, the Hearing Examiner finds the amount of $5,500 will adequately compensate the Complainant for his emotional distress damages arising from the Respondent's discrimination. An award in the range of those made in Leatherberry, supra, and Laitinen-Schultz, supra, are not supported by the facts and testimony in this record. This was a single act of discrimination that limited the Complainant's access to a single establishment. No patently offensive words or terms were used. The Complainant had other options for entertainment than the Respondent's bar.

Much of the distress experienced by the Complainant seems to be connected with his pursuit of this complaint. It does not appear to be directly attributable to the act of discrimination. After 6 months, the affects of the distress seem to have been replaced with other stressors in the Complainant's normal existence.

On the other hand, the Complainant is an individual vulnerable to the distress occasioned by discrimination. The Hearing Examiner can accept that the distress initially suffered by the Complainant because of his particular sensitivities, was greater than that experienced by those in the Meyer and Steele cases.

Setting damages is an imprecise activity at best. The Hearing Examiner finds that the amount of $5,500 represents his best calculation of the Complainant's damages. The nature of the act and the circumstances are much more benign than those complaints in which significantly higher awards have been made. The award of $5,500 takes into account the Complainant's special circumstances and sensitivities.

In order for the Complainant to remain as whole as the Hearing Examiner can make him, the Complainant must be relieved of the costs and fees including reasonable attorney's fees expended in pursuit of this claim. It is the practice of the Commission to award prevailing Complainant's such costs and fees. There are no factors present on this record to require an alteration of this practice. The Hearing Examiner expects that there should be little conflict over the Complainant's costs and fees.

This case presents a difficult balancing of the interests of small business and those to be protected by the ordinance. The Hearing Examiner could find no claim similar to this in the reported cases. Clearly, if those with disabilities, especially those of a hidden nature, are to be allowed full access to public places of accommodation and amusement, business must be willing to be more accepting and open to the stated needs of the disabled. However, small businesses often do not have the experience and resources to understand their obligations under laws such as the ordinance and the ADA. The Hearing Examiner reminds all sides that it is available to provide an educational role in order to help both sides pave the way to a more open and accepting society. Given the broad requirements of the ordinance and the ADA, these conflicts are likely to increase in the future. A societal approach that works toward a common good instead of one that encourages side taking has to be in the best interest of all concerned.

Signed and dated this 8th day of November, 2005.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Michael J. Nichols 109 Washburn, # 204 Deerfield, WI 53531 Complainant vs. Buck's Madison Square Garden Tavern 802 Regent Street Madison WI 53715 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON MOTION TO DISMISS Case No. 20033011

INTRODUCTION

On February 11, 2003, Michael James Nichols filed one complaint with the Madison Equal Opportunities Commission (MEOC), claiming the Respondent discriminated against him based upon his disability. Nichols suffers from social anxiety disorder, and allegedly requires special animal assistance for this condition. Nichols believes the Respondent ejected him from the Madison Square Garden Tavern based solely upon the presence of his service animal, violating MGO Sections 3.23(5) and 3.23(6), which protect against disability discrimination within places of public accommodation.

The Respondent denies violating the Madison Equal Opportunities Ordinance, claiming tavern staff never discriminated against Nichols. According to the Respondent, Nichols began arguing with another patron about bringing animals into the tavern. Tavern staff ejected Nichols, but only for nondiscriminatory reasons, the Respondent argues. These reasons include separating hostile patrons and suspecting that Nichols' female companion was underage.

This matter was assigned to an MEOC Investigator/Conciliator, who found probable cause to believe discrimination occurred. A prehearing conference was then held with the Hearing Examiner, wherein the Respondent requested permission to challenge the jurisdiction of the Commission. The Hearing Examiner acceded, and the Respondent filed the dismissal motion presently under consideration. After reviewing that motion and related submissions, the Hearing Examiner finds the Commission has jurisdiction over the complaint.

DECISION

I

The jurisdictional power of the Madison Equal Opportunities Commission is limited. The Commission must act within limits established by the legislature, see Hafner v. Last Coast Producing Corporation, MEOC Case No.

20003184 (Ex. Dec. 1/14/02), and must not violate the spirit of laws enacted by superior jurisdictions in enforcing the Equal Opportunities Ordinance.

The Respondent advances numerous arguments supporting its dismissal motion. Generally speaking, these argument proceed along two lines: that Nichols never alleges disability discrimination, and that certain steps, including updating the Madison Square Garden Tavern employee manual and educating tavern staff about disability discrimination, will safeguard against future discrimination, eliminating the need for additional proceedings.

The Complainant responds with several arguments against the motion. First, Nichols proposes that the Respondent reads MGO Section 3.23(6)(e) too narrowly. Section 3.23(6)(e) prohibits specific conduct, including—in subsection (6)(e)2—failing to make reasonable policy modifications when such modifications are necessary to afford goods, services, facilities, and accommodations to disabled individuals. Section 7.08(6)(o), which establishes sanitation requirements for taverns, prohibits bringing animals into taverns, except guide dogs accompanying the blind. The Respondent would read this limitation into Section 3.23(6)(e)2, meaning tavern owners could legally exclude all service animals other than seeing-eye dogs. This narrow reading of the reasonable modifications provision, Nichols argues, would contravene long-held interpretations of identical language found within the Americans With Disabilities Act (ADA). See 42 U.S.C.A. 12182(b)(2)(A)(ii). Second, Nichols argues that Section 3.23(6)(e) deserves greater weight than Section 7.08(6)(o). Third, Nichols rejects the notion that anything here deprives the Commission of jurisdiction. And finally, regarding safeguards against future discrimination and the need for additional proceedings, Nichols observes that while the Respondent denies any wrongdoing, it nevertheless proposes certain “remedial” measures. These proposals are vague, Nichols maintains, and arguably disingenuous, given that the Respondent denies any wrongdoing.

