STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
DOROTHY DIEFFENDERFER,	)		
	)		
	)		
Complainant,	)	CHARGE NO(S):	2006CP0957
	)	EEOC NO(S):	N/A
and	)	ALS NO(S):	07-208
	)		
PACE SUBURBAN BUS CO.,	)		
	)		
	)		
Respondent.	)		

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 17th day of March 2009

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
DOROTHY DIEFFENDERFER,	)	
	)	**Charge No. 2006CP0957**
Complainant,	)	**EEOC No. N/A**
	)	**ALS No. 07-208**
and	)	
	)	
PACE SUBURBAN BUS CO.,	)	**Judge Reva S. Bauch**
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission on Respondent's Motion for Summary Decision ("Motion"). Complainant filed a Response to the Motion. Respondent filed a Reply. Accordingly, this matter is now ripe for a decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant. Facts not stated herein are not deemed material.

1. Complainant filed a Complaint against Respondent alleging she was denied the full and equal enjoyment of a public accommodation on May 16, 2005, June 15, 2005, July 4, 2005 and August 29, 2005 because of a physical handicap and a mental handicap.

2. On May 16, 2005, Complainant attempted to enter a Pace bus at or around 109th and Cicero.

3. At the time she boarded the bus, she had a wire cart containing six cement stepping stones and two bags of cottonseed meal.

4. The bus driver asked Complainant to take the items out of her wire cart and place them onto the wheel cover of the bus.

5. Complainant refused to remove the items and place them on the wheel cover.

6. The bus driver called his supervisor.

7. The supervisor arrived at the scene.

8. The police arrived at the scene and requested Complainant lift the cement stepping stone out of the cart and put them onto the wheel cover or to get off the bus.

3. Respondent's employee, the supervisor, drove Complainant to 159th and Cicero, which is where southbound route 383 ends.

4. Complainant believes this happened because she does not look disabled.

5. On June 15, 2005, Complainant boarded the Pace bus at 109th and Cicero with a few cement stepping stones in her cart.

6. The bus driver told her to put her cart between the seats and out of the aisle.

7. Another passenger told Complainant to pull up the disabled seat, place her cart on the seat and sit next to it.

8. The bus driver said nothing more to Complainant.

9. Complainant took the bus to the end of the line.

10. On July 4, 2005, Complainant boarded a Pace bus.

11. Complainant sat in the disabled seat with her chair and tote beside her.

12. A male passenger grabbed her wheeled luggage tote two times so that he could sit down.

13. The bus driver did not intervene or say anything.

14. Another passenger offered to put Complainant's tote with her chair on the bus wheel cover.

15. Complainant agreed so long as the passenger would help her take it off later.

16. The passenger failed to remove the tote for Complainant.

17. Complainant requested help from the bus driver.

18. The bus driver asked another passenger to help Complainant.

19. The passenger refused.

20. The bus driver got out of his driver's seat and helped Complainant remove the tote.

21. On August 29, 2005, Complainant boarded a Pace bus with a luggage tote on wheels.

22. The bus driver told Complainant to keep the tote out of the aisle.

23. Complainant sat down in one of the seats which was parallel to the sides of the bus.

24. The bus operator never said anything to Complainant.

25. Respondent's articulated legitimate, non-discriminatory reason for its actions is not pretextual.

Conclusions of Law

1. Respondent is an "operator" of a "place of public accommodation" as those terms are defined in the Illinois Human Rights Act, 775 ILCS 5/5-101(A) and (B).

2. Complainant is an "aggrieved party" as that term is defined in the Act, 775 ILCS 5/1-103(B).

3. Complainant is "handicapped" as defined in the Act, 775 ILCS 5/1-103(I).

4. The Commission has jurisdiction over the parties and the subject matter of this action.

5 There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

Discussion

I *Standards for Summary Decision*

Under Section 8-106.1 of Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1**. *See also* **86 Ill. Admin. Code §5300.735.** A summary decision is the administrative agency procedural analog to the motion for summary judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill App3d 130 (1993).** Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill App3d 386 (1994).** The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herrschner v. Xttrium Lab. Inc., 26 Ill App3d (1969)**. All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill App3d 453 (1979)**. If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill App3d 482 (1990)**. Where the facts are susceptible to two or more inferences, reasonable inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc., 209 Ill App3d 519 (1991)** Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy, 241 Ill App3d 119 (1993).** Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen, 208 Ill App3d 881 (1991).** If a respondent supplies sworn facts that if uncontradicted, warrant

judgment in its favor as a matter of law, a complainant may not rest on his/her pleadings to create a genuine issue of material fact. **Fitzpatrick at 392.** Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp., 289 Ill App3d 410 (1997).** Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and fee from doubt **Purtill v. Hess, 111 Ill2d 229 (1986).**

II. Analysis

Since there is no direct evidence in this case, the most common indirect analysis will be used. The method of proving a charge of discrimination through indirect means was described in the U.S. Supreme Court case of **McDonnell Douglas Corp. v. Green, 411 US 792 (1973)**, and is well-established.

