

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1316-2018:

JOEL JACOBSON, )  
 )  
 Charging Party, )  
 ) **HEARING OFFICER DECISION**  
 vs. ) **AND NOTICE OF ISSUANCE OF**  
 ) **ADMINISTRATIVE DECISION**  
 THE CANNERY, )  
 )  
 Respondent. )

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I. INTRODUCTION

Charging Party Joel Jacobson (Jacobson) brought this complaint alleging that Respondent The Cannery discriminated against him with regard to his service animal.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter in Bozeman, Montana. Jacobson represented himself and was accompanied by his dog, Benji. Attorney Edward J. Guza represented The Cannery.

At hearing, Jacobson, Robert Fletcher, Tana Koelzer, Myra Uribe, and Paul Knutson testified under oath. The Hearing Officer admitted Jacobson's Exhibits 1, 2, 3, 4 (in part, excluding hearsay), 5 (in part, excluding hearsay), 6, 7 and 8. The Hearing Officer admitted The Cannery's Exhibits 100 and 101(a-c).

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received in the Office of Administrative Hearing. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following hearing officer decision is rendered.

## II. ISSUES

1. Did The Cannery discriminate against Jacobson on the basis of his disabilities as alleged in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If The Cannery did illegally discriminate against Jacobson on the basis of his disabilities as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If The Cannery did illegally discriminate against Jacobson on the basis of his disabilities as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

## III. FINDINGS OF FACT

1. Jacobson was diagnosed with chronic Post Traumatic Stress Disorder (PTSD) by Idris K. Syed, LPCC, of Warren Psychiatric Consultants in Ohio on or around May 27, 2005. The diagnosis resulted from a car accident that occurred on or about August 14, 2003.

2. Jacobson testified that his symptoms of PTSD include his inability to handle people coming up from behind him, touching him, and loud noises. Jacobson generally has difficulty dealing with other people.

3. Jacobson has a dog, Benji, which he views as a service animal. Jacobson acquired Benji from his daughter approximately six years prior to the hearing.

4. Benji was not trained until approximately three years prior to the hearing. Both Jacobson and another individual, Alan O'Donnell (O'Donnell), loosely taught Benji to work as a service animal, which included simply rewarding Benji's natural behavior.

5. Benji acts as an interloper on behalf of Jacobson to intervene and distract him from both the outside world and his own internal thought processes.

6. Jacobson does not place a service animal vest on Benji because he does not wish to stigmatize himself as disabled.

7. The Cannery, a tavern located in Bozeman, Montana, is a "public accommodation" that primarily serves liquor, but also serves food.

8. Jacobson was not familiar with The Cannery prior to May 26, 2017.

9. On May 26, 2017, in the late-afternoon, Jacobson entered The Cannery with Benji and was immediately told by a server that dogs were not allowed in the business (an offer may have been made for Jacobson to sit in an open-to-the-street area in the front of the bar where Benji could be outside). Jacobson pointed to the collar Benji was wearing to show it was a service animal, but the server determined she needed to involve The Cannery's manager, Tana Koelzer (Koelzer) because of Jacobson's aggressiveness with her.

10. Koelzer is the daughter of The Cannery's owner, Robert Fletcher (Fletcher).

11. Koelzer told Jacobson that Benji needed to have a vest and paperwork, and that because food was served at The Cannery, only service dogs were allowed. Jacobson informed Koelzer that such a request was not within the ADA guidelines, and accused Koelzer of discriminating against him and violating his civil rights. Koelzer responded to the effect that if he had a real service dog, he would know the laws.

12. Jacobson left The Cannery, tied Benji up outside, and returned. He demanded the owner's contact information to make a complaint.

13. At some point during his interactions with Koelzer—particularly after Jacobson re-entered The Cannery—Jacobson became loud, belligerent, and foul-mouthed toward Koelzer, referring to her as a “fucking bitch” and a “fucking cunt.” Jacobson's behavior was aggressive, loud, uncivilized, and boorish.

14. The majority of the confrontation between Jacobson and Koelzer occurred after Jacobson returned to The Cannery, without Benji.

15. Although Jacobson admitted to swearing, he denied and/or did not recall making the foregoing epithets. The Hearing Officer finds it more-likely-than-not that Jacobson did, in fact, use these specific terms. An employee of The Cannery and witness to some of the incident, Myra Uribe (Uribe), testified to Jacobson's aggressive behavior and use of the term “fucking bitch.” Furthermore, Jacobson showed himself to be easily agitated at the hearing, and openly stated "this is a joke" (referring to the hearing process itself) when the Hearing Officer refused to admit hearsay portions of evidence.

