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

Marchell Mack 1212 Sweeney Dr Apt 1 Middleton WI 53562 Complainant vs. Kayser Automotive Group 2303 W Beltline Hwy Madison WI 53713 Respondent	COMMISSION'S DECISION AND FINAL ORDER Case No. 20043144

BACKGROUND

On August 19, 2004, the Complainant, Marchell Mack, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Kayser Automotive Group, discriminated against him on the basis of his race and disability when it refused to service his car in July of 2004. The Respondent denied that it discriminated against the Complainant in any way.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in the provision of a public place of accommodation or amusement on the bases of his race and/or his disability. Efforts at conciliation of the complaint proved unsuccessful, and the complaint was transferred to the Hearing Examiner.

The Hearing Examiner held a public hearing and on September 18, 2007, issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner concluded that although the record demonstrated that something unusual had occurred, the Complainant failed to meet his burden of proof to establish that he had been discriminated against on the basis of either his race or disability. The Complainant appealed the Hearing Examiner's Recommended Findings of Facts, Conclusions of Law and Order.

The parties were given the opportunity to submit exceptions and briefs in support of their respective positions. On March 14, 2008, the Commission met to consider the appeal of the Complainant. Participating in the Commission's deliberation were Commissioners Bayrd, Cramer Walsh, Ellingson, Enemuoh-Trammell, Holmes-Hope, McDonnel, Morrison, Selkowe, Solomon, Wood and Zipperer.

After review of the record as a whole and subsequent to extensive discussion, the Commission adopts by reference, as if fully set forth herein, the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated September 18, 2007. The Commission finds that the Hearing Examiner's determination that discrimination did not occur as alleged by the Complainant is supported by the record in this matter.

ORDER

The complaint is hereby dismissed.

Joining in the Commission's decision are Commissioners Cramer Walsh, Ellingson, Enemuoh-Trammell, Holmes-Hope, Selkowe and Zipperer. Opposing the Commission's decision are Commissioners Bayrd, McDonnel, Morrison, Solomon and Wood. No Commissioner recused himself or herself.

On behalf of the Commission,

Signed and dated this 1st day of April, 2008.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President

cc: Axel F Candelaria
Tim Douglas

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Marchell Mack 2174 Allen Blvd Apt 1 Middleton WI 53562 Complainant vs. Kayser Automotive Group 2303 W Beltline Hwy Madison WI 53713 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20043144

This matter came before the Hearing Examiner, Clifford E. Blackwell, III, for a public hearing on the merits of the complaint on December, 2005. Appearing at the time of hearing were the Complainant, Marcell Mack, and his attorney, Axel Candelaria of Mingo and Yankala, and the Respondent by its corporate representative, Timothy Douglas, and its attorney, Timothy Yanachek of the law firm of Bell, Gierhart and Moore. Based upon the record of proceedings in this matter, the Hearing Examiner issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an African American. He has a pronounced limp from an injury. The limp is readily noticeable to an observer.

2. The Respondent is an automobile dealership with its principle place of business located in Madison at 2303 W. Beltline Highway.

3. The Complainant owns a 2001 Ford Taurus. He has taken it to a number of dealerships for service and other work. In the summer of 2003, the Complainant first took his Taurus to the Respondent for service. Over the next year, the Complainant took his car for a variety of maintenance, repairs and service to the Respondent. Prior to July 14, 2004, there were no major problems between the Complainant and those employed by the Respondent. Some of the work performed by the Respondent was under warranty, some the Complainant paid for, and other work was done without charge as a courtesy to the Complainant.

4. Between the end of June, 2004, and July 14, 2004, the Complainant became concerned that the Respondent had not performed an alignment as well as it should have. He took his Taurus to Sears for an evaluation of the work performed by the Respondent. The results of the Sears evaluation were somewhat equivocal; however, the Complainant believed them to show a problem with the work performed by the Respondent.

5. On July 14, 2004, the Complainant went to the Respondent's dealership to redress the problem. The Complainant started with either a mechanic or his usual service representative. As he became more frustrated, the Respondent's Service Manager, Tim Douglas, came to speak with the Complainant. The Complainant wanted the Respondent to make good the repair while Douglas felt that no further work need be done, and that any problem was a result of normal wear and tear of items not covered by the warranty.

6. The Complainant became increasingly agitated. At some point things came to a head. It is not clear what was said between the Complainant and Douglas, but the Complainant took his car and left the Respondent's dealership.

7. The Complainant's friend, Laura Kopp, and a friend of hers went to meet the Complainant at the Respondent's place of business with the intention of hanging out with the Complainant once his business was completed. Kopp did not hear what was said between the Complainant and Douglas. However, as the Complainant and Douglas parted, Kopp observed Douglas as he was walking away from her and the Complainant and towards his office area. She heard someone say, "That nigger's going to cause trouble," or something to that effect as Douglas passed by other employees. Kopp told the Complainant of what she heard before she went to smoke a cigarette in her car and wait for the Complainant.

8. Willie Solis, a friend and acquaintance of the Complainant, came to the Respondent's dealership on July 14, 2004, along with his wife, to obtain a part for Solis's wife's car. As they approached the service area, Solis observed the Complainant leaving in a distressed condition. Solis attempted to signal the Complainant to discuss photography and to say hello. He was unable to catch the Complainant's attention. Solis's wife suddenly told Solis she wanted to leave. When he questioned her about her change in interest, she told him that she had heard someone say, "Nigger's going to cause trouble," and she did not feel welcome.

9. The statement apparently heard by Kopp and Solis's wife was made after the Complainant had left the area, and was not heard by the Complainant.

10. Neither Kopp nor Solis heard the discussion between the Complainant and Douglas.

11. On July 23, 2004, the Complainant wrote to the Respondent explaining his problems with repairs. He also mentioned that he believed he had been discriminated against, but did not detail the manner of the discrimination, nor did he detail any of the events of July 14, 2004.

12. On July 30, 2004, the Respondent, by Gregg Erickson, responded to the Complainant's July 23, 2004 letter indicating that the Respondent welcomed the Complainant as a customer, that the Complainant had been taken care of well in the preceding year, but that if the Complainant wished to use another dealership, he was welcome to do so.

13. The Complainant, after the events of July 14, 2004, took his vehicle to a dealership in Milwaukee and was charged approximately $98 for evaluation of a condition that was later repaired. Douglas, when he learned about the charge paid by the Complainant, contacted the regional Service Manager for Ford Motor Company to see about a refund to the Complainant of the amount paid. Ford Motor Corporation had extended a warranty, and the Complainant should not have been charged for the evaluation.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class "race."

2. The Complainant is not a member of the protected class "disability" because he does not have an actual disability, a history of such a disability nor is he perceived to have a disability by the Respondent or its employees.

3. The Respondent is a public place of accommodation or amusement within the meaning of the ordinance.

4. The Complainant was not denied service at or the equal enjoyment of a public place of accommodation or amusement because of his race or for any other reason proscribed in the ordinance.

ORDER

The Complainant is dismissed and the parties directed to bear their own costs.

MEMORANDUM DECISION

The record in this matter is sparse, confusing, and in some respects, troubling. It is the lack of specific detail that makes application of the ordinance difficult. In order to come to a conclusion in this kind of environment, the Hearing Examiner must rely upon the allocation of the burdens of proof and his own determinations of credibility.

The Complainant is an African American who walks with a pronounced limp. He is the owner of a 2001 Ford Taurus automobile. In July of 2003, the Complainant began taking his vehicle to the Respondent for service and repairs. The Respondent is an automobile dealership with a full service repair center.

Over the next year, the Complainant took his Taurus to the Respondent for a variety of reasons and on a number of different occasions. Some of the work performed on the Complainant's vehicle was covered by warranty while the Complainant paid for other work. On several occasions, the Respondent waived the charge for work performed as a matter of good customer relations.

It appears that the Complainant was generally satisfied with the work done by the Respondent. This satisfaction was not universal, however. In June of 2004, the Complainant became more dissatisfied with the work performed by the Respondent. He took his automobile to other repair facilities to evaluate the work done by the Respondent. In July of 2004, the Complainant's concern over the work performed by the Respondent came to a head over an issue relating to alignment of the Complainant's vehicle. He had taken his car to a Sears repair center and understood that the Respondent had not properly aligned his vehicle. On July 14, 2004, the Complainant went to the Respondent's dealership to gain some level of satisfaction over this issue.

The Complainant began discussions with his service representative, but Tim Douglas, Service Center Manager, eventually became involved. Douglas had spoken with or had dealings with the Complainant on several occasions in the preceding year. Douglas had been employed by the Respondent for at least 20 years in a variety of capacities, and had been the manager in charge of the Service Center for the preceding 13 or 14 years.

What exactly happened during the dispute or discussion between the Complainant and Douglas is highly contested. The Complainant asserts that both he and Douglas were agitated and angry. The Complainant states that matters came to a head when Douglas told him, "Get your crippled, black ass out of here and don't fall down on your way out." Douglas denies having said anything of the sort, and asserts that he suggested that perhaps the Complainant might receive more satisfaction by trying another repair facility.

At this point in the analysis, neither party is entitled to a finding of credibility over the other. This means that absent some compelling reason to believe either the Complainant or Douglas, the Hearing Examiner is without reason to believe one version of events over another version. Unless there is evidence in the record to alter this state, the Complainant would "lose," because he carries the burden of proof to establish each element of a claim of discrimination.

In a claim of discrimination in a public place of accommodation or amusement, the Complainant must establish that he/she is a member of a protected class or protected classes, that he/she experienced a denial of service or a denial of equal enjoyment of a public place of accommodation or amusement, and that there is a reason to believe that the denial of service or the denial of equal access or enjoyment of a public place of accommodation or amusement is causally linked with the Complainant's membership in one or more protected classes. Should a Complainant fail to establish any of these elements, the complaint fails with respect to that claim. If there are multiple claims of discrimination, the Complainant must establish each element for each claim.

In the present complaint, the Complainant asserts two bases for his claim of discrimination, race and disability. There is no dispute that the Complainant is a member of the protected class race. He is an African American and no one disputes his membership in the class "race."

There is a contest of whether the Complainant is a member of the protected class "disability." In order to be a member of the protected class disability, one must have an actual disability that is known to the Respondent, have a history of an actual disability, or be perceived as having a disability by the Respondent. In order for one to have an actual disability, one must have a physical or mental impairment that substantially affects a major life function. MGO 3.23(2)(m). This definition tracks the one in the American with Disabilities Act 42 U.S.C. 1201 et. seq. The Commission may use decisions made under the ADA for guidance in interpreting the ordinance, but is not bound by those decision unless they are applying constitutional principles.

On this record, the Hearing Examiner cannot find that the Complainant has an actual disability as that term is defined by the ordinance. The Complainant has a physical impairment that results in a substantial limp. The question is whether the impairment adversely affects a major life function. Clearly the Complainant can walk, albeit with a limp. There was no testimony about how exactly the Complainant is limited by the condition relating to his leg. It would appear that the Complainant's mobility is impaired by the condition, but how and what major life function is adversely affected, is not presented in the record. There was no medical testimony as to the nature, severity or limitation of the Complainant's condition. Generally speaking, proof of an actual disability requires testimony by a medical witness of some variety. Busto v. Wisconsin Power and Light, MEOC Case No. 20945 (Comm. Dec. 3/14/90, Ex. Dec. 9/25/89); State ex rel. Elizabeth Busto v. MEOC and WP&L, 90 CV 1594 (Dane County Cir. Ct. 1/9/91). There was no such testimony at the hearing.

Despite a failure of proof on the issue of actual disability, the Complainant may still establish membership in the protected class "disability," if he can demonstrate that the Respondent or its employees, especially Douglas, perceived him to have a disability. Resolution of this point will have to be reserved. The only evidence of such a possible perception of disability is the statement that the Complainant alleges Douglas to have made on July 14, 2004. At this point in the analysis of the record, there is insufficient evidence to accept that the statement, "get your crippled, black ass out of here and don't fall down on your way out," was actually made as alleged. However, if analysis of additional evidence leads to the conclusion that the statement was made as alleged, it is sufficient evidence of a perception of disability for the Complainant to be a member of the protected class "disability." Use of the word "cripple" and directing one with an observable limp "not to fall down on your way out" are clear, direct and unambiguous expressions of a perception of disability.

The next question to be answered in the prima facie analysis is whether the Complainant experienced a denial of service or was denied equal enjoyment of a public place of accommodation or amusement. In this regard, the Complainant contends that he was publicly treated in an embarrassing and humiliating manner that those not of his race or those without disabilities would have had to experience. He was required to leave before repairs were completed on his vehicle, and circumstances made it clear he was not welcome to return. The Respondent, in response, states that it provided the Complainant's requested service on every occasion on which he brought his Taurus in for work. On those occasions where the suggested work was not performed, it was because the Complainant determined that he did not want the work performed at that time. Douglas denies having "ejected" the Complainant or indicating a lack of willingness to provide service in the future. Douglas testified that he told the Complainant that the Complainant could take the vehicle elsewhere, but also the Respondent could do the work. Additionally, Douglas's supervisor, Gregg Erickson, on July 30, 2004, in response to a letter from the Complainant dated July 23, 2004, indicated that the Respondent welcomed the Complainant's business, but understood if the complainant wished to take his business elsewhere.

This proves to be one of the pivotal issues in this matter. If there is no denial of service or of equal enjoyment of a service at a public place of accommodation or amusement, there is no violation of the ordinance. On the face of it, what the Complainant asserts seems unlikely. The Complainant and Respondent dealt well with each other for approximately a year. There is no allegation that prior to July 14, 2004, there was any hint of discrimination or racial or other form of animus. As a business open to the public with substantial competition in the geographic area, the Respondent could not accept the losses to a healthy business base if it routinely turned away customers for any reason, much less a discriminatory one.

Noting that the Complainant's allegation seems unlikely does not dispose of the matter. The Hearing Examiner recognizes that despite an otherwise good working relationship, in a single incident, tempers could flare and things might be said that would not be said under "normal" circumstances. These statements, if they occurred,

must be taken at face value and could give rise to liability under the ordinance. If Douglas in fact told the Complainant to "get his crippled, black ass out of there and don't fall on your way out," it could easily be construed to be the kind of statement that works a denial of service, and certainly a denial of equal enjoyment of a service or public place of accommodation or amusement. The Hearing Examiner cannot conceive of any white or "able-bodied" customer being exposed to such statements. However, as such a denial of service rests on the disputed statement, the Hearing Examiner must hold resolution of this issue until the issue of whether the statement was made is decided.

Accepting for the moment that there was a denial of service or a denial of equal enjoyment of a service at a public place of accommodation or amusement, the Hearing Examiner must determine whether there is sufficient evidence to conclude that the denial or service or denial of equal enjoyment of a service was motivated by either the Complainant's perceived disability or his race. To answer this question, the Hearing Examiner must resolve the question that is central to this entire claim, did Douglas tell the Complainant to "get his crippled, black ass out of there and not to fall down on his way out?" In the scheme of things, it is the Complainant's burden to establish by the greater weight of the credible evidence that the statement was made. The respondent does not have a burden in this regard, i.e., it does not have to establish by the greater weight of the credible evidence that Douglas did not make such a statement.

The Complainant, to support his testimony about Douglas and his alleged statement, produced two witnesses, Laura Kopp and Willie Solis. Both are friends or acquaintances of the Complainant. Neither testified that she or he heard Douglas make the statement attributed to him by the Complainant. A brief summary of these witnesses' testimony is important at this point.

Ms. Kopp is a white woman who at the time of hearing was 23 years of age. She stated that she had been a friend of the Complainant's for several years, but that she had not had a more substantial relationship with the Complainant. She testified that on July 14, 2004 (she did not provide the date), she and a friend identified only as Abby went to meet the Complainant at the Respondent's dealership because after the Complainant conducted some business, they were going to go hang out together. She further testified that she observed the Complainant and Douglas in a heated discussion. As she was leaving the area of the repair shop, she paused in the door and observed Douglas walking away from the Complainant and passing by a mechanic. Kopp stated that though she could not see to whom Douglas was speaking, she heard him mumble something to the effect of, "That nigger's going to cause trouble."

Kopp was upset by what she heard. She located the Complainant and told him what she overheard. She went to her car to smoke a cigarette and was eventually joined by the Complainant and her friend and they all left together.

On cross-examination, Kopp admitted that she had made a claim against the Respondent for an incident in which she slipped and fell at the dealership on the same day. She testified that she had subsequently withdrawn her claim. She also confirmed that the statement she overheard she attributed to Douglas but that he was walking away from her at the time, and that there were one or more other employees of the Respondent near to Douglas. She verified that she had not heard the "crippled, black ass" statement.

Willie Solis testified that he was a friend or acquaintance of the Complainant, and that he had not known him very long. Their social acquaintance resulted because the Complainant did some photography and had taken a couple of pictures of Solis and his wife/life partner. Solis testified that on a date not precisely identified, he and his wife went to the Respondent's dealership to obtain a part for his wife's car. As they entered the dealership, Solis saw the Complainant leaving the dealership appearing to be upset. Solis attempted to catch the Complainant's attention, but didn't want to do so too aggressively given the bad mood in which the Complainant appeared to be. As Solis and his wife walked towards the service bays, his wife became upset and said that she wanted to leave. When Solis asked why, she told him that she had heard someone say, "Nigger's going to trouble" or "Nigger's going to cause trouble." Solis believed that the remark may have been directed at him and his wife as they are young African Americans, and it is his experience that such comments are from time to time made and directed at people like him. Solis did not hear the statement himself, nor did he have any idea who made the statement.

On cross-examination, Solis stated that his wife was not feeling well on the day of the hearing and could not attend. He had forgotten about the incident until he had come across the Complainant seeking people who may have heard or witnessed the incident underlying this complaint.

It is the Complainant's contention that Kopp's and Solis's testimony makes it more likely that Douglas made the "crippled, black ass" statement, and provides a second and separate basis for finding liability linking the Complainant's race with the adverse action. The Respondent argues that Kopp's statement is inherently incredible because of her friendship with the Complainant, and because of inconsistencies in her testimony and recollection, and the testimony of other witnesses. Specifically, Douglas testified that Ms. Kopp's claim for slipping and falling occurred on June 4, 2004, another occasion on which the Complainant was present at the Respondent's dealership, and that Kopp was drunk or had been drinking on that occasion. Also, the Respondent points to the hearsay nature of Solis's testimony, the general vagueness, and inability to identify the speaker or not having heard the statement in the first place.

Given the record as a whole, the Hearing Examiner concludes that the Complainant has failed to carry his burden of proof with respect to whether Douglas made the "crippled black ass" statement. Essentially, the Hearing Examiner is left with the Complainant testifying that the statement was made and Douglas denying that he stated it. Both the Complainant and Respondent have reasons to provide such testimony. The Complainant cannot win his case without it while the Respondent will certainly be exposed to liability if Douglas made the statement. The Hearing Examiner finds both individuals' testimony credible. The Complainant did not express himself as an individual who was out of control or incapable of remembering and recounting an incident that significantly affected his life. Equally, Douglas impressed the Hearing Examiner as someone who was sincere in his desire to help his customers, and to try to deal with disputes in as calm a manner as possible to the benefit of both the upset customer and his employer. Without more, the Hearing Examiner cannot determine which of two equally credible witnesses he should believe.

The testimony provided by Kopp and Solis present both problems and support a finding that something occurred, but do not necessarily support the allegations of the complaint. Kopp's testimony is somewhat shaky as to date. It appears that she could well be describing an earlier visit except that the substance of her testimony is corroborated by that of Solis. However, it is clear that Kopp states that she did not hear the "crippled, black ass" statement, though she was perhaps in a better position to have heard that statement than the one she testified to having heard. She was closer to the Complainant and Douglas and was moving out the doorway when she heard the "nigger's going to cause trouble" statement. If she was closer and moving away when she heard that, why did she not hear the other alleged statement?

The other problem with Kopp's testimony is that she was not really in a position to determine that it was Douglas who made the "nigger's going to cause trouble" statement. From Kopp's testimony, Douglas was moving away from her and from the Complainant. Given her description, it appears that Douglas's back would have been to Kopp. He was passing by other individuals when she heard the statement. Neither counsel asked Kopp how she could identify Douglas as having made the statement, as opposed to one of the other individuals who witnessed the discussion between an upset Complainant and Douglas.

Solis's testimony makes it more likely than not that the statement Kopp heard was made on July 14, 2004. Though Kopp and the Complainant may have been at the Respondent's on June 4, 2004, there was not testimony from which the Hearing Examiner could conclude that Solis was there on that date too. The description of an upset Complainant, and the closeness of the statement recounted to Solis by his wife, and that testified to by Kopp, make it more likely that they heard the same statement on July 14, 2004.

That Solis corroborates Kopp, however, does not appreciably move the Complainant's proof on the "crippled, black ass" statement forward. There is little credible evidence tying Douglas to the "nigger's going to cause trouble" statement other than physical proximity. On this record, it seems as likely that the statement testified to by Kopp and Solis was made by one of the mechanics who observed the dispute between Douglas and the Complainant. Kopp really couldn't see who made the comment, and Solis didn't hear it and was relying solely on his wife's statement. That such a remark should not be tolerated in any workplace goes without saying, but its importance is much different depending upon whether Douglas made the statement or not.

The Complainant further asserts in support of his position that Douglas made the derogatory statement the fact that during Douglas's deposition taken in pre-hearing proceedings, he referred to a prior complainant in a separate action, as a "colored man." While the term "colored man" is certainly not in vogue or generally acceptable for African Americans today, it does not evince the type of racial animus that would lead one to believe that phrases like "black ass" or "nigger" are lurking high in one's vocabulary. The words used to denote African Americans over the years have changed as to what is or is not acceptable. Depending upon one's family background and cultural environment growing up, some terms might be in more common use or

acceptable than others. Douglas testified that he did not understand that "colored" was necessarily a derogatory term or that he meant offense when he used it.

The Hearing Examiner does find this part of the record to be somewhat troubling, but finds that it falls short of the proof necessary to establish that Douglas told the Complainant to "get your crippled, black ass out of there." There is certainly a suggestion that something adverse and unacceptable happened at the Respondent's place of business. However, the fact that there remains suspicion, as opposed to some verified evidence, creates a problem of proof.

The Respondent spent much time and effort to portray the Complainant as a deluded and mentally ill individual whose testimony could not be trusted. The Respondent introduced the Complainant's medical records and questioned the Complainant about his diagnosis and whether he was taking prescribed medications on July 14, 2004. The Hearing Examiner found this approach to be little more than a cheap attempt to smear the Complainant on the record. There was apparently no effort to obtain competent medical testimony to interpret or give guidance with respect to the Complainant's medical history or condition. As the Complainant failed to produce required expert testimony to demonstrate that he had an actual physical disability, the Respondent failed to produce expert testimony to illuminate the importance or lack of importance of the Complainant's medical records. It represents a form of character assassination to bring up the Complainant's medical history of mental illness and expect that the fact of a diagnosed mental illness renders the individual inherently incredible without supporting expert testimony.

There is another point that the Hearing Examiner finds troubling, but is not clear about how it might have affected the facts in this complaint. On July 23, 2004, the Complainant, apparently after speaking with Gregg Erickson, the Respondent's manager, sent a letter outlining his complaints about the Respondent's service of his Taurus. Though he does not reference the specifics of either statement that was allegedly made on July 14, 2004, he does clearly indicate that he felt that he had been discriminated against. Erickson's response on July 30, 2004, while welcoming the Complainant back as a customer, makes no reference to the Complainant's feelings of discrimination, and there is nothing in the record to indicate that the concerns about discrimination identified in the Complainant's July 23, 2004, letter were ever investigated or addressed. Had the Complainant alleged discrimination in a different manner, the correspondence and the lack of effort on the part of the Respondent may well have been the basis for a different result.

The Complainant asserts that the "nigger's going to cause trouble" statement might provide a separate basis for finding a denial of service or denial of equal enjoyment of a service in a public place of accommodation or amusement. He seems to contend that even though he found out about this statement after the fact, that it somehow denied him service or the equal enjoyment of the services of the Respondent. In support of his position, the Complainant cites Bond v. Michael's Family Restaurant, ERD 9150755 and 9151204 (March 30, 1994), arguing that even though the statement was not directed at the complainants in that case, they were permitted to bring suit. In that case, the complainants were customers in a restaurant who had to listen to a discussion by two restaurant employees that was filled with racial slurs and invective. The court held that even though the customers were not the target of the employees' racial animus, their enjoyment of a public place of accommodation or amusement was diminished by being exposed to the employees' conduct. Bond is different from the case at hand. The Complainant did not overhear the statement and only learned of it much after the fact. It could not have resulted in a diminishment of his experience at the Respondent's because while he was at the Respondent's he was not aware of the statement. Had the Complainant testified that he was kept from returning because of the statement and the attitude it evinces, that might be different, but that was not the testimony in the record. Again it is not to excuse the use of such language in any business or public place, but it fails to establish a cause of liability in this particular setting.

Having determined that the Complainant fails to meet his burden of proof on the question of whether Douglas made the "crippled, black ass" comment, the Hearing Examiner must return to those matters he deferred. First, without proof of the Douglas statement, the Complainant cannot demonstrate that the Respondent perceived him to have a disability. Absent the reference to "crippled" and "don't fall on your way out," there is no evidence in the record upon which the Hearing Examiner can base a finding on perceived disability.

Second, there can be no finding of a denial of service if Douglas's statement is not accepted. It forms the sole basis for finding a denial of service. As noted above, the "nigger" statement, though outrageous, comes after the fact and does not demonstrate a denial of service or equal enjoyment.

Finally, without a finding that Douglas made the "crippled, black ass" statement, there is no basis, even if a denial of service had been found, to link either of the Complainant's protected classes to the adverse action.

The parties have had to wait a long time for this decision. The period of waiting reflects the deep thought and reflection that the Hearing Examiner has put into the conclusions contained herein. While the Hearing Examiner concludes that there was a failure of proof with respect to the claims of this complaint, it seems clear the Respondent has much work to do before it can say that it truly cares about the service it extends to all of its customers.

Signed and dated this 18th day of September, 2007.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

cc: Axel F Candelaria
Tim Douglas