

5. Respondents shall submit a plan to MCHR of how they will comply with these orders within six (6) weeks of their receipt of this order.

Donna Birks 5-14-16
Donna Birks Date
Commissioner

Agree

Disagree _____

Melody A. Smith 06/01/2010
Melody Smith Date
Commissioner

Agree

Disagree _____

Jenifer Placzek 6-12-16
Jenifer Placzek Date
Presiding Commissioner

Agree

Disagree _____

[Faint, illegible text or stamp]

Before the
Commission on Human Rights
State of Missouri



STATE OF MISSOURI, ex rel.)	
CRAIG D. MERSHON,)	
)	
Petitioner,)	
)	
vs.)	No. 14-0002 HRC
)	
KENNY LAI and)	
KENNY LAI d/b/a PROLONG NAILS,)	
)	
Respondent.)	

RECOMMENDED DECISION

The Administrative Hearing Commission (“AHC”), as the hearing examiner in this case, recommends that the Missouri Commission on Human Rights (“MCHR”) grant the claim of Craig D. Mershon against Kenny Lai¹ and award Mershon \$13,000 in actual damages.

Procedure

Mershon filed a complaint of discrimination on the basis of disability with the MCHR on June 16, 2009. On April 29, 2010, the MCHR found probable cause to believe that discrimination occurred. On June 2, 2010, the MCHR received an affidavit of failure of conciliation efforts. On January 27, 2014, the MCHR approved the appointment of the AHC as Hearing Examiner. On March 26, 2014, the MCHR transmitted its record to the Hearing

¹ The complaint names Lai and Lai d/b/a Prolong Nails. A “d/b/a” business is not an entity separate from its owner. Therefore, in this recommended decision we refer to the respondent simply as Lai.

Examiner. On July 16, 2014, the MCHR filed a first amended complaint. Lai did not file an Answer.

After several continuances, the Hearing Examiner convened a hearing on the amended complaint on July 10, 2015. Sara Harrison and Michael Pritchett appeared on behalf of the MCHR. Lai did not appear. Lai later contacted the AHC to state that he did not understand the hearing was to be held on July 10, 2015 and he asked to appear on another date. We convened a second day of hearing on August 4, 2015. Lai was given an opportunity to review the transcript from the first hearing date prior to the proceeding. Harrison and Pritchett again represented the MCHR and Lai represented himself.

After the hearing, we set a briefing schedule. Because Lai did not file any brief, the matter became ready for our recommended decision on November 4, 2015, when Lai's brief was due.

Findings of Fact

1. The MCHR is an agency of the State of Missouri, established and existing pursuant to § 213.020.1² for the purpose of administering and enforcing Chapter 213 and the regulations promulgated and adopted under 8 CSR 60.³
2. Mershon is a person with cerebral palsy. He is a triplegic who has difficulty using his legs and his left hand. He is also legally blind.
3. Mershon uses a motorized scooter for transport. He is also able to walk short distances with a four-pronged cane.

² Statutory references are to RSMo 2000 unless otherwise indicated.

³ All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

4. Foot care is important for Mershon. He cannot cut his own toenails or care for his feet properly by himself. If he does not receive regular care, he gets ingrown toenails and his already-limited mobility is further impaired.

5. Prolong Nails is a nail salon that is open to the public. The nail technicians at Prolong Nails perform manicures and pedicures for customers.

6. Since Lai has owned Prolong Nails, he has charged \$10 for a manicure, \$20 for a pedicure, and \$28 for a combined manicure/ pedicure. All customers are charged the same price for services.

7. It usually takes a technician 30-35 minutes to perform a pedicure. Of the \$20 for a pedicure, the technician keeps \$12 and pays \$8 to Lai.

8. Mershon began patronizing Prolong Nails in 2007, and he continued to get monthly manicures and pedicures from Prolong Nails throughout 2008.

9. At Prolong Nails, Mershon was able to transfer himself from his scooter to the pedicure chair without assistance. He needed assistance only with removing his shoes and socks, and putting them back on.

10. It took about 45 minutes for a technician to do Mershon's pedicure.

11. Lai bought Prolong Nails in July or August 2008.

12. Sometime in 2009,⁴ Mershon went to Prolong Nails for his monthly manicure/ pedicure. Lai returned from an errand to Home Depot toward the end of Mershon's visit.