II

The Respondent first argues that Nichols never actually alleges disability discrimination. Essentially, the Respondent contends that MGO Sections 3.23(5) and 3.23(6)(e) cannot impose upon restaurant and tavern owners obligations inconsistent with Section 7.08(6)(o), which unambiguously states that animals are prohibited within restaurants and taverns, “except guide dogs accompanying blind persons.” In other words, Section 7.08(6)(o) unambiguously prohibits all animals other than seeing-eye dogs, including other service animals.

This issue first presented itself in Hafner v. Last Coast Producing Corporation, MEOC Case No. 20003184 (Ex. Dec. 1/14/02). Hafner asked whether another ordinance—which barred from public parks and school grounds all dogs other than guide dogs assisting persons with certain disabilities—deserved greater weight than the Equal Opportunities Ordinance.

Hafner involved MGO Section 8.19 rather than the tavern-and-restaurant ordinance with which Nichols and the Madison Square Garden Tavern are concerned. Despite this difference, the core issue remains the same. Section 8.19 exempts from liability individuals with certain disabilities: blindness, deafness, and mobility impairment. These individuals—and only these individuals—may bring service animals into public parks. The Equal Opportunities Ordinance covers many more disabling conditions. Indeed, the Ordinance protects all disabled persons.

Like the Hafner Respondents, the Madison Square Garden Tavern believes the more specific ordinance necessarily controls. Here, Section 7.08(6)(o) is the more specific ordinance. The tavern contends the Hearing Examiner must incorporate into Sections 3.23(5) and 3.23(6)(e) the limitations expressed in Section 7.08(6)(o). But Nichols correctly observes that this harmonization would eviscerate certain broad protections afforded disabled persons under the Equal Opportunities Ordinance—harmonization would mean tavern owners could legally prohibit all service animals other than seeing-eye dogs.

This reading of Sections 3.23(5) and 3.23(6)(e) could not have been what the Common Council intended. The Equal Opportunities Ordinance nowhere indicates that only persons with certain specified disabilities may bring service animals into public places. Moreover, Sections 3.23(5) and 3.23(6)(e) were adopted more recently than Section 7.08(6)(o) and serve the much broader social purpose of protecting against disability discrimination. As the Equal Opportunities Ordinance declares, discrimination unfairly targets certain individuals and adversely affects the general welfare, intensifying group conflict and threatening basic rights. While specific, 7.08(6)(o) serves only the narrow purpose of regulating food storage and service. This restaurant-and-tavern ordinance

cannot be the exclusive regulation concerning the presence of service animals in public places, given the broad language of Sections 3.23(5) and 3.23(6)(e). In this world of numerous and varied disabilities, Section 7.08(6)(o) cannot alone determine which disabilities merit accommodation.

Nichols suggests that the ADA provides some guidance. Federal regulations implementing the ADA simply state that places of public accommodation shall modify policies, practices, and procedures so that disabled individuals can use service animals. See 42 U.S.C.A. §12182(b)(2)(A)(ii) and 28 C.F.R. §36.302(c)(1). The ADA clearly contemplates broad access to service animals performing many functions. See 56 Fed. Reg. 35565 (1991). Nevertheless, the Madison Equal Opportunities Commission only applies the Equal Opportunities Ordinance. The Hearing Examiner may indeed seek guidance from the ADA, but the Equal Opportunities Ordinance does not require the same interpretation. See Crystal Lake Cheese Factory v. Labor and Industry Review Commission, 664 N.W.2d 651, 655 (Wis. 2003).

Finally, the Respondent contends that updating the Madison Square Garden Tavern employee manual and educating tavern staff about disability discrimination will safeguard against future discrimination, eliminating the need for additional proceedings before the Commission. Specifically, the Respondent cites MGO Section 3.23(10)(c)2 for the proposition that only when conciliation and persuasion have been insufficient to eliminate discriminatory practices must the Commission convene hearings. While the Respondent pledges conformity with the ADA, Nichols doubts that “hollow promises” will end the alleged discrimination.

Whether such promises are hollow is largely beside the point. The record simply does not reveal that affirmative steps have been taken and that discrimination has been stopped. Moreover, Section 3.23(10)(b) clearly says the Commission may remedy discrimination by any means which “make the complainant whole again.” Nichols has requested compensation, and Section 3.23(10)(c)2, paragraph b, unambiguously gives the Commission authority to award economic and noneconomic damages, including damages for emotional injuries. Promises neither make the Complainant whole nor positively eliminate the alleged discrimination.

ORDER

The dismissal motion is hereby dismissed. Further proceedings will be scheduled.

Signed and dated this 14th day of October, 2003.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner