

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

GEOFFREY ANGEL,

Charging Party,

-v-

BAXTER HOMEOWNERS ASSOCIATION
and HIGH STREET PROPERTIES INC.,

Respondents.

Case No.'s: 0083012911, 0083012912

**ORDER REJECTING AND
REMANDING TO THE HEARINGS
BUREAU FOR FURTHER
PROCEEDINGS**

Geoffrey Angel (Angel) filed a complaint with the Department of Labor and Industry asserting that Baxter Homeowners Association (Baxter) and High Street Properties (High Street) unlawfully discriminated against him by failing to provide the public accommodation he requested for disabled persons when it decided to lock its elevator during business hours. The Hearings Bureau (Bureau) held a contested case hearing pursuant to § 49-2-505, MCA. Following the hearing, the Bureau issued a decision that determined Baxter and High Street did not discriminate against Angel. Angel filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on November 18, 2009. Geoffrey Angel appeared and argued on his own behalf. Margot Barg appeared and argued on behalf of Baxter. Todd Shea appeared on behalf of High Street. The Commission hereby rejects certain conclusions of law and remands for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

As a preliminary procedural matter at the hearing before the Commission, Angel objected to Todd Shea presenting oral argument on behalf of High Street because Angel did not raise any issues on appeal that challenged the hearing officer's decisions regarding High Street. The Commission sustained the objection and did not allow High Street to present oral argument.

Angel raised only issues of law on appeal and did not raise any issues of fact. Therefore, this order adopts the hearing officer's findings of fact in their entirety. Further, the parties do not dispute that Angel has standing to bring a claim under § 49-2-304, MCA.

STANDARD OF REVIEW

Administrative Rule of Montana 24.9.123(4) provides: "The commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer decision." The Commission's standard of review pursuant to this rule is whether the hearing officer's interpretation and application of the law is correct. See *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, 198 P.3rd 284.

DISCUSSION

Angel argued the hearing officer erred as a matter of law in applying employment law principles to a public accommodation law case. Baxter argued the hearing officer was correct.

After careful and due consideration, the Commission concludes the hearing officer erred as a matter of law in this case. Section 49-2-304(1), MCA, provides:

Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation: (a) to refuse, withhold from, or deny to a person any of

its services, goods, facilities, advantages, or privileges because of . . . physical or mental disability.

In citing this statute, the hearing officer properly noted that it is appropriate to look to federal law for guidance in this area, since the Montana Legislature amended the Montana Human Rights Act to conform to the Americans with Disabilities Act in 1993.

The hearing officer also properly determined that Angel had met his burden to show he had requested a modification and that the modification was reasonable. The hearing officer found that the elevator's access was restricted while the stairwell that allowed unfettered access to the second floor was left open. He concluded that since the stairwell remained open, Angel's request to leave the elevator unlocked during business hours was reasonable.¹

However, after concluding Angel met his burden, the hearing officer went on to interpret the law in a manner that narrowed the coverage of public accommodations under the Montana Human Rights Act as compared to federal law. He noted that under federal law, once a charging party meets the burden to show a reasonable modification was requested, the defendant has the burden to prove the requested modification would fundamentally alter the nature of the public accommodation. The hearing officer then concluded that the defendant's "fundamentally alter" burden under federal law is

¹ While Baxter asserts in its brief on appeal that Angel requested only that the elevator remain unlocked 24/7, the hearing officer's findings indicate he found that Angel's request was regarding business hours. The Commission is bound by those findings.

equivalent to the requirement in § 49-2-101(19)(b), MCA, under state law. This statute reads:

Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.”

Based on this language, he stated that a defendant meets the burden to show no discrimination if the defendant can show a public accommodation would require an undue hardship or would endanger the health or safety of any person.

The Commission concludes this interpretation is incorrect. Section 49-2-101(19)(b), MCA, is a definition section that by its plain language, applies in the employment law context because it explicitly refers to “an otherwise qualified person.” Under employment discrimination, an employer is not required to make an accommodation if the change would create an undue hardship or endanger someone. While the two standards can undoubtedly be similar under certain practical circumstances, the “undue hardship/endanger” threshold is simply not the same as the “fundamentally alter” test. Rather, the differences in the two tests reflect the differences between the questions that arise in employment discrimination versus public accommodation discrimination. And, because the two tests each apply in their respective settings, to switch the two can also create substantially different burdens for a respondent. Therefore, the Commission holds that regarding public accommodations, if a charging party meets their burden, a defendant must show the modification would fundamentally alter the nature of the public accommodation.

In spite of the potential errors that could result from equating the two tests, the reversible legal error in the hearing officer's decision is that he failed to apply either test and switched his analysis to consider whether Baxter's delay was reasonable under the totality of the circumstances. By the time of the hearing, over 12 months after Angel requested his modification and three months after the modification was provided, the hearing officer determined he had to analyze the reasonableness of the delay in making the elevator unlocked for disabled business customers. But by failing to require Baxter to meet its fundamental alteration burden and by only considering the delay, the hearing officer's decision effectively condoned Baxter locking the elevator while at the same time leaving the stairs open. In other words, Baxter was allowed to address its security concerns in a manner that prohibited access to individuals with certain disabilities. Therefore, the Commission concludes it was error for the hearing officer to apply the interactive process under employment discrimination law to this case without first assessing the proper burden on Baxter. Once Baxter is required to meet the proper burden, if it fails that burden, the many issues involved in the delay until the requested modification was made, including proper mitigation or lack thereof, are relevant to damages.

In sum, while the Commission agrees that the ultimate burden to prove reasonableness of a requested modification is on the charging party, in this case, Angel met that burden and the hearing officer erred by not requiring Baxter to meet its burden. To interpret the statutes to allow this sort of time lapse in responding to a simple request for modification is to defeat the purpose of the statute. As noted by the hearing officer, "The Montana Human Rights Act's anti-discrimination provisions are very broad

prohibitions, indicating a legislative intent to eliminate discrimination except under very limited circumstances.”

Accordingly, the Commission rejects the Bureau's determination on Baxter's liability and remands for a determination of whether the requested modification would fundamentally alter the nature of the public accommodation. Should the hearing officer determine that Angel's request would not fundamentally alter the public accommodation supplied by Baxter, the Bureau must also make a determination of damages. The Commission did not reach the issue of whether the hearing officer erred in requiring Angel to produce documents that he asserts are privileged because it did not address damages. Therefore, that issue is preserved for purposes of any future appeal.

DATED this ____ day of February, 2010.

Ryan C. Rusche, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the forgoing Human Rights Commission ORDER was served on the following persons by U.S. mail, postage prepaid, on February ____, 2010.

GEOFFREY ANGEL
ATTORNEY AT LAW
803 WEST BABCOCK
BOZEMAN MT 59715

TODD SHEA
ATTORNEY AT LAW
225 EAST MENDENHALL SUITE 1
BOZEMAN MT 59715

MARGOT BARG
ATTORNEY AT LAW
602 FERGUSON AVENUE SUITE 5
BOZEMAN MT 59718

Montana Human Rights Bureau