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

Michael J Nichols
101 Washburn Rd Apt 104
Deerfield WI 53531

Complainant

vs.

Mental Health Center of Dane County Inc
625 W Washington Ave
Madison WI 53703

Respondent

COMMISSION'S DECISION AND FINAL ORDER

CASE NO. 20053154

BACKGROUND

On September 30, 2005, the Complainant, Michael J. Nichols, filed a complaint with the City of Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, The Mental Health Center of Dane County, Inc., discriminated against him on the basis of his disabilities when, as a public place of accommodation or amusement, it altered his previous accommodation and restricted his options for entering the Respondent's facility at 625 W. Washington Avenue in Madison, Wisconsin. The Respondent denied that the alterations made to the Complainant's accommodations adversely affected his access to the services and programs that the Complainant accessed at the Respondent's facility. The Respondent further asserted that it had made the alteration to the Complainant's accommodation in order to accommodate a disability of one of the Respondent's employees.

Subsequent to an investigation, a Division Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his disabilities. Efforts to conciliate the complaint failed and it was transferred to the Hearing Examiner for a hearing on the merits of the complaint.

On October 30, 2007 through November 1, 2007, a hearing was held on the merits of the complaint. Subsequent to the submission of briefs and written argument on August 6, 2009, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and a proposed Order finding that the Respondent had not discriminated against the Complainant when it altered the terms of the Complainant's accommodation for his service dogs because despite the modification, the Complainant was still able to reasonably access the services and programs for which he visited the Respondent's facility.

The Complainant timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission. The parties were given the opportunity to submit briefs and written arguments in support of their respective positions.

On April 8, 2010, the Commission's Appeal Committee met to consider the Complainant's appeal. Participating in the Committee's consideration were Commissioners Benford, Hurd and Zipperer.

DECISION

The record in this matter is extensive. The Committee members were impressed by and relied heavily upon the thoughtful, professional and thorough submissions of the parties and the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to help them in their review of this record.

Though the record is extensive, the Committee focused on two issues as being central to the dispute. First, was the Complainant able to continue to reasonably access his appointments and to avail himself of the services and programs of the Respondent? Second, once an accommodation is made, can it be modified to reflect changed circumstances? In order to put the Committee's decision in context, a brief review of the record is appropriate.

The Complainant is an individual with multiple emotional or mental disabilities including post traumatic stress disorder, social anxiety disorder, general anxiety disorder and several other conditions that limit his ability to effectively interact in public or work. He received services from the Respondent relating to alcohol and other drug abuse problems for a number of years. While receiving these services, the Complainant brought his dog to his counseling sessions. The Complainant's counselor, Merle Baily, observed that the presence of the Complainant's dog helped with the counseling sessions. Baily suggested that the Complainant seek recognition as a service dog/animal for his pet.

The Complainant trained his dog, Precious, for general obedience and ultimately sought certification of Precious as a service dog. Though the nature of Precious' certification is open, the Complainant felt that Precious was a valid service dog.

The Complainant eventually began to train a second dog, Rosco, as a service dog. Initially, Rosco was intended to replace Precious as Precious aged. However, the Complainant changed the intent of his training to provide Rosco as a service dog for his wife/companion.

In March 2005, Rosco startled an employee of the Respondent triggering a post traumatic stress reaction. The employee had been the victim of a vicious dog attack several years earlier. Though there is no indication that Rosco made any threatening actions towards the employee, the employee was paralyzed with fear stemming from her past attack.

The Respondent sought to accommodate both its employee and its client, the Complainant. In doing so, it attempted to develop a plan which would limit the opportunity for the Complainant and the employee to come into contact with each other. To that end, Karen Stevenson, the employee's supervisor, approached Baily on behalf of the Complainant to work out a plan for keeping the individuals separated.

Stevenson and Baily worked out a plan that they felt would be effective to allow the Respondent's employee to accomplish her work and permit the Complainant continued access to Baily and to the Respondent's facility to meet the Complainant's needs. This plan included limiting the Complainant's ingress and egress to one specific entrance and to limit his access to

other parts of the facility. Additionally, Baily was to inform the employee of the Complainant's appointment schedule so that she could limit her likely exposure to the Complainant and his service dogs.

Over the next two or three months, the Complainant objected to Baily about the limitations on his "free access" to the Respondent's facility. There were also several incidents that were not anticipated by the plan and these incidents increased both the employee's feelings of being threatened and the Complainant's feelings of isolation.

Eventually, the incidents ceased and the Complainant was able to continue to attend his scheduled sessions with Baily. That is not to say that the Complainant was happy with the situation. Baily had difficulty focusing the Complainant's counseling sessions to deal with pressing problems facing the Complainant instead of allowing the Complainant to focus on his feelings about his treatment by the Respondent. Eventually, the Complainant filed the complaint that brings us to this point.

The Complainant continued to see Baily at the Respondent's facility until the end of 2005. Baily retired from his work with the Respondent at the end of 2005. The Complainant declined referral to another counselor employed by the Respondent due to his feelings about how he had been treated.

For a more detailed account of the interactions between the parties during 2005, see the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated August 6, 2009. That document is adopted and incorporated by reference as if fully set forth herein. It provides a more detailed account of the actions and reactions of the individuals involved in this complaint.

What is clear from the record is that despite the Complainant's unhappiness with the Respondent's limitation of his method of entering the building, he was able to maintain his regular visits with his counselor. It was only the counselor's retirement that ultimately caused the Complainant to decide not to return to the Respondent. While it is true that the Complainant was unhappy and his unhappiness limited the effectiveness of his counseling, it is not clear that this was something over which the Respondent could exercise control. It would appear that the Complainant or his various conditions, in this circumstance, were the cause of this limitation of his counseling effectiveness.