13. As Mershon was preparing to leave, Lai approached him. He told Mershon not to return to Prolong Nails because it took too long, and was too difficult, for technicians to do his manicure/pedicure. Lai told Mershon that if he came back to Prolong Nails, he would be charged \$50 for the manicure/pedicure instead of the posted \$28.

⁴ In Mershon's initial complaint filed with the MCHR on June 16, 2009, he states the date of most recent discrimination as January 13, 2009. In Lai's testimony at the hearing, he said he thought his encounter with Mershon took place in September 2008, but he was not sure. We accept Mershon's exact date as the more accurate one.

14. Lai also told Mershon that the salon's license did not allow it to service "special" people, i.e., people with disabilities, which was not true. Lai told Mershon to go to a foot doctor instead of his salon.

15. The technicians at Prolong Nails perform manicures and pedicures on other customers who are disabled or who need assistance; however, those customers are typically accompanied by aides.

16. Mershon was humiliated by the incident. He was also worried about obtaining care for his feet because he knew he would have trouble walking if he did not get his nails done.

17. There were no other nail salons easily accessible to Mershon, and his nail and foot care was neglected. He had to take more frequent trips to the podiatrist for nail and foot care.

18. Lai now receives in-home health care. A nurse comes in weekly. Along with her other duties, she cleans Mershon's feet and clips his nails for him.

Conclusions of Law

The MCHR has jurisdiction under § 213.075.5. The MCHR has the burden of proof. *See Kline v. City of Kansas City*, 334 S.W.3d 632, 649 (Mo.App.W.D. 2011). The AHC acts as a hearing examiner for this complaint pursuant to a memorandum of understanding with the MCHR. The findings of fact in this recommended decision reflect the hearing examiner's credibility assessments. Nonetheless, "[t]he hearing examiner is not the final arbiter of credibility. That function is reposed in the [MCHR]." *Bean v. Missouri Commission on Human Rights*, 913 S.W.2d 419, 423 (Mo. App. E.D. 1996).

In deciding a case under the Missouri Human Rights Act ("MHRA"), we may look to both Missouri law and federal law that is consistent with Missouri law. *See Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818-19 (Mo. banc 2007). But the MHRA is not identical to federal laws prohibiting discrimination; it may offer broader protection in some areas, but it may

be more restrictive in others. *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112-13 (Mo. App.E.D. 2006).

Elements of Discrimination Under § 213.065

The MCHR claims that Lai discriminated against Mershon in Lai's place of public accommodation. Section 213.065.2 provides:

It shall be an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.

Thus, in order to prevail on its claim of discrimination under § 213.065.2, the MCHR must prove that: (1) Mershon is a member of a class protected under the statute; (2) Prolong Nails is a place of public accommodation; (3) Lai refused, withheld, or denied service to Mershon, attempted to do so, or otherwise discriminated against him; and (4) Mershon's disability was the "grounds of" Lai's discriminatory acts toward Mershon. The MHRA does not require the MCHR to prove that discrimination was a substantial or determining factor in a decision to deny service to a person with a disability; "if consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient." *Daugherty*, 231 S.W.3d at 231.

Mershon is a Person with a Disability

A "disability" is a (1) physical or mental impairment which substantially limits one or more of a person's major life activities (2) which, with or without having reasonable accommodation, does not interfere with utilizing the place of public accommodation. Section 213.010(4); *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919, 924 (Mo.App. S.D. 2012). A reasonable accommodation is an accommodation that does not impose undue financial and

administrative burdens, or require fundamental alterations in, the place of accommodation's business. *See Wells*, 379 S.W.3d at 924, *citing Devor v. Blue Cross & Blue Shield of Kansas City*, 943 S.W.2d 662, 666 (Mo. App. W.D. 1997).

Mershon has cerebral palsy that severely limits his ability to walk and he is legally blind. Walking and seeing are major life activities. Mershon was able to go to Prolong Nails, enter the business, and transfer himself into a chair in order to receive a pedicure. The only "accommodations" the business had to provide to him were to help him take his shoes and socks off, put them back on, and take a little extra time with him. We find these to be reasonable accommodations to allow Mershon to access the services offered by Prolong Nails. Mershon has a disability as defined in § 213.010(4). *Cf. Mershon v. St. Louis University*, 442 F.3d 1069 (8th Cir. 2006) (Mershon is disabled within the meaning of the Americans with Disabilities Act).

