

ISS Action Security v New York City Commn. on Human Rights
2011 NY Slip Op 33552(U)
December 21, 2011
Sup Ct, Queens County
Docket Number: 17984/11
Judge: Augustus C. Agate
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

ISS ACTION SECURITY,	X	INDEX NO. 17984/11
Plaintiff,		MOTION SEQ. NO.1
- against -		MOTION DATED: October 4, 2011
NEW YORK CITY COMMISSION ON HUMAN RIGHTS AND CHARLES ROMO,		Motion
Defendants.		Cal. No.: 13
X		

In this proceeding for judicial review pursuant to section 8-123 of the Administrative Code of the City of New York, petitioner ISS Action Security (ISS) seeks a judgment annulling a decision and order of respondent New York City Commission on Human Rights (Commission), dated June 26, 2011, and in the alternative, modifying the decision by reducing the award of \$20,3600.00 in compensatory damages, and the civil penalty of \$20,000.00. Respondent Commission cross moves to deny the petition and to enforce the June 26, 2011 decision and order.

Petitioner ISS, pursuant to a contract with the New York State Office of General Services, provides security guard services to 55 Hanson Place, Brooklyn, New York. It is noted that although petitioner states that its correct name is ISS Action, Inc., neither the notice of petition nor petition name this entity in the

caption. On July 30, 2009, Charles Romo, Jr. filed a verified complaint with the Commission in which he alleged as follows:

"1. Charles Romo, Jr., ('Complainant') is disabled and requires the use of a service animal....

"2. ISS Action Security ('Respondent') is a provider of public accommodation as defined by Section 8-102 of the Administrative Code of the City of New York. Its address is C/O Richard Gallagher, 55 Hanson Street Brooklyn, New York 11217.

"3. In or around June 2009 Complainant and his service animal attempted to enter a building, which utilizes Respondent's security services. Complainant wished to visit an organization located on the building's second floor. A Respondent employee would not allow Complainant to enter the building with the service animal unless he could prove his disability. Complainant objected to this inquiry and asked the employee if he could speak to a manager.

"4. The Respondent employee called the manager, who allowed Complainant to enter but prohibited Complainant from going upstairs with the service animal.

"5. Complainant charges Respondent with discrimination on the basis of his disability, in violation of Section 8-107(4)(a) of the Administrative Code of the City of New York."

ISS filed an answer dated September 12, 2009, in which it stated that on June 3, 2009 Mr. Romo entered a building located at

55 Hanson Street with a small dog and sought access to an organization located on the second floor; "that an employee of ISS correctly informed Complainant that under the direction of the Office of the General Services dogs were not allowed in the building, except for service animals; that Complainant manifested no disability or impairment; that Complainant asked to speak to a manager, and was in fact brought to the office of the Building Manager for OSG, Mr. Richard Gallagher; and otherwise denies the allegations." ISS denied knowledge as to what the "manager" allowed, and "affirmatively alleges that the person on the second floor who Complainant asked to see in fact came to the first floor and met with Complainant." The answer interposed as a first affirmative defense that: "At the time Complainant was first informed that his dog was not allowed in the building, there was neither any indication that Complainant was in any way impaired or disabled; nor that the dog provided any service to Complainant; nor that the dog was a service animal." The second affirmative defense alleged that "[t]o whatever extent Complainant was not allowed access to any part of the Building, it was due to his own unruly conduct, and not to any act of discrimination by Respondent." The third affirmative defense alleged that "[t]o the extent that Complainant was denied access to the Building other than by Respondent's employees, the Complaint should be dismissed as to Respondent."

The Commission referred the matter to the Office of Administrative Trials and Hearings (OATH) and a hearing was held on February 8 and 9, 2011 before Administrative Law Judge (ALJ) Alessandra F. Zorgniotti. The Commission represented Mr. Romo at the hearing, and ISS was represented by counsel. The record was closed on March 11, 2011, after submission of post-hearing briefs. In addition to documentary evidence, the Commission presented testimony from Mr. Romo; Ms. Kale, a Commission employee; Ms. Kimmelstein, a New York State employee; and Nathaniel Green, an ISS security guard who was present during the incident complained of. ISS presented documentary evidence and the testimony of Bertha Gonzalez, an ISS security guard and supervisor at the time, and Ms. Newman, the principal of ISS.