By providing an accommodation that permitted the Complainant to continue to attend his counseling sessions, the Respondent did what it was required to do by the ordinance. It is a long standing notion in the law relating to accommodation of disabilities that an individual requesting an accommodation is entitled to an accommodation that permits continued access, but is not necessarily entitled to the precise or specific accommodation requested by the individual. In the present case, had the record not demonstrated that the Complainant, with only minimal disruption, was able to continue meeting Baily at the Respondent's facility on a regular basis, then the Respondent's accommodation might be found lacking. However, since the Complainant was able to continue to meet with Baily and since it was the Complainant who chose not to accept a referral for further counseling, the Complainant cannot demonstrate that his right to an accommodation of his disabilities was violated.

The Complainant seems to be particularly upset about the apparently lesser impact on the Respondent's employee of the planned accommodation when compared to the impact

apparently experienced by the Complainant. While it is tempting to balance such factors, it is not the appropriate test. The bottom-line question is whether the Respondent's proposed modification of the Complainant's accommodation permits his continued access to the services and facilities of the Respondent. The record indicates that it does.

The second issue addressed by the Committee, of whether an accommodation can be changed once it is made, has indirectly been addressed by the above discussion. Accommodation of a disability is intended to be a flexible and fluid concept. Malleable accommodations must be permitted to reflect changes in the realities of a workplace or a place of accommodation of amusement. In the present case, the circumstances facing both the Respondent and the Complainant changed due to neither party's fault. For either party to be able to "lock in" the other to an accommodation once granted does not reflect the changing needs and resources of the parties and society in general.

Tied into this needed flexibility is the idea that a party is only obligated to provide an accommodation that works, not necessarily the one requested or desired by the individual needing the accommodation.

In the situation where a previously granted accommodation needs to be modified, it would be best for the parties to work together through an interactive process to achieve the best outcome and one that both parties can have "ownership" of. That issue is not directly before the Committee on this appeal, however.

Given the record as a whole, the Appeals Committee finds that the Recommended Findings of Fact, Conclusions of Law and Order of the Hearing Examiner dated August 6, 2009 is fully supported by the facts and the law. Accordingly, the Committee affirms the Hearing Examiner's Findings and Conclusions.

ORDER

The complaint is dismissed. The parties shall bear their own costs.

Concurring in the Committee's decision are Commissioners Benford and Zipperer. Dissenting from the Committee's decision is Commissioner Hurd.

Signed and dated this 14th day of April, 2010.

On behalf of the Appeals Committee and the Commission,

Bert G. Zipperer, Chairman
Appeals Committee

cc: Joshua J Kind-Keppel
Amy O Bruchs

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
MADISON, WISCONSIN

Michael J Nichols 109 Washburn Rd Apt 204 Deerfield WI 53531 Complainant vs. Mental Health Center Of Dane County Inc 625 W Washington Ave Madison WI 53703 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20053154

This matter came before Hearing Examiner Clifford E. Blackwell, III, for a public hearing on the merits of the complaint on October 30 and 31 and November 1, 2005 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainant, Michael Nichols, appeared in person and by attorney Joshua Kind Keppel. The Respondent appeared by corporate representative, Lynn Brady, and by attorney Amy O. Bruchs. Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDING OF FACT

1. The Complainant is an adult resident of Deerfield, Wisconsin.

2. The Respondent is a not-for-profit corporation with its principal place of business at 625 W. Washington Avenue within the City of Madison.

3. The Complainant has numerous emotional or mental impairments that substantially and adversely affect a number of his major life activities. These conditions include Post Traumatic Stress Disorder, Social and General Anxiety, and several others. As a result of these conditions, the Complainant is disabled.

4. In approximately 2000 after returning to the Madison area from New Mexico, the Complainant renewed a counseling relationship with Merle Bailey, who was employed by the Respondent in the Alcohol and Other Drug Abuse program. The Complainant received services for substance abuse problems and other general counseling.

5. When the Complainant returned to Madison, he had acquired a dog, Precious. Over time, the Complainant observed that Precious helped him with some of the symptoms of his disabilities. With the urging of Bailey, the Complainant began to train Precious and eventually sought certification of Precious as a service dog/animal.

6. Bailey observed that Precious, in fact, appeared to have a positive effect on the Complainant's several disorders and helped the Complainant to cope in public settings that might otherwise cause him problems. Precious attended the Complainant's counseling sessions with Bailey despite the Respondent's general prohibition on bringing animals into the Respondent's facility.

7. At some point after the Complainant's return to counseling with Bailey, Precious had a litter of puppies. The Complainant retained one puppy, Rosco, with the intention of training Rosco to act as a service dog for his wife, Laura. Laura has a number of mental and other impairments for which the Complainant believed a service dog might help.

8. The Complainant began training Rosco to serve as an accommodation of his wife's disorders. As part of this training, the Complainant brought Rosco to his counseling sessions along with Precious. Bailey noted that Rosco, at first, possessed a certain enthusiasm related to his status as a puppy or a young dog, but

that with time and training, Rosco became more disciplined.

9. On March 22, 2005, the Complainant, his wife, Precious and Rosco were sitting in the first floor waiting room of the Respondent's facility. Laura was filling out forms to receive some service from the Respondent and the Complainant accompanied her to assist. Precious and Rosco were leased and wearing jackets identifying them as service dogs.

10. Deborah Natzke-Bergman is a nurse employed in the Respondent's Emergency Services Unit. This unit has offices on the Respondent's first floor. Natzke-Bergman's duties take her to most areas of the Respondent's facilities because of the emergency nature of the services she provides.

11. In 1999, while employed in another position unrelated to the Respondent, Natzke-Bergman suffered a life threatening attack by a hybred wolf dog. As a result of that attack, Natzke-Bergman had both physical and emotional injuries. With the passage of time, Natzke-Bergman had recovered to a great extent from both types of injuries and was able to retain employment again.

12. While the Complainant and his wife were in the first floor waiting room on March 22, 2005, Natzke-Bergman came out of her office, approached the waiting room and signaled to someone across the waiting room to come to speak with her. This was performed mostly with a hand gesture.

13. Though it is impossible to know why for sure, Rosco stood, took a few steps in Natzke-Bergman's direction and emitted a soft woof. Nothing indicates that Rosco acted in any aggressive manner, but did act in a manner inconsistent with good service dog training or conduct. Rosco was still being trained as a service dog at this time.

14. Natzke-Bergman experienced a post-traumatic flashback and panic attack associated with her earlier dog attack. Though Rosco did not attack or act aggressively, Natzke-Bergman screamed and was frozen next to the wall crying and unable to move.

15. Karen Stevenson, the manager in charge of the Emergency Services Unit, heard the disruption and Natzke-Bergman's scream and crying and went to investigate. She found Natzke-Bergman facing the hallway wall. Stevenson asked the Complainant to remove his dogs until calm could be restored. Stevenson also took Natzke-Bergman back into the Emergency Services Unit.

16. Shortly after March 22, 2005, Stevenson sought a meeting with the Complainant's counselor, Merle Bailey, to see what could be done to avoid a recurrence of the March 22, 2005 incident. Natzke-Bergman still felt traumatized as a result of her brief contact. Stevenson was aware that Precious and Rosco were accommodations for the Complainant's disabilities and did not want to do anything that would limit the Complainant's use of the dogs or receipt of services from the Respondent.

17. After some discussions, Stevenson and Bailey decided on a plan that would require the Complainant only to enter the Respondent's building from the entrance on West Washington Avenue. Prior to the plan, the Complainant most frequently entered the building through an entrance directly from the parking lot. The parking lot entrance would take the Complainant directly past the door to the Emergency Services Unit where Natzke-Bergman worked.

18. The Complainant had not wished to be involved in the discussions as he realized that his conditions might well prevent meaningful negotiations. However, when Bailey explained the proposed plan, the Complainant was very upset and felt that the Respondent was not considering his needs and feelings while totally accommodating the needs of Natzke-Bergman. The Complainant suggested moving the entire Emergency Services Unit or moving Natzke-Bergman's work location as alternatives. It is not clear that Bailey ever took the Complainant's suggestions to Stevenson.

19. As part of the plan, Bailey was to inform Natzke-Bergman or the Emergency Services Unit of the date and times of the Complainant's appointments to avoid additional incidents similar to that of March 22, 2005. For her part, Natzke-Bergman was to take precautions not to enter locations in the building where the Complainant or his dogs would likely be found, i.e., the lower level.

20. This initial plan was not memorialized in any way. Stevenson was to relay it to Natzke-Bergman and Bailey was to do the same to the Complainant. It is not clear how or that Stevenson related the plan to Natzke-Bergman. It is clear that despite the responsibility to notify Natzke-Bergman of the Complainant's appointments that Bailey did not do so on most occasions.

21. During the months of April, May and June, there were additional conflicts between Natzke-Bergman and the Complainant's dogs. These included the Complainant coming to the door of the Emergency Services Unit as directed to pick up medications for his wife. The Complainant was accompanied by his dogs and Natzke-Bergman observed them at the doorway and reacted adversely. Another incident involved Natzke-Bergman being frightened when walking through the parking lot when she observed the Complainant's dogs in his car with the windows partially down. A final incident concerned Natzke-Bergman's observation of the Complainant allowing his dogs to be off leash while returning to his car in the parking lot. All these incidents caused additional emotional distress and related symptoms to Natzke-Bergman.

22. As a result of these incidents, the Complainant felt as if he was being blamed for alleged violations of the plan.

23. On July 26, 2005, Stevenson sent the Complainant a letter reaffirming the basic outline of the plan, but adding requirements that the Complainant not bring his dogs on the first floor of the building, that he maintain his dogs on leash at all times and that he not leave the dogs unattended in his car in the parking lot.

24. This letter contained several mistakes concerning access to the lower level and the Complainant's access to the first floor. These mistakes caused the Complainant to be further confused and to feel "picked upon." The Complainant had to travel on the first floor to get to the elevators/stairwells for getting to the lower level. Additionally, the elevator on the first floor did not go to the lower level, but could be taken up to the second level where another elevator could be taken to the lower level.

25. Though the Complainant was offended and upset by the restrictions placed upon him, he continued his appointments with Bailey until Bailey's retirement at the end of 2005.

26. Early in July of 2005, Bailey decided that he would retire at the end of 2005. He felt it necessary to prepare the Complainant for the end of their counseling relationship. Additionally, Bailey believed that the Complainant's relationship with his wife posed a substantial risk to his well being and wished to focus the Complainant's sessions on how to deal with this threat.

27. In early July, 2005, Lynn Brady, the Respondent's Director of Clinical Services, directed Bailey to no longer be involved in attempting to advocate or to represent the Complainant with respect to the issues surrounding his access to the building. Brady directed Bailey to focus on his counseling relationship with the Complainant instead. Bailey felt this was best given the other issues in the Complainant's life.

28. Despite Bailey's attempts to address other issues in the Complainant's life, the Complainant wished to discuss the ongoing issues relating to his treatment by the Respondent with respect to access. It might take Bailey 10 to 20 minutes of each appointment to redirect the Complainant's focus.

29. When Bailey retired at the end of 2005, Bailey asked the Complainant if the Complainant would like a referral to another counselor at the Respondent's facility. The Complainant declined such a referral indicating that he had lost faith in the Respondent.

30. The Complainant's perceptions of how the Respondent had injured him changed the Complainant's view about his positive feelings towards his experience at the Respondent's facility. However, it is difficult to determine how much of these feelings were attributable to Bailey's work and to the general work of the Respondent.

CONCLUSIONS OF LAW

1. The Complainant is a person with one or more disabilities.

2. Deborah Natzke-Bergman is a person with one or more disabilities.

3. The Respondent is a public place of accommodation or amusement.

4. The Respondent is an employer.

5. The Respondent owes a duty to accommodate the disabilities of those who wish access to it services and facilities.

6. The Respondent owes a duty to accommodate the disabilities of it employees.

7. Any individual who is entitled to an accommodation is not necessarily entitled to the specific accommodation that is requested so long as a reasonable accommodation is provided. This is true whether the accommodation is for access to the goods, services or facilities of a public place of accommodation or amusement or for purposes of employment.

8. The Respondent provided the Complainant an accommodation that permitted him to continue to access the goods, services and facilities of the Respondent with his service dogs. Reasonableness in this context relates not only to the Complainant but to the other obligations of the Respondent.

9. While the Respondent limited the Complainant's physical access to it facility, it did not limit the Complainant's full and equal enjoyment of the goods, service and facilities of the Respondent.

10. The Respondent did not discriminate against the Complainant on the basis of his disabilities in violation of the Equal Opportunities Ordinance.

ORDER

1. The complaint is dismissed.

2. The parties shall bear their own costs.

MEMORANDUM DECISION

This case presents unique, interesting and difficult issues regarding the rights and duties of an employer that is also a public place of accommodation or amusement to meet the sometimes differing needs of employees and clients/customers. There are also questions involving the duty of an entity to protect the confidentiality of employees and clients while trying to assure them their rights.

The antecedents of this complaint are found in an unquestionably vicious and traumatizing attack on an individual who later came to work for the Respondent. In 1999, Deborah Natzke-Bergman, in the course of her duties as a community nurse, was attacked and severely injured by a hybred wolf kept by one of her patients/clients. She physically survived the attack, but suffered and still suffers from the emotional impact of this horrific incident.

The Complainant is an individual who has a number of mental/emotional illnesses that qualify him to receive Supplemental Security Income (SSI) from the Social Security Administration. In order for the Complainant to receive payments under this program, he must be disabled within the meaning of that term as used in Madison's Equal Opportunities Ordinance. The Complainant's conditions include post traumatic stress disorder (PTSD), social anxiety disorder, general anxiety disorder and intermittent explosive disorder. The Respondent does not challenge the Complainant's claim to be an individual with disabilities under the ordinance.

In approximately 1996, the Complainant, while living in New Mexico, became the owner of a dog named Precious. The bond between the Complainant and Precious was deep and became meaningful. Later, this bond would enable the Complainant to train and qualify Precious as a service animal. This training was mostly in the form of general obedience training rather than some specific training related to the Complainant's disability. However, the training bond established a supportive link between the Complainant and Precious. This link permitted the Complainant to engage in social contacts that he was unable to engage in prior to his acquisition and training of Precious.

In 2001 or 2002, the Complainant returned to Madison and sought treatment for his long-term alcohol and substance abuse problems. The Complainant attributes his desire to conquer these problems to the bond between him and Precious.

The complainant sought out Merle Bailey, a Social Worker specializing in Alcohol and other Drug Abuse (AODA) treatment with the Respondent. The Complainant had some professional contact with Bailey in the 1990's, before the Complainant moved to New Mexico, and had felt that Bailey held the Complainant's best interests at heart.

Bailey and the Complainant began therapy on a regular basis. Bailey observed that the Complainant's sessions seemed to go more smoothly and more successfully when he was accompanied by Precious. Bailey suggested that the Complainant pursue having Precious recognized as a service dog.

The Complainant eventually obtained "certification" of Precious as a service animal. It must be noted that there are no federal, state or local requirements for certification of service animals, and no precise standards for training or conduct exist. Nichols v. Buck's Madison Square Gardens Tavern, MEOC Case No. 20033011 (citations omitted). Once certified, the Complainant began to bring Precious to all of his appointments at the Respondent's. There were no objections or limitations placed upon the Complainant or Precious.

Shortly after Precious received her certification, Precious had a litter of puppies. The Complainant retained one of these puppies, Rosco, with an eye towards training him to eventually replace Precious as Precious's age and physical condition required replacement. The Complainant began training Rosco and became aware that Rosco seemed to be aware of the Complainant's cardiac problems. Eventually, Rosco also exhibited awareness of the Complainant's then wife's seizure episodes. As the Complainant trained Rosco, he began to bring Rosco along to his appointments with Bailey too.

Sometime in late 2004 or early 2005, the Complainant brought his then wife or friend, Laura, from New Mexico to Madison to live. In doing so, he sought to remove Laura from some difficulty in New Mexico. Because of a seizure disorder experienced by Laura, the Complainant was determined to train Rosco to serve as a service dog for Laura.