16. Koelzer had previously gone through TIPS (Training for Intervention Procedures) training required by the State for barkeepers, which in part dealt with how to handle intoxicated, unruly, and aggressive customers. Koelzer's take-away from the training in this situation was to remain calm and keep distance between herself and Jacobson, which she did. At no point did Koelzer use profanity in response to Jacobson, and she remained behind the bar at all times.

17. Jacobson interpreted Koelzer's demeanor to mean he was being toyed with, which further enraged him.

18. The exchange between Koelzer and Jacobson lasted several minutes. At some point, Koelzer asked Jacobson to leave because of his aggressiveness and belligerence, but not because of his service dog.

19. Jacobson called the police, who came to The Cannery. No citations were issued and no criminal charges were later filed as a result of the police call.

20. Jacobson left Bozeman to return home to the Billings area following the incident.

21. On or about May 27, 2017, Jacobson wrote a negative review of The Cannery on Google. The following day, he called Fletcher, threatening a lawsuit if he did not call back.

22. Fletcher returned Jacobson's call on or about May 30, 2017. Jacobson demanded—and Fletcher agreed—that Fletcher train his staff as to the proper questions to ask people who have service animals, and that Fletcher go to the State website to review current laws. Fletcher alleges Jacobson made a monetary demand of \$10,000 to settle his claim, while Jacobson alleges Fletcher raised the possibility of pursuing disorderly conduct charges with the County Attorney in relation to the May 26, 2017, incident at The Cannery.

23. Following the phone call, Fletcher contacted the Montana Human Rights Bureau (HRB) and explained that rules concerning what can be asked of an individual with a service animal had not been communicated to businesses. Fletcher wrote a letter to the HRB offering to provide an informational seminar on service animals and related issues.

24. Koelzer thereafter obtained a flyer from the Montana Department of Public Health and Human Services (DPHHS) that set forth the proper questions that could be asked of an individual with a service animal. She posted the flyer at The

Cannery meetings with employees to discuss the requirements concerning service animals.

25. The Cannery now has semi-annual training on service animal requirements and had put a disciplinary policy in place regarding the same. Because of the training in place, Fletcher testified that he feels the type of incident that occurred with Jacobson will not happen again.

26. Jacobson testified he felt humiliated, embarrassed, frustrated, and upset as a result of the May 26, 2017, incident at The Cannery. He testified to having digestion problems and sleep disturbances, and that it has negatively impacted his ability to interact with people. The incident had, according to Jacobson, adversely affected everything in his life, and caused him to leave Montana.

27. Paul Knutson (Knutson), who had employed Jacobson “under the table” and was his roommate before and after the incident, observed that, while he worked with Jacobson, Benji would stay in Jacobson’s car. He also observed that Jacobson’s emotions were always an issue, both before and after the incident, and that they had not worsened after the incident. Knutson had no reason to believe that Jacobson left Montana for reasons having any connection with the incident at The Cannery.

28. Jacobson was working “under the table” for Knutson at the time of the incident because Jacobson was concerned that having a job with reportable income would cause him to lose benefits.

#### IV. DISCUSSION<sup>1</sup>

##### **A. The Cannery, as a Public Accommodation, Violated Jacobson’s Civil Rights with Regard to His Service Animal**

The Montana Human Rights Act (MHRA) prohibits discrimination with regard to service animals in public accommodations. There is no dispute that The Cannery is a "public accommodation" as that term is defined under both the MHRA and the Americans with Disabilities Act (ADA). *See* Mont. Code Ann. § 49-2-101(20)(a); 42 U.S.C. § 12181(7)(B). Pursuant to the MHRA, a person with a disability has the right to be accompanied by a service animal in a public accommodation without being charged extra for the service animal, although is liable for any damage done by the animal. Mont. Code Ann. §§ 49-4-211(2), -214(1). The anti-discrimination provisions of the MHRA closely follow a number of federal

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<sup>1</sup> Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

anti-discrimination laws, including Title III of the ADA, 42 U.S.C. § 12181, *et seq.*, which prohibits discrimination in public accommodations: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . .” 42 U.S.C. § 12182(a). Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *See, e.g., Crockett v. City of Billings*, 234 Mont. 87, 92, 761 P.2d 813, 816 (1988) (specifically addressing disparate treatment cases). Because of this cooperative spirit between the Acts, courts may consider Title III regulations as persuasive authority to the extent they are not inconsistent with the MHRA. *See McDonald v. Dep’t of Env’tl. Quality*, 2009 MT 209, ¶ 55, 351 Mont. 243, 214 P.3d 749 (citations omitted) (regarding application of Title III principals to Title 1 and the MHRA).

Pursuant to the MHRA, a person with a disability has the right to be accompanied by a service animal in a public accommodation without being charged extra for the service animal, although is liable for any damage done by the animal. Mont. Code Ann. §§ 49-4-211(2), -214(1). Similarly, the federal regulations state: “Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” 28 C.F.R. § 36.302(c)(1). The MHRA defines a “service animal as “. . . a dog or other animal individually trained to provide assistance to an individual with a disability.” Mont. Code Ann. § 49-4-203(2). The federal regulations are largely similar, defining a “service animal” as “. . . any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” 28 C.F.R. § 36.104. “The work or tasks performed by a service animal must be directly related to the individual's disability[,]” and can include providing non-violent protection and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. *Id.* Under the MHRA, only dogs acting as service animals in training are required to wear a leash, collar, cape, harness, or backpack that identifies in writing that the dog is a service animal in training. Mont. Code Ann. § 49-4-211(4).

Jacobson has essentially alleged that The Cannery failed its obligations as a public accommodation by exceeding the parameters of a legitimate inquiry in confronting him about his dog. The MHRA does not, however, specifically address what type of inquiry may be made when an individual attempts to enter a public accommodation. Federal law does, however, address this issue. The Code of Federal Regulations states as follows:

Inquiries. A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

28 C.F.R. § 36.302(c)(6). To reiterate, the public accommodation may not ask about a person's disability. *Id.* The public accommodation may only ask: (1) if the animal is required because of a disability; and (2) what work or task the animal has been trained to perform. *Id.*

Here, it is undisputed that employees of The Cannery asked neither of the foregoing questions, and instead went far beyond what was permitted. They questioned why Benji did not have a vest typical of service dogs, and also demanded documentary proof that Benji was, in fact, a service animal for Jacobson. Indeed, Jacobson alleges that Koelzer went so far as to tell him that if he had a real service dog, he would know the legal requirements for bringing one into The Cannery. Jacobson has therefore established The Cannery's discriminatory acts, largely through The Cannery's own admissions.

The Cannery attempts to rebut Jacobson's claims in part by professing Koelzer's ignorance of the law. The Cannery established with sufficient certainty that Koelzer made inquiries regarding Jacobson and Benji's capacity as a service dog out of a sincere belief that Jacobson was 'in the wrong.' As Koelzer testified, her own mother had a service dog, and she was operating under assumptions she had formed from that experience. Her assumptions were, however, incorrect. Furthermore, while Koelzer's mistaken impressions do play a role in the ultimate relief awarded in this matter, they are irrelevant to Jacobson's claims.

The Cannery also attempts to rebut Jacobson's claims by placing emphasis on both the degree of Jacobson's disability and Benji's lack of qualifications as a service dog, these arguments are misplaced. As other courts have stated, "a violation of the statute [or rule] can occur by virtue of the manner by which an inquiry is conducted." *DiLorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187, 1193 (W.D.

Wash. 2007) (commenting on a defendant’s misplaced emphasis on a service dog’s lack of qualifications when the issue was the manner of inquiry). Were this a typical accommodation case, it would be appropriate to look into issues such as the nature of the disability, the training of the service animal, and what kind of accommodations would be reasonable and legally required as a result. *See, e.g., Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050 (5th Cir. 1998) (“PTSD . . . standing alone, is not necessarily a disability contemplated by the ADA”); *see also* Mont. Code Ann. § 49-2-101(1) (defining “disability” under the MHRA); 42 U.S.C. § 12102(1) (defining “disability” under the ADA). Because this case only concerns the threshold questions put to Jacobson by The Cannery’s employees, however, accommodations themselves (other than allowing a service dog on the premises) are not at issue and are therefore irrelevant.

The Cannery’s violation lies in the manner in which the inquiry was conducted, and it has admitted such a violation. *See* 28 C.F.R. § 36.302(c)(6); Mont. Code Ann. §§ 49-4-211(2), -214(1); *see also DiLorenzo*, 515 F. Supp. 2d at 1193. In light of the foregoing, The Cannery cannot rebut its admitted violation of the law resulting from the nature of its inquiry to Jacobson by focusing on issues which—for purposes of the present inquiry—are again irrelevant. The Cannery is therefore liable to Jacobson for its violation of his rights.

## **B. Damages**

The Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Jacobson as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages). The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See Vainio*, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted). However, because of the broad remunerative purpose of the civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions. *Id.*

As stated, The Cannery did make a showing that Koelzer was operating under a good faith belief that she was acting within the bounds of the law when she confronted Jacobson. Nonetheless, she was incorrect. Although there is some question as to what degree Koelzer’s questions exacerbated the confrontation with



Jacobson, it was her unjustified questioning which started the dispute in the first place. The Cannery is thus culpable for at least some of the consequences that followed. The confrontation which ultimately took place, however, was far more than what was justified under the circumstances.

Jacobson's response to Koelzer's questioning was uncivilized at best, and atrocious at worst. Neither Koelzer's questions nor any disabilities from which Jacobson may have been suffering warranted his boorish behavior. Rather than make any attempt to resolve the situation rationally, Jacobson became foul-mouthed and verbally abusive toward Koelzer, replete with use of discriminatory expletives directed at her sex.

Jacobson provided testimonial evidence regarding his emotional damages and public humiliation he suffered directly as a result of the incident, but the magnitude of his claimed damages did not match the magnitude of the incident. For example, although Jacobson spoke of public humiliation by Koelzer being a factor in his damages claim, his return into The Cannery and his own vulgar, profane, and disrespectful behavior was in itself a significant contributing factor to his public humiliation. Indeed, Jacobson was never actually asked to leave The Cannery because of Benji—it was not until he returned and became unruly that Jacobson's presence became an issue, and it was not because he had a service dog. Although he provided evidence that he was going to counseling (21.5 hours' worth), there was no evidence beyond Jacobson's own testimony regarding the purpose of the counseling. Jacobson also testified that the incident exacerbated his PTSD to the extent that he lost his job (as a result of his own outbursts), but he also admitted both that he was being paid "under the table" and that he was doing this in order to avoid losing disability benefits. In other words, regardless of causation, Jacobson had no cognizable income loss.

Notwithstanding the foregoing, the Hearing Officer cannot overlook that The Cannery's inquiry of Jacobson was violative of Jacobson's rights. Because the severity of the harm to Jacobson was not significant, the Hearing Officer finds that \$2,500.00 is an appropriate award for the humiliation and emotional distress caused by The Cannery when it violated Jacobson's civil rights. *See Vortex*, ¶ 33 (citations omitted); *see also Emel v. Anmol, Inc., et al.*, OAH Case No. 1594-2015, HRB Case No. 0141017055 (awarding \$2,500.00 in damages for emotional distress when hotel improperly demanded that charging party furnish documentation proving that his dog was a service animal, and refusing to assign him a handicap accessible room without payment of the pet deposit and/or documentary proof of his service animal).

The law requires affirmative relief enjoining further discriminatory acts and may further prescribe any appropriate conditions on The Cannery's future conduct

relevant to the type of discrimination found. Mont. Code Ann. §49-2-506(1)(a). Following the incident, The Cannery's management took it upon itself (albeit with direction from Jacobson) to contact State regulators, post appropriate notices regarding questions that could be asked regarding service animals, and to train its employees accordingly. The Cannery further sought training from the State related to preventing further incidents such as what happened with Jacobson. Given the proactive actions already taken by The Cannery, the Hearing Officer does not find that further affirmative relief would serve any purpose not already accomplished by The Cannery on its own volition.

## **V. CONCLUSIONS OF LAW**

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

2. Pursuant to the MHRA, a person with a disability has the right to be accompanied by a service animal in a public accommodation without being charged extra for the service animal, although is liable for any damage done by the animal. Mont. Code Ann. §§ 49-4-211(2), -214(1)

3. The Cannery is a public accommodation located in Bozeman, Montana. Mont. Code Ann. § 49-2-101(20)(a); *see also* 42 U.S.C. § 12181(7)(B)

4. The Cannery violated the MHRA when its employees made extensive, unwarranted inquiry into the nature of Jacobson's service animal. Mont. Code Ann. §§ 49-4-211(2), -214(1); 28 C.F.R. § 36.302(c)(6).

5. The circumstances of the discrimination in this case do not mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

6. Jacobson is owed compensatory damages in the amount of \$2,500.00.

7. For purposes of Mont. Code Ann. § 49-2-505(8), Jacobson is the prevailing party.

## **VI. ORDER**

1. Judgment is granted in favor of Jacobson against The Cannery for discriminating against Jacobson in violation of the Montana Human Rights Act.

2. The Cannery must pay Jacobson the sum of \$2,500.00 in damages.

DATED: this 26th day of March, 2019.

/s/ CHAD R. VANISKO  
Chad R. Vanisko, Hearing Officer  
Office of Administrative Hearings  
Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

**To: Joel Jacobson, Charging Party; and The Cannery, Respondent, and its attorney, Edward J. Guza:**

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. **Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(C) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505(4), WITH ONE DIGITAL COPY, with:

**Human Rights Commission  
c/o Annah Howard  
Human Rights Bureau  
Department of Labor and Industry  
P.O. Box 1728  
Helena, Montana 59624-1728**

**You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.**

**ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.**

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

**IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard at (406) 444-4356 immediately to arrange for transcription of the record.**