Prolong Nails is a Place of Public Accommodation

A "place of public accommodation" is a place or business "offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public[.]" Section 213.010(15). Prolong Nails provides manicures and pedicures to the general public. It is a business that offers services for the comfort and health of the general public. Therefore, it is a place of public accommodation under § 213.010(15).

Discrimination on the Basis of Disability

Under § 213.065.2, a person may not: 1) directly or indirectly refuse, withhold from or deny, a service to any other person; 2) attempt to do any of those things; or 3) otherwise discriminate against a person, on the grounds of his disability. "Discrimination" is "any unfair treatment . . . as it relates to . . . disability." Section 213.010(5). The MCHR argues that Lai engaged in unlawful discrimination against Mershon when Lai 1) told Mershon not to come back

to Prolong Nails because it took too long and it was too difficult to do his manicure/pedicure, but that it did not take significantly more time to provide services to Mershon than to other customers; 2) falsely told Mershon that Prolong Nails did not have a license that allowed its nail technicians to provide services to him; and 3) told Mershon that, if he did return to Prolong Nails, he would be charged significantly more for a manicure/pedicure than other people were charged.

Lai admits some of these allegations, but he testified that he did not want to serve Mershon at Prolong Nails for several reasons: it took so long to do his pedicure that he and his workers lost money on him; his technicians complained that he looked down their blouses and made them feel uncomfortable when he was having his pedicure; and he was afraid Mershon would fall getting in or out of his chair. He testified that the reason he told Mershon that his license did not allow him to serve a person like him was that he did not want to discuss his true concerns with Mershon out of concern for his feelings.

Whether or not it took longer to perform Mershon's pedicure, § 213.065.2 prohibits a place of public accommodation from refusing service to a person because of his disability. As previously discussed, a person with a disability under the MHRA is one who not only has the impairment that substantially limits one or more major life activities, but may utilize the place of public accommodation with or without reasonable accommodation. A reasonable accommodation is one that does not impose undue financial and administrative burdens on, or require fundamental alterations in, the place of accommodation's business. Assisting a customer with his socks and shoes, and taking an extra ten minutes to perform his pedicure, does not impose an undue financial or administrative burden on, or require fundamental alterations in, Lai's business. In short, both are reasonable accommodations. Lai violated § 213.065.2 when he

told Mershon not to return to the salon, essentially denying him future service. Lai's false statement about his license is part of this violation.

Lai's testimony about the two workers' complaints about Mershon is hearsay, but the MCHR did not object to it. Hearsay testimony in an administrative hearing may be considered if no objection is made. *Lacey v. Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 843 n. 7 (Mo. App. W.D. 2004). When asked whether he stared at the technician's chest, Mershon replied, "Not that I know of." Tr. 48. He testified that the technicians were too far away for him to see clearly, given his visual impairments, and that he usually brought a book and read while his nails were being worked on.

Lai has the right and the duty, as a business owner, to protect his workers from harassment, and he may refuse service to any person, including a person with a disability, if that person behaves inappropriately toward his workers. Such harassment or inappropriate behavior would be a legitimate, non-discriminatory reason for refusing service. Lai did not prove that this actually occurred, however. He was not present at the shop when Mershon had his pedicure; he admits he saw none of the interaction between Mershon and the nail technicians. In addition, Mershon is legally blind; presumably he would have seen little if he had stared down at the technician. We do not find that Mershon stared at the nail technicians' chests inappropriately.

Moreover, it is clear that any such complaints were not the primary reason Lai refused service to Mershon. The primary reason, as he candidly stated, was Mershon's disability and the issues arising from it. Proving discrimination under the MHRA does not require that the offensive action was "motivated by" discrimination, merely that the protected characteristic was a "contributing factor" in the discrimination.

Lai also feared Mershon would fall while transferring himself between his scooter and the shop chair. Mershon testified that he was able to transfer himself and did not need assistance

to do so. Lai's fears, without more foundation for them, are not a reason to deny service to Mershon. The purpose of laws prohibiting discrimination against people with disabilities such as the Americans with Disabilities Act ("ADA") and the MHRA is to prevent such fears and inaccurate beliefs about people with disabilities from blocking their access to employment opportunities and public accommodations. *See Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 117 (1st Cir. 2004).

Whether the alleged "surcharge" of \$50 violates the MHRA is less clear. It may be viewed as just another way that Lai tried to tell Mershon he was no longer welcome at Prolong Nails. In that sense, it is simply another act of discrimination, and unlawful under the MHRA. On the other hand, it could be viewed as an alternative proposal for providing pedicure service to Mershon at a higher price. It is unclear whether the MHRA prohibits a surcharge when accommodating a person's disability makes it unprofitable to render a service to that person.

Lai testified that it took two nail technicians more than two hours to perform Mershon's pedicure – in other words, much more time than it took for most customers. Again, however, Lai did not witness Mershon's pedicure, and he had no first-hand knowledge of how long it took, or whether it took two technicians to do it. Mershon testified that it took about 45 minutes for his pedicure, and that two workers were not required. We accept Mershon's testimony that his pedicure took about 45 minutes, and typically required only one technician to perform.

Regulations under the ADA prohibit such surcharges. Under 28 C.F.R. § 36.301:

A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

But, as previously discussed, the protections against discrimination under the MHRA are not necessarily co-extensive with those under the ADA; they may be more or less extensive. There is no comparable regulation under the MHRA; there is only the requirement of “reasonable accommodation.” And there are no regulations that interpret or explain “reasonable accommodation” in the public accommodation context. Thus, we look again to the guidance in *Wells v. Cox*: A reasonable accommodation is one that does not impose undue financial and administrative burdens on, or require fundamental alterations in, the place of accommodation’s business.

We have already found that the accommodations of helping Mershon with his shoes and socks and taking a few extra minutes for his pedicure are reasonable. Although the MHRA does not specifically bar a surcharge for services to disabled persons, it bars “unfair treatment,” and, as a remedial statute, it should be broadly construed to accomplish its goals. *State ex rel. Washington University v. Richardson*, 396 S.W.3d 387, 396 (Mo.App.W.D. 2013). We find the surcharge proposed by Lai was unfair treatment because of Mershon’s disability. It, too, is discriminatory.

Conclusion

Mershon is a person with a disability and Prolong Nails is a place of public accommodation. Lai told Mershon not to come back to Prolong Nails because of issues relating to Mershon’s disability, and told him that if he did, he would charge him much more than the posted price for his pedicure. We find that Lai violated § 213.065.2.

Damages

In its complaint, the MCHR requested an order finding that Lai discriminated against Mershon and awarding damages to Mershon for humiliation, emotional distress, and deprivation of his civil rights. It also asked that Lai be ordered to cease and desist from his discriminatory

practices, that a civil penalty be assessed against him, and for “such other orders” as the MCHR determines to be just and proper. The prayer for damages in the amended complaint requests no specific dollar amounts, however. The MCHR made no request for a specific amount of damages until it filed its written argument, when it requested that Lai be ordered to pay Mershon \$32,000 in damages. At that time, the MCHR dropped its request for a civil penalty, but added a request for prejudgment interest on the damage award, and asked that Lai receive training on how to accommodate customers with disabilities and be ordered to develop a plan to comply with the MHRA.

Section 213.075.11 provides in part:

The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

(1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to ... payment of actual damages; and the submission of a report of the manner of compliance[.]

Actual Damages

“A damage award is designed to fulfill the remedial purposes of the civil rights laws and compensate a wronged person for the loss or injury suffered.” *Van Den Berk v. Comm’n on Human Rights*, 26 S.W.3d 406, 413 (Mo.App. 2000). Actual damages may be awarded for humiliation, emotional distress, and deprivation of civil rights. *State ex rel. Sir v. Gateway Taxi Management Co.*, 400 S.W.3d 478 (Mo. App. E.D. 2013). We conclude Lai’s actions deprived Mershon of civil rights guaranteed to him by law. Mershon’s testimony established that he suffered the type of mental anguish that a discrimination claim is designed to address. Mershon is entitled to actual damages for humiliation, emotional distress, and deprivation of civil rights.

Mershon testified that he felt humiliated when Lai told him not to return to Prolong Nails, which is understandable. He also testified that no other nail salon was easily accessible for him, and that as a result he did not receive the foot care he needed on a regular basis, and instead had to visit a podiatrist more frequently. He worried about his foot and nail care and had trouble sleeping as a result. At the hearing, Mershon asked for \$30,000 in damages to compensate him for that emotional distress and the additional medical expenses he incurred as a result of Lai's failure to provide him pedicures. Mershon offered no proof of such medical expenses, however.

Because Mershon provided no medical bills or specific testimony of increased costs he incurred due to visits to a podiatrist, we recommend no damages be awarded to him for medical expenses. However, damages can be awarded even where a medical diagnosis is not indicated and where the claim is "for emotional distress ... that an ordinary person would feel in such circumstances." *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. banc 2006). Although Mershon's testimony on this point also lacked specificity, his claim that he was humiliated and felt emotional distress is credible and need not be proven with medical documentation. Therefore, we recommend that Mershon be awarded \$10,000 in actual damages.

Deprivation of Civil Rights

"The severity of the harm suffered by the plaintiff due to the deprivation of his or her civil rights . . . should be used to determine the amount of the damages." *MCHR v. Red Dragon Restaurant*, 991 S.W.2d 161, 171 (Mo. App. W.D. 1999). In *Conway v. Missouri Comm'n on Human Rights*, 7 S.W.3d 571, 574, (Mo. App. E.D. 1999), the court awarded actual damages for violation of civil rights in the amount of one third of the amount of the damages for humiliation and emotional distress. A similar amount is sufficient to compensate Mershon for the violation of his civil rights. Mershon is entitled to an award of damages for deprivation of his civil rights in the amount of \$3,000.

Prejudgment Interest

Prejudgment interest may be awarded on damages awarded under the MHRA. *Lynn v. TNT Logistics North America, Inc.*, 275 S.W.3d 304, 312 (Mo. App. W.D. 2008). The purpose of such an award, along with other damages, is to make the victim whole. *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 771 (Mo. App. E.D. 1999). Whether to award prejudgment interest is a matter of discretion. *Id.* at 772.

The hearing examiner does not recommend an award of prejudgment interest in this case. First, the reported cases that have discussed prejudgment interest on awards under the MHRA are employment cases involving back pay.⁵ Ordinarily, it is an abuse of discretion not to award prejudgment interest on a back pay award. *Pollack*, 11 S.W.3d at 771. But this is not an employment case and does not involve back pay. Second, nearly four years elapsed between the MCHR documented that its conciliation efforts had failed and it transferred the file to the hearing examiner. This period of time was, presumably, in the control of the MCHR, not Lai. Under these circumstances, no prejudgment interest should be awarded.

Cease and Desist, Compliance, and Education

The hearing examiner recommends that Lai be ordered to cease and desist from his discriminatory practices. As Mershon suggested at the hearing, Lai would benefit from education on the requirements of laws against discrimination and ways in which he can accommodate people with disabilities at Prolong Nails. Lai should also develop a plan for compliance with the requirements of the MHRA. Thus, the hearing examiner also recommends that Lai be ordered to receive such education and to develop a compliance plan.

⁵ In addition to *Lynn* and *Pollack*, they are *Sir v. Gateway Taxi* and *Howard v. Kansas City*, 332 S.W.3d 772 (Mo. banc 2011).

Conclusion

Sufficient evidence exists to establish discrimination due to disability under the MHRA. The evidence demonstrates that Mershon suffered humiliation, emotional distress, and deprivation of his civil rights. Accordingly, the hearing examiner recommends that Mershon be awarded damages in the amount of \$13,000.

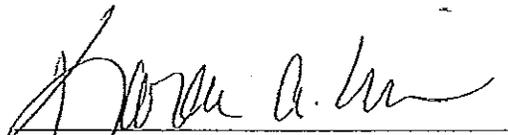
Summary

The Hearing Examiner recommends that the MCHR take the following actions:

- (1) find that Lai committed unlawful and discriminatory acts in violation of § 213.065, RSMo;
- (2) assess damages against Lai, including emotional distress, humiliation, deprivation of civil rights, and any other damages deemed reasonable by the MCHR in the amount of \$13,000; and
- (3) order Lai to cease and desist any ongoing unlawful and discriminatory practices that violate the prohibition on discrimination against persons with disabilities in § 213.065, obtain training on how to accommodate customers with disabilities, and to submit a report of his plan to comply with these orders to the MCHR. The MCHR should provide Lai with resources to obtain the training and set a reasonable deadline for Lai to complete the training and submit a compliance plan.

Pursuant to 8 CSR 60-2.200(1), the parties may file exceptions within ten days of the date of this recommended decision.

SO RECOMMENDED on April 13, 2016.


KAREN A. WINN
Hearing Examiner