On March 22, 2005, the Complainant and Ms. Natzke-Bergman crossed paths with most unfortunate results. The Complainant, Precious, Rosco and his wife Laura, were in the first floor waiting area of the Respondent's facility. The Complainant was helping Laura sign up for emergency and other services with the Respondent. On this occasion, Laura, for the first time, had sole "control" over Rosco as her service dog. Rosco was still being trained for this responsibility. Rosco was wearing a jacket indicating his status as a service or working dog and was leashed, though while sitting and completing paperwork, Laura did not have hold of Rosco's leash. The Complainant was sitting some small distance away from Laura and Rosco with Precious.

Ms. Natzke-Bergman came to the edge of the waiting area from her office in the Emergency Services Unit (ESU) and observed someone across the waiting area. Ms. Natzke-Bergman signaled to that individual with a hand gesture to come with Ms. Natzke-Bergman.

It is at this point that circumstances become somewhat confused and some degree of interpretation on the part of the Hearing Examiner is required. However, an exact and absolutely accurate recounting is not necessary for resolution of the allegations of the complaint.

Rosco stood and began walking towards Natzke-Bergman. Rosco gave a small bark or made some other sound. It seems likely that Rosco responded to Natzke-Bergman's hand signal rather than independently moving towards Natzke-Bergman, but this is not a matter of definite proof.

Natzke-Bergman was alerted to Rosco's approach either by the sound of his chain collar clinking or by whatever sound may have been made by Rosco. Regardless of how she became aware of Rosco's motion, Natzke-Bergman suffered a flashback to her attack in 1999. She was petrified and immobilized with fear. She stood facing the wall of the hallway until a co-worker became aware of her condition and helped her return to the ESU.

As soon as the Complainant became aware of Rosco's movement, he moved to take control of Rosco. At no time during this instant did Rosco approach close to Natzke-Bergman. Though Natzke-Bergman interpreted Rosco's actions as threatening, the Hearing Examiner cannot conclude that Natzke-Bergman was at any time in danger from Rosco.

It must be kept in mind that at the time of this incident Rosco was still under training. Precious who had had much more training did not move or react at all during this incident.

Natzke-Bergman's experience triggered a full onset of Post-Traumatic Stress Disorder with symptoms including anxiety, fear and additional physical reactions. The Hearing Examiner has no doubts about the severity or reality of Natzke-Bergman's reactions or that they significantly affected her ability to perform her duties at work.

The Hearing Examiner accepts the sincerity of Natzke-Bergman's reaction; likewise, the Hearing Examiner equally accepts that the Complainant did nothing wrong, nor did he wish to cause Natzke-Bergman or anyone else any problem.

This incident began the chain of events that lead to this complaint. The Respondent, understandably, wished to prevent further harm or injury to its employee no matter how innocently the injury occurred. The Respondent found its options limited however, by the physical setting and the breadth of Natzke-Bergman's duties. As a nurse in the ESU, Natzke-Bergman's duties required her to have access to the complete building.

Karen Stevenson was the supervisor in charge of the Emergency Services Unit. She did not directly supervise Natzke-Bergman, but supervised Natzke-Bergman's supervisor. Stevenson took it upon herself to attempt to work out a plan or procedure that would keep Natzke-Bergman and the Complainant's dogs separate. While there were other users of the Respondent's services who used service dogs, no one reported any problems or concerns with them.

Stevenson met with Merle Bailey, the Complainant's counselor. Oddly, Stevenson did not seek to meet with the Complainant and had only occasional contact with Natzke-Bergman about how to preserve Natzke-Bergman's emotional safety. Stevenson accepted that the Complainant's use of Precious and Rosco represented a legitimate accommodation of a disability. Stevenson did not know the nature of the Complainant's disability, nor did she feel that it was critical to what she believed she had to do.

Stevenson and Bailey met shortly after the March 22, 2005 incident to work out some solution. The plan that Stevenson and Bailey worked out was that the Complainant would enter the Mental Health Center from the entrance on West Washington Avenue and not use the other entrances that might take him and his dogs more closely to Natzke-Bergman's primary work area in the Emergency Services Unit. Once entering the building, the Complainant was to go directly to an elevator instead of waiting in the first floor waiting room and descend to the lower floor area in which Bailey's office was located. Bailey was to inform Natzke-Bergman and/or the Emergency Services Unit of days upon which the Complainant had appointments so that steps could be taken to avoid or minimize the possibility of contact between Natzke-Bergman and the Complainant's dogs.

This plan was not memorialized in writing and was transmitted verbally by Bailey to the Complainant.

It must be noted that this plan was flawed from the start in that the elevator on the first floor does not descend to the lower level, but ascends to the second floor and an elevator can be taken from that floor to the lower level. Stevenson was unaware of this difficulty in the plan until shortly before hearing of this matter.

By consulting Bailey, Stevenson was focused on trying to resolve a problem and did not understand or view what she was attempting to do as altering or modifying an existing accommodation of the Complainant's disability. However, by restricting the Complainant's access, albeit in a very limited way, Stevenson (on behalf of the Respondent) altered the Complainant's access to services and changed the focus of his treatment with Bailey.

Stevenson and Bailey believed that the proposed plan was reasonable and represented the only way to "protect" Natzke-Bergman and preserve the Complainant's rights to an accommodation. Stevenson and Bailey did not seek input from the Complainant and apparently not from Natzke-Bergman, nor from anyone else. Bailey told the Complainant of the plan at the Complainant's next appointment.

By engaging Bailey in this manner, Stevenson viewed Bailey as an agent or advocate for the Complainant without actually obtaining consent for this relationship. As the Complainant's treating therapist, Bailey was placed in the impossible role of maintaining his therapeutic relationship and attempting to represent the Complainant's interests and those of the Respondent. It is a fundamental principle of agency that one may not serve multiple and conflicting masters.