First, the Complainant must establish a *prima facie* showing of discrimination against her by Respondent. If she does, Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. *See also* **Texas Dep't. of Community Affairs v. Burdine, 450 US 248, 254-55 (1981)**. This method of proof has been adopted by the Illinois Human Rights Commission ("Commission") and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill2d 172 (1989).**[1]

The issues in this case revolve around physical and mental handicap discrimination. In general, to establish a *prima facie* case for physical handicap or mental handicap discrimination under the Act in the context of a public accommodation

case, a complainant must prove: (1) she is handicapped within the meaning of the Act; (2) she was denied or refused the full and equal enjoyment of a respondent's facilities and services of any (3) public place of accommodation. **775 ILCS 5/5-102(A); Friedner and Happy Reunion, IHRC, S-11365, Aug. 1, 2001.**

There appears to be no dispute that Respondent is a "place of public accommodation" as defined in the Act. Regarding whether or not Complainant is "handicapped" within the meaning of the Act, Respondent does not provide arguments on this point. Rather, Respondent states that assuming Complainant was handicapped as defined by the Act, it had no knowledge or belief Complainant was handicapped. Respondent submits the affidavits of Thomas Kwidd to support that fact, as well as Complainant's own admission in her affidavit that the events of May 16, 2005 "happened to me because I don't look disabled." (Complainant's Affidavit, ¶30.)[2]

On the other hand, Complainant attests that she is physically and mentally disabled. She attests that she specifically informed the bus drivers on each date in question of her disability. Respondent argues that even if Complainant informed the driver on May 16, 2005 of her disability, that occurred after she had been told to remove her cement stones. Ultimately, Respondent provided an accommodation to Complainant when the supervisor drove her to the end of the bus route. In any event, for purposes of this Motion, I find Complainant has supplied sufficient evidence to support that she is handicapped within the meaning of the Act.

Lastly, Complainant's affidavit provides some evidence that she was denied the full and equal enjoyment of the Pace transit system. Thus, for purposes of this Motion, I

---

[1] The Commission invokes this indirect, burden shifting method in public accommodation cases, as well as employment cases. **Porter and Treasure Island Foods, Inc., IHRC, 11593, Feb. 7, 2003.**

[2] In her brief, Complainant also states: "The problem I have experienced is that I don't look disabled and am not treated with the same respect as those who do look disabled." (Complainant's Response at 3.)

find Complainant might be able to establish a *prima facie* case of physical and mental handicap discrimination. Whether or not Complainant has demonstrated that she can establish a *prima facie* case for physical or mental handicap discrimination, however, is not determinative. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. ***Clyde and Caterpillar, Inc.,* 52 Ill. HRC Rep. 8 (1989),** *aff'd sub nom* ***Clyde v. Human Rights Comm'n*, 206 Ill App3d 283 (1990).**

Respondent contends that the facts do not rise to the level of denying Complainant full and equal enjoyment of Pace services on May 16, 2005, June 15, 2005, July 4, 2005 or August 29, 2005. In any event, Respondent justifies its actions by articulating that the bus drivers were simply enforcing Respondent's standard operating procedures governing the conduct of passengers aboard buses (*i.e.*, no carriages, strollers, or shopping carts – folded only). In support of its articulated, non-discriminatory reason of enforcing its formal standard operating procedures, Respondent submitted the affidavits of Bus Operators Kwidd, Evans and Marks. All three Operators attest that they were following standard operating procedures when they asked Complaint to either remove her tote from the aisle or fold her wire cart when boarding the bus to securely place it between the seats. Further, Respondent also points to Operator Kwidd's incident report prepared on May 16, 2005, the date of one of the incidents in question, which states, "I believe the cart would have been a dangerous object to allow in the bus due to its extreme weight. If I would have had to stop quickly,

the cart and its contents would have been a dangerous projectile and could have inflicted severe injuries and damage."[3]

Complainant argues that Respondent's articulated, non-discriminatory reason for requiring Complainant to unload her cart and secure her tote is pretext for physical and mental handicap discrimination. To support her position, Complainant submitted her affidavit, as well as affidavits of other passengers' bus experiences and photographs of bus conditions on other dates. The affiants state that many passengers are not required to close their carts or fold their totes/luggage. Indeed, the photographs indicate that other passengers have been allowed to have their open wire carts, luggage, totes on wheels and other items in the bus aisles. Although the photographs clearly show that Respondent does not always enforce its standard operating procedures and safety standards, they fail to show that Respondent discriminated against Complainant on May 16, 2005, or the other dates in question, because of her disabilities.

Viewing the facts in a light most favorable to the Complainant, as to all four incidents, I find Complainant has failed to raise a genuine issue of material fact that Respondent's articulated, non-discriminatory reason for its actions regarding Complainant (*i.e.*, enforcing standard operating procedures and safety measures) is a pretext for discriminating against Complainant because of her physical and/or mental handicap. Thus, I recommend that the Commission grant Respondent's Motion.

Recommendation

Based on the foregoing, Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed in its entirety, with prejudice.

---

[3] Complainant objects to the Kwidd incident report as inadmissible hearsay that does not fall within an exception. Even if the incident report is not considered, Operator Kwidd's

HUMAN RIGHTS COMMISSION

BY:

REVA S. BAUCH
DEPUTY ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: October 17, 2008

---

affidavit fully supports Respondent's position.