Barbara Johnson, a security guard involved in the incident, died prior to the hearing.

ALJ Zorgniotti, following the hearing, issued a report in which she found that Mr. Romo is a member of a protected class as defined by the City's Human Rights Law; that he had been denied privileges or advantages by ISS; that ISS is a public accommodation under the Human Rights Law; and that ISS had discriminated against Mr. Romo by denying him and his service dog access to a building. The ALJ recommended that ISS pay compensatory damages to Mr. Romo in the sum of \$20,000.00 for mental anguish and \$360.00 in actual damages, and recommended that the Commission impose a civil penalty

of \$15,000.00. The ALJ further recommended that ISS be required to provide training to its employees regarding their obligations under the Human Rights Law.

The three member Commission issued a decision and order on June 26, 2011, stating, in pertinent part as follows:

"Petitioner's [Romo] relevant testimony was consistent with his allegations, in that he testified that he has hepatitis C and is HIV positive; that his illnesses and the side effects of his medication causes disorientation and dizziness; and that he has trained his service dog to assist him with his balance and to guide him home. Petitioner further testified that on June 3, 2009, he entered the building with his service dog. Without being asked to do so, he presented the dog's license - a document that included service animal identification - to Security Guard Green. Mr. Green then prepared a building pass for petitioner but, as he was giving it to him, Security Guard Johnson told petitioner that he could not enter with the dog, and refused to open the security gate unless petitioner disclosed his disability and provided proof that his dog was a service animal. Petitioner testified that after Ms. Johnson and her supervisor, Ms. Gonzalez, continued to insist that he disclose the nature of his disability, he told them that he had HIV. When he again asked Ms. Johnson to open the security gate, she did not open the gate but told him to get away from her because he had HIV. Mr. Green corroborated petitioner's description of the

confrontation between petitioner, Ms. Johnson and Ms. Gonzalez. Mr. Green also corroborated petitioner's testimony that petitioner presented a dog license to him upon entering the building, and that he gave petitioner a building pass after seeing that document.

"ALJ Zorгниotti issued a Report and Recommendation on April 12, 2011, wherein she determined that respondent violated the HRL by denying petitioner the advantages and privileges of a public accommodation by indicating that he was unwelcome in the building because of his disability. The ALJ recommended that the Commission award compensatory damages of \$360 dollars to petitioner, as well as \$20,000 dollars damages for mental anguish. The ALJ also recommended that the Commission impose a civil penalty of \$15,000 dollars on respondent; and recommended that the Commission order respondent's employees to undergo training on their obligations under the HRL.

"After a review of the trial transcript and exhibits and the Report and Recommendation of ALJ Zorгниotti, the Commission agrees with the recommended damages, penalty and affirmative relief.

"The Commission agrees with the ALJ's conclusion that petitioner's dog is a service dog. Although the HRL does not define 'service animal' the Commission applies Federal and State regulations to conclude that under the HRL, a 'service animal' is defined as 'any animal that is individually trained to do work or

perform tasks for the benefit of an individual with a disability.' Again, using Federal and State regulations as a guide, a covered entity may not ask about the nature or extent of a person's disability, or demand documentary proof that an animal is a service animal, but may ask (1) if the animal is required because of a disability, and (2) what work or task the animal has been trained to perform.

"The Commission agrees with the ALJ's conclusion that Respondent denied Complainant a public accommodation. In relevant part, the Human Rights Law makes it unlawful for 'any place or provider of public accommodation because of the actual or perceived ... disability ... of any person directly or indirectly to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof....

"The Commission find ample support in the record for ALJ's Zornotti's [sic] finding that respondent's employee, Security Guard Johnson, engaged in unlawful discrimination. By word and deed, Ms. Johnson announced that because of his disability, petitioner's presence in the building was unwelcome, objectionable and undesired, denying him a public accommodation and violating the HRL. As the ALJ held, when employees of a place or provider of public accommodation engage in unlawful discrimination against members of the public, their employer is strictly liable for those actions. Ms. Johnson was respondent's employee at the

time of this incident, and respondent is, therefore, liable for her unlawful conduct.

"The Commission also agrees with the ALJ's conclusion that respondent was not acting as an arm of the State. As respondent has conceded that throughout the investigation and litigation of this matter, it is a provider of public accommodation, within the meaning of the HRL, in its own right. The HRL thus applies directly to respondent. Respondent's contract with the State does not immunize respondent against liability for its own unlawful conduct.

"The New York City Commission on Human Rights has no jurisdiction over the State."

The Commission ordered ISS to pay petitioner the sum of \$360.00 in compensatory damages, and \$20,000.00 for mental anguish; and to pay the City of New York a fine of \$15,000.00. The Commission ordered ISS to provide training for its employees about their obligations under the New York City Human Rights Law, with a focus on the rights of the disabled, within 60 days of its order, and to provide proof to the Commission that the training had occurred. ISS was directed to include proof of the dates on which the training occurred, attendance records containing the names and signatures of the employees trained and the name, address and qualifications of the person or persons conducting the training.

Petitioner ISS timely commenced this action on July 29,

2011, for judicial review under Section 8-123 of the Administrative Code of the City of New York. Petitioner alleges that the Commission's decision and order of June 26, 2011 is erroneous and that it is not supported by substantial evidence in the record. The petition does not comply with the requirements of CPLR 402 as it fails to contain the particular grounds for the relief requested. Rather, the petition states that said grounds are "set forth more fully in a Memorandum of Law submitted in support of the this Petition." In view of the fact that the respondent Commission has responded in full to the grounds raised in petitioner's memorandum of law, the court will consider these grounds as if they were properly incorporated into the petition.

Petitioner alleges that the conclusions of the Commission and its decision and order are not supported by substantial evidence. It is asserted that the Commissioner's recitation of Mr. Romo's complaint is not accurate, in that Mr. Romo alleged that he was allowed to enter the building, but was prohibited by the manager from going upstairs with his service dog. It is asserted that respondents never amended the complaint, and did not conduct any pre-hearing depositions.

Petitioner asserts that at the hearing respondents made no attempt to support Mr. Romo's sworn allegation that although he was allowed to enter the building, it was an ISS employee who prevented him from going to the second floor. Rather, Mr. Romo

testified that the at the time he signed the complaint he believed that Mr. Gallagher was an ISS employee, and that he now believed that Gallagher was an employee of New York State and not ISS. The ALJ dismissed the charge that the respondent's building manager engaged in a discriminatory practice.

Petitioner asserts that the ALJ incorrectly referred to Mr. Gallagher as "Respondent's [ISS] building manager," and that the ALJ incorrectly stated that "petitioner [Mr. Romo] does not argue that respondent should be liable for his [Gallagher's] acts," when in fact this was asserted in the complaint. Petitioner asserts that as the allegations set forth in the verified complaint were not proven at the hearing, the case should have been dismissed.

Petitioner further states that the ALJ eliminated issues relating to the written security protocol, or "post orders" which the ISS security guards were instructed to follow.

Petitioner asserts that to the extent that the verified complaint alleges an encounter occurred between Mr. Romo and "a respondent employee" prior to Mr. Gallagher's involvement, Mr. Romo testified that this encounter only lasted "a minute or two." Petitioner, therefore, asserts that as the encounter between Mr. Romo and Ms. Johnson was of "extraordinarily limited duration," the awards recommended by the ALJ and adopted by the Commission are excessive. Petitioner further asserts that ALJ and Commission's

finding that ISS's security guards discriminated against Mr. Romo by denying him access to a building based on his disability, in violation of Administrative Code section 8-107(4)(a), is a "distortion."