When Bailey informed the Complainant of the plan for keeping Natzke-Bergman and the Complainant's dogs apart, the Complainant was incensed. The Complainant felt that all of the responsibility or blame was being placed upon him and there was no commensurate burden on Natzke-Bergman. The Complainant suggested an alternative plan that he thought more equitably balanced the responsibility for avoiding contact. The Complainant sought to have Natzke-Bergman's job location moved or limited so as to give him more access and make further contact less likely.

Bailey did not take this alternative suggestion to Stevenson for consideration. It appears that Bailey did not believe such an alteration feasible. However, Bailey did not indicate that he wouldn't take the alternative proposal to Stevenson. Bailey did not tell the Complainant that Bailey did not find the Complainant's suggestion workable.

Though the Complainant was increasingly unhappy with the new requirement for accessing the services of the Respondent, he attempted to comply with the new requirements. However, Bailey testified that each session was a struggle to refocus the Complainant on issues facing him in his life instead of the Complainant's anger with the Respondent. Approximately 10 minutes at the start of each appointment was spent on the Complainant's feelings and Bailey's attempt to refocus the session.

Despite the plan, Bailey did not routinely, if ever, communicate to Ms. Natzke-Bergman or the Emergency Services Unit the times or dates of the Complainant's appointments.

Over the next two to three months, three additional incidents occurred between Natzke-Bergman and the Complainant and his dogs. The exact sequence and timing of these events is not clear from the record and does not appear critical.

One of the incidents involved the Complainant's appearance at the door of the Emergency Services Unit to pick up medications needed by his wife. The Complainant had called the Emergency Services Unit and was directed to pick up the medications at the dispensary door. When the Complainant appeared as directed, Ms. Natzke-Bergman who was working in the Emergency Services Unit observed the Complainant and his dogs at the Unit door. The sight of the dogs triggered a further panic reaction in Natzke-Bergman. She was taken to one of the unit's internal offices to regain her composure. The Complainant was sent away under circumstances that made him feel that he had done something wrong.

A second incident involved Natzke-Bergman's discovery of the Complainant's dogs in his car in the general parking lot. The dogs were allegedly alone with the windows down. While the dogs were barking, they did not attempt to leave the car. However, Natzke-Bergman returned to the Emergency Services Unit feeling traumatized by the encounter.

The third incident is subject to some confusion. The Complainant indicates that he was exercising his dogs on the railway right-of-way adjacent to the Respondent's parking lot when he was approached by someone from the Respondent. According to the Complainant, the individual yelled at the Complainant that the Complainant was violating the agreement and that he shouldn't bring his dogs on the Respondent's property again. The Respondent does not know of any such incident, but does indicate that on some occasion in the period after the March 22, 2005 incident, the Complainant was observed in the Respondent's parking lot with his dogs off leash and out of his control.

The Respondent, through Stevenson, sought to clarify the verbal plan by issuing a written version that addressed the issues it saw as being raised in the three additional incidents. Stevenson did so on July 26, 2005. Stevenson clarified that the Complainant was not to bring his dogs on the first floor except to enter the building and proceed to the elevator. Stevenson further emphasized that the Complainant was to have his dogs on leash and under control at all times.

In seeking to clarify the plan, Stevenson did not consult with the Complainant or Bailey about the new or re-emphasized requirements. One reason Stevenson did not consult with Bailey about the July, 2005 letter was because earlier that month Lynn Brady, the Respondent's Director, had made it clear that she wanted Bailey to avoid discussions of these incidents and to focus his involvement with the Complainant on his therapeutic relationship. Additionally, Bailey had recently determined that he would be retiring at the end of 2005; he felt that he needed to prepare the Complainant for the end of their counseling relationship and to regain focus on other issues that Bailey felt more directly affected the Complainant's life.

The Complainant continued to attempt to follow the plan as he understood it. However, the imposition of the plan and the Respondent's perceived lack of balance in how it approached the relationship continued to be an irritant for the Complainant that interrupted his customary counseling sessions with Bailey. The Complainant's dissolution with the Respondent was so complete that at the end of the year, the Complainant did not wish Bailey to establish a new counseling arrangement for him with someone else at the Mental Health Center.

The Complainant takes the position that the Respondent imposed a change in his accommodation while doing nothing to alter the conditions of Natzke-Bergman's work. For much of this complaint, the Complainant has not believed that Natzke-Bergman is a person with a disability. As he did not believe that Natzke-Bergman has a disability, he believes that any "preference" shown her works to his detriment. It is the imposition of restrictions on

the Complainant's access that is the gravamen of the Complainant's claim. Generally, he asserts a denial of "full and equal" access to the Respondent's facilities and a failure to accommodate his disability resulting in a degradation of the Respondent's services to him.

On the other hand, the Respondent asserts that it was placed in an almost impossible position trying to maintain its accommodation of the Complainant while needing to accommodate its employee, Natzke-Bergman's disability. In trying to navigate these duel responsibilities, the Respondent did not believe that it could contact the involved individuals. Indeed, the Respondent asserts that the Complainant did not complain internally to the Respondent or indicate that the proposed alteration of the Complainant's existing accommodation was not acceptable. The Respondent additionally contends that the alterations to the Complainant's existing accommodation do not constitute a reduction in service or a limitation in any way. Respondent makes additional claims and they will be addressed as required in this decision.

The ultimate question presented by this record is whether the Respondent failed to accommodate the Complainant's disability. Given the record as a whole, the Hearing Examiner concludes that it did not.

As previously noted, the Complainant began receiving services through the Respondent for alcohol and drug issues. The Complainant utilized the services available through the Respondent because of his prior experience with Merle Bailey. This relationship was renewed after the Complainant relocated to the Madison area from New Mexico in approximately 2000.

At the time of the renewed counseling relationship, the Complainant was accompanied by his dog, Precious. Over time, Precious became acknowledged to be an accommodation for some of the Complainant's disabilities. This included a certification process.

Though the Respondent has a policy prohibiting animals on the premises, it waived this requirement for the Complainant as an accommodation for his disability. Several employees of the Respondent knew of Precious and the role that Precious played for the Complainant. No one sought to deny or to limit the Complainant's access with Precious. As the Complainant trained Rosco to act as an accommodation for several disabilities of his wife, Laura, the Complainant brought Rosco to his appointments with Bailey. Though initially Rosco demonstrated a certain enthusiasm related to his status as a puppy or young dog, over time he learned the discipline required of a service dog. It was during the period when Rosco was being trained that the March 22, 2005 incident occurred.

When the Respondent proposed that the Complainant restrict his entrance to the building to the West Washington Avenue entrance, it was not removing the accommodation to which it had previously agreed. At most, the proposed limitation on the point of entrance represents an alteration of the accommodation or a limitation of that accommodation.

Though the Complainant did not like the limitation, the record convincingly demonstrates that the Complainant was able to maintain his appointments with Bailey at more or less the same frequency and under the same general conditions as prior to the direction to use the West Washington Avenue door. That the Complainant did not enjoy the same unconditional access to the facility as prior to March 22, 2005 does not alter the fact that he was able to fully utilize the services of the Respondent.

The fact that the change in accommodation did not result in a reduction of access to services has a number of important consequences. First, a qualified individual with a disability is entitled to an accommodation that permits the full and equal enjoyment of the benefits or services of a public place of accommodation. Such an individual is not necessarily entitled to the accommodation that he or she wishes or prefers or even the best possible accommodation. It is sufficient if the accommodation provided permits access to the services desired by the Complainant. That is not to say that a public place of accommodation or amusement should satisfy itself with providing the bare minimum of service to its customer base. In this case, it is clear that the Respondent could have made more effort to find a more palatable solution than the one arrived at on its own.

Second, the question of whether the Respondent did or should have engaged in an interactive process is obviated by the finding that it, in fact, provided a reasonable accommodation to the Complainant for his disabilities. In other words, even if there is a requirement for an interactive process, a failure to participate in such a process is not actionable absent a failure to provide a reasonable accommodation. This makes sense as the interactive process is intended as a method to develop a reasonable accommodation not necessarily as an end in

itself.

The interactive process is a creation of regulations implementing the employment provisions of the Americans with Disabilities Act. Once an employer is made aware of the need for an accommodation, there is a duty to engage in a flexible process of communication between the employer and employee to determine whether an accommodation is necessary or what might be the best accommodation that will meet the needs of both parties.

The interactive process, as such, has not been applied to the public accommodation setting. In part, this is because of the nature of many claims of discrimination relating to public accommodations. In the commercial setting, where a customer seeks access to a good or service, a decision may be needed in a much more immediate time frame. In such cases, a protracted negotiation and exchange of information may represent a de facto denial of access. In these cases, it may be required that a provider of a public place of accommodation simply grant the request unless to do so would fundamentally alter the nature of the accommodation.

In certain settings such as educational or long term service relationships, there may be more time for the interplay of ideas and the exchange of information which are more likely to be found in the employment relationship. In such cases, an interactive process might be more appropriate. However, given the limited provisions found in MGO sec. 39.03(6), it is difficult to see how one might create the requirement for one type of accommodation while not imposing on another type without engaging in legislation instead of interpretation.

While the Hearing Examiner may well find that the provisions of the Equal Opportunities Ordinance implicitly require an interactive process, the Hearing Examiner declines to do so in the context of this complaint. The provisions of the ordinance are stated in terms of a prohibition to engage in certain conduct. Neither the employment section found at MGO sec. 39.03 (8)(g) nor the section setting forth requirements of public places of accommodations MGO sec. 39.03(6) give the Hearing Examiner much guidance beyond the general limitation on conduct. For the Hearing Examiner to impose a requirement such as the duty to conduct an interactive process would likely be an impermissible creation of law instead of interpretation and implementation of the existing provision.

The Complainant's primary objections to the altered accommodation are that it required him to walk further in the elements than he had to walk before, and that he did not have the same freedom of access to services as before. That the Complainant had to walk approximately 100 feet further than he had to previously does not have an impact upon his disabilities. Had the Complainant's disabilities been in the nature of an impairment of his mobility, this might have a different outcome.

The notion that the Complainant's access to the Respondent's services was decreased is a tempting one. However, what was being limited was the entrances to the facility not the goods, benefits or services of the Respondent. Simply because the Complainant could not choose his manner of entrance and exit does not demonstrate that he was being limited in his access to the services for which he went to the Respondent. The record indicates that the Complainant was able to maintain his appointments with Bailey, and that with only one or two occasions the appointments occurred as before. The Complainant's decision not to continue to utilize the services of the Respondent after the retirement of his counselor is not a matter over which the Respondent had control. Bailey clearly believed that there were others at the Respondent's facility that could and would have seen the Complainant had the Complainant been willing. However, the Complainant was not willing, but the Respondent did not have control over the Complainant's decision-making in this regard.

The Complainant contends that his continuing fixation on the Respondent's treatment of him represents a limitation of his accommodation. The Complainant points to the time lost during his sessions while he was upset by the Respondent's actions. Bailey testified that perhaps 10 to 20 minutes of each session were spent trying to help the Complainant regain focus on issues other than the Respondent's actions. Also, the Complainant argues that his loss of confidence in the Respondent and his change in mental attitude represent an alteration in his level of service.