Petitioner further asserts that the Commission's determination is not supported by substantial evidence in that respondent's own witnesses offered contrasting testimony as to whether Mr. Romo displayed the service animal credentials on the day in question. It is further asserted that the ALJ incorrectly set forth the service dog number issued to Mr. Romo's service animal, and that based upon the testimony presented, she incorrectly stated that the service dog license number, rather than a general dog license number was presented to Mr. Green. It is asserted that the ALJ's analysis of the evidence presented, therefore, is flawed. Petitioner argues that given the various testimony provided by the witnesses, as well as the documentary evidence presented, and Mr. Romo's admitted memory lapses, no weight should have been accorded to Mr. Romo's testimony, and the complaint should have been dismissed.

Petitioner further asserts that Mr. Romo failed to meet his burden of proving that any act by ISS was the cause of any damages.

Finally, petitioner asserts that it never maintained that it had sovereign immunity from suit, and that the statements made

by the ALJ and Commission in this regard is a mis-statement. It is also asserted that ISS never disputed that it was a public accommodation and that the ALJ's statements in this regard are in incorrect, and were improperly adopted in toto by the Commission.

Respondent Commission cross-moves in opposition, and seeks an order directing ISS to pay the amounts awarded to Mr. Romo and to comply with its decision and order. Respondent asserts that its decision and order is supported by substantial evidence in the record, and that the Commission acted properly and within its discretion in awarding compensatory damages and imposing the civil penalty.

It is well settled that findings of fact made by the Commission must be regarded as conclusive "if supported by sufficient evidence on the record as considered as a whole" (Administrative Code of City of NY § 8-123 (e)); see *Matter of Orlic v Gatling*, 44 AD3d 955 [2007]; *Matter of Brooklyn Hosp. Med. Ctr. v DeLeon*, 208 AD2d 624, 625 [1994]). In reviewing the Commission's findings, the court is limited to determining whether those findings are supported by substantial evidence (see *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]), and may not weigh the evidence or reject the Commission's determination "where the evidence is conflicting and room for choice exists" (*Matter of State Div. of Human Rights [Granelle]*,

70 NY2d 100, 106 [1987]; see *Matter of 119-121 E. 97th St. Corp. v New York City Commn. on Human Rights*, 220 AD2d 79, 81 [1996]).

Substantial evidence is a standard defined as, in pertinent part, "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt [emphasis in original, internal quotations and citation omitted]." (*Matter of 119-121 East 97th Street Corp. v New York City Commission on Human Rights*, *supra* at 81-82). Additionally, the Court of Appeals has stated that this section of the Administrative Code is comparable to Executive Law § 298 (see *Matter of Pace College v Commission on Human Rights of City of New York*, 38 NY2d 28, 33 [1975]).

The court finds that the evidence in the record amply supports the Commission's determination that Mr. Romo is a member of a protected class, pursuant to the City Human Right's Law; that he was denied privileges or advantages by ISS; that ISS is a public accommodation under the Human Rights Law; and that ISS acted in such a manner and circumstance as to give rise to an inference that its actions constituted discrimination in violation of Section 8-107(4) of the Administrative Code. The record is unequivocal that on the day of the incident, as Charles Romo, a disabled person accompanied by his service dog, attempted to pass

through security at 55 Hanson Place, ISS security guard Barbara Johnson demanded that Mr. Romo identify for her his disability before she would allow him entry into the building beyond the lobby; prevented Romo from entering the building because he would not tell her the nature of his disability; and that after Romo told her he had HIV, Johnson indicated that Romo was not welcome at the premises and told him "Eeew, you're HIV positive get away from me."

The testimony of ISS's own employees corroborated Mr. Romo's testimony. ISS security guard Nathaniel Green testified that Ms. Johnson intervened while he was writing a pass permitting Mr. Romo entry into the building, and further corroborated Mr. Romo's testimony regarding Ms. Johnson's questions regarding the nature of his disability and her negative comments towards Mr. Romo's HIV status. ISS security guard Bertha Gonzalez also testified as to Ms. Johnson's statements regarding Mr. Romo's HIV status. Substantial evidence thus exists to support the Commission's finding that ISS, through its employees, impeded and prevented Mr. Romo from entering the subject building beyond its lobby, and indicated that his presence was not welcome on the basis of his disability.

Although plaintiff seeks to shift the blame to Mr. Gallagher, a New York State employee, the evidence in the record clearly supports the Commission's conclusion that it was the

actions of the ISS employees in the first instance who impeded Mr. Romo's access to VESID's second floor office.

Furthermore, plaintiff's interpretation of the evidence as to whether Mr. Romo displayed a general dog license, rather than a service dog license, is not supported by the record. The documentary evidence presented at the hearing established that in 2007, the New York City Department of Health and Mental Hygiene (DOHMH) issued to Mr. Romo a dog license, number 2924025, for Ramses, an 11 inch Italian Greyhound, and said license bears the words "SERVICE DOG." The same license number appeared in ISS and Gallagher's incident reports, and on the copy of the dog license produced by Mr. Romo. Although separate dog tags were issued to Mr. Romo, the evidence in the record does not support petitioner's claim that Mr. Romo was only in possession of a general dog license and had not been issued a dog license for a service dog. Rather, the record supports the Commission's finding that Mr. Romo presented to Mr. Green a dog license that included the service animal designation, and that Mr. Green was in the process of writing a building pass when Ms. Johnson intervened.

To the extent that respondent seeks to cast doubt on the complainant's credibility, this does not form a basis for annulling the Commission's determination. It is the function of the Commission, and not this reviewing court, to weigh the evidence or

assess the credibility of the witnesses. (*See Matter of 119-121 E. 97th St. Corp. v New York City Commn. on Human Rights, supra*).

Finally, the duration of the incident between Mr. Romo and the ISS security guards does not militate against a finding that the Commission's determination is supported by substantial evidence.

Section 8-120(a)(8) of the Administrative Code permits the Commission to award damages to complainants who suffer mental anguish because of discrimination. Credible testimony by a complainant corroborated by reference to the circumstances can be sufficient to sustain an award of for mental anguish. (*New York City Transit Auth. v NYS Div. of Human Rights*, 78 NY2d 207 [1991]; *Cullen v Nassau County Civil Service Comm'n*, 53 NY2d 492 [1981]).

An award for compensatory damages for mental anguish "must be upheld if it is reasonably related to the wrongdoing, is supported by substantial evidence, and is similar to comparable awards for similar injuries" (*Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights*, 71 AD3d 890, 892 [2010] quoting *Matter of State Div. of Human Rights v Stoute*, 36 AD3d 257, 266 [2006]; see also *Matter of Goldberg v New York State Div. of Human Rights*, 85 AD3d 1166 [2011]). Here, Mr. Romo testified that he was humiliated by having to reveal his disability in a public place. Furthermore, due to the incident with Johnson, Romo temporarily lost the benefits provided by VESID which had allowed him to

receive assistance in paying for school, and technological assistance for a visual impairment, which enabled him to seek employment. Mr. Romo testified that as a result of this incident, coupled with the temporary loss of his VESID benefits, caused him to suffer depression; that he was scared, and cried fore days; that he did not leave his apartment or walk his dog for an entire weekend; that he lost 15-20 pounds; and that he sought counseling as well as the support of his family in Texas. Thus, there was sufficient evidence in the record to support an award of damages for mental anguish.

In addition, the Commission's award of \$20,000.00 for mental anguish is comparable to other awards. Notably, the ALJ calculated the amount of damages for mental anguish, in light of comparable awards and other mitigating factors.

The Commission, in adopting the ALJ's determination as to damages, properly relied on applicable precedent with respect to the award of \$20,000.00 for mental anguish. With respect to the award of actual damages, the Commission properly relied upon Mr. Romo's testimony that he purchased a \$300.00 air ticket to visit his family in Texas, and as counseling services had been scheduled prior to the incident, awarded \$60.00 as partial payment. Finally, the Commission, in adopting the sum of \$15,000.00 as a civil penalty, also relied upon comparable awards in this regard.

In view of the foregoing the court finds that the Commission's decision and order of June 26, 2011 is supported by substantial evidence in the record and is not erroneous. Petitioner's request to vacate said award is denied, and the cross motion for an order directing petitioner to comply with said decision and order in all respects is granted.

Settle one judgment and order.

Dated: December 21, 2011

Augustus C. Agate, J.S.C.