The Hearing Examiner disagrees. Those changes in the Complainant's comfort, mental attitude and his personal obsession with what he saw as wrongful treatment by the Respondent may constitute injuries, but did not represent a loss or alteration of accommodation for which the Respondent can be found to be at fault. The Respondent did continue to permit the Complainant to receive treatment and it did not limit the Complainant's use of his dogs.

In addition to the Complainant's claim that he's been denied a reasonable accommodation of his disability, the Complainant contends that being limited to one entrance denies him the "full and equal enjoyment . . . of the facilities" of a public place of accommodation. This contention is extremely slippery. It is true that the Complainant's access to the Respondent's building is being limited to one entrance and he's not allowed unfettered access to all portions of the Respondent's facilities as a result of the accommodation of his disability. However, MGO Sec. 39.03(6)(a) does not speak in terms of full and equal access, but full and equal enjoyment. The limitation of the Complainant's access does not prevent his enjoyment of the Respondent's goods, services, benefits or facilities.

The Complainant testified that he continued with his appointments and received the services for which he began treatment at the Respondent's facility even after the limitations were imposed upon his access. The Complainant, in this way, confuses access to the facility with enjoyment of the facility and the services offered within.

It is tempting to compare the Complainant's limitation to a single entrance with similar restrictions in this country's openly segregated past. However, such a comparison is not apt in this circumstance.

First, the Complainant is a single individual. In the time of legal segregation, such limits were placed on all members of a protected class because of one's now protected status.

Second, and highly related, is the fact that in the present case, the limitation of the Complainant's access was premised on a legitimate, balancing of the interests of two individuals, both of whom had a need for accommodation of one or more disabilities. The restriction was not imposed on any broader a group than necessary.

Given this record as a whole, the Hearing Examiner finds that though somewhat more restricted than before March of 2005, the Complainant's full enjoyment of the premise was not limited by the Respondent, nor was he denied a reasonable accommodation of his disabilities. For those reasons, the complaint must be dismissed.

Finding that the Complainant has not proven discrimination in this case should not be understood to condone the Respondent's conduct in this matter in the least. The Respondent did a grave disservice to both the Complainant and Ms. Natzke-Bergman by not involving them individually and together to accomplish a meeting of the minds concerning this situation. At the time of hearing, it was clear that neither the Complainant nor Natzke-Bergman had any appreciation for the cause of their feelings. It seemed clear that both sides blamed each other for their experiences as if fault were an appropriate concept. Had Natzke-Bergman and the Complainant been given or encouraged to exercise the opportunity to meet, the Hearing Examiner believes that much of the succeeding bitterness and recrimination could have been avoided.

The Respondent's paternalistic response and attitude needlessly confused the situation. Though the Hearing Examiner cannot conclude that he can impose an interactive process on the parties, it is clear that such a meaningful process might have defused this situation before complaints were filed.

The Respondent asserts that it engaged in an interactive process with the Complainant through the Complainant's counselor, Merle Bailey. Such a contention is laughable. First, the Respondent puts Bailey in the untenable position of being an employee of the Respondent yet expecting him to simultaneously tend to the Complainant as a client and act as his advocate/agent. For the Respondent to have given such a notion any consideration as an acceptable situation demonstrates how deluded the Respondent's management was.

After Bailey reported to Stevenson that the Complainant was not happy with the proposed change to his accommodation, Bailey is directed to no longer act as the Complainant's advocate and to concentrate on his counseling role instead. This is eminently sensible, but comes too late in the process.

The Respondent faults the Complainant for failing to utilize the services of the client advocate or to file an internal complaint. Had Brady or Stevenson bothered to ask Bailey about the Complainant's ability to pursue these actions, the Hearing Examiner would expect that the Respondent would have quickly discovered how inappropriate such a suggestion might be.

The Respondent cloaks itself in the mantle of client confidentiality when it asserts that it was unaware of the nature of the Complainant's specific disabilities or treatment and states, through Brady, that it would be

inappropriate to inquire into such matters. However, the law imposes a higher duty on those who work with or employ those with mental disabilities. In Bultmeyer v. Fort Wayne Community Schools, 100 F.3d 1681 (Cir. 7th, 1996), the 7th Circuit imposed an affirmative duty on an employer school board to take additional steps to reach out to an employee with a mental illness to make sure that that employee's rights were protected. Such a requirement should be no less applicable in the present matter. Again, it may well have avoided much of the intervening hard feelings and misunderstandings.

While the Hearing Examiner believes that the Respondent's conduct in this matter, though not illegal, has resulted in unhappiness and injury to several individuals, he feels that particularly Stevenson tried to work in the best interests of both Natzke-Bergman and the Complainant. It was in many respects too little too late to keep things from reaching the point of this complaint. However, Stevenson impressed the Hearing Examiner as a fundamentally decent person. Despite her decency, a failure of training and guidance from other managers resulted in this situation in which no one was well served.

The Hearing Examiner understands the Complainant's feelings about his treatment, but cannot find that the actions that led to those feelings were the result of discrimination. Regardless, the Complainant came away without a place of refuge or someone with whom he could address the other issues in his life.

The Hearing Examiner encourages the Respondent to re-examine its processes, procedures and its lines of authority. While it seems that it should not be necessary to remind the Respondent that it is dealing with a particularly vulnerable population, it seems that the Respondent forgot in the present matter.

Signed and dated this 6th day of August, 2009.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner