

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MYTCHELL LOW AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
Complainants

Against

Docket No. 04 BPA 00422

COSTCO WHOLESALE CORP.
Respondent

Appearances: David J. Fried, Esq., for Complainant
Charles A. Valente, Esq. and Stephen B. Reed, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 20, 2004, Complainant filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) against Costco Warehouse Corp. and its Avon, Massachusetts Front End Warehouse Manager Michael Donahue. Complainant alleged discrimination on the basis of handicap in violation of G. L. c.272, secs. 98 & 98A arising out of an incident in which Complainant was not permitted to enter Respondent’s Avon warehouse store on December 31, 2003 accompanied by his dog, Ozzie, whom Complainant describes as a service animal.

The MCAD issued a probable cause finding on August 2, 2006 and certified the

case for public hearing on June 26, 2007. A public hearing was held on October 3, 6, 7, and 24, 2008.

The Complainant testified on his own behalf, as did Susan Nee and Dr. Garland S. Alcock. Michael Donahue testified for Respondent. To the extent the testimony of the witnesses is not in accord with or irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant, Mytchell Low, was a forty-seven year individual on December 31, 2003. At the time, Complainant was known legally as Marci Rose and self-identified as female. Transcript I at 119, 164; II at 36. Some time subsequent to December 31, 2003, Complainant began to live as a man and legally adopted the name Mytchell Epstein Low. Consequently, I will refer to Complainant in the male gender throughout this decision.
2. Respondent Costco Wholesale Corporation is a private membership club which sells goods in warehouse stores located throughout the United States. It owns and operates a Costco warehouse store in Avon, Massachusetts at 120 Stockwell Drive, 02322.
3. Complainant worked as a professional entertainer, stand-up comedian, and writer for approximately twenty-five years. In 1999, Complainant began to experience health problems consisting of shooting nerve pains, anxiety, cognitive difficulties, arthritic joint pain, fibromyalgia, and neuropathy. Transcript I at 14, 16, 46. In the latter part of 1999, Complainant began to suffer immobilizing panic attacks

which produced heart palpitations and made him feel like he was going to die.

Transcript I at 14-15, 21, 7; II at 52. Complainant stopped working and had difficulty leaving his house. Transcript I at 47. Complainant relied on emergency medical technicians at various Cape Cod fire departments to help him when he experienced panic attacks. Id.

4. Complainant testified that in 2000 or 2001, he was diagnosed with and treated for Lyme disease by Dr. Peter McKay. Dr. McKay first treated Complainant with oral antibiotics and subsequently with Rocephin, an intravenous antibiotic. Transcript I at 25-26. The parties stipulated that there is evidence, but no definitive proof, that Complainant's Lyme disease caused or exacerbated his panic attacks. Treating physician Dr. Jay Rosenfeld described Complainant in a medical note dated 4/24/03 as having "persistent symptoms related to Lyme disease." Complainant's Exhibit 1.
5. Complainant was in weekly treatment with psychiatrist Dr. Garland Alcock from 2000 to 2007. Transcript I at 64-65; II at 111; IV at 14. Dr. Alcock diagnosed Complainant with post-traumatic stress disorder ("PTSD") and anxiety disorder with panic attacks. Dr. Alcock connected Complainant's conditions to a history of extreme child abuse by Complainant's stepfather, loss of housing, and a series of destructive personal relationships. She also testified that chronic Lyme disease can be correlated with emotional lability, depression, and cognitive deficits and may have exacerbated Complainant's panic attacks. Transcript IV at 20, 39-40, 97, 105-106. Dr. Alcock prescribed Klonopin, an anti-anxiety medication for panic disorder, and Lexapro, an antidepressant. Transcript I at 34, 66-67.

6. On or around May 7, 2002, Complainant became eligible for supplemental security disability income benefits. Complainant's Exhibits 2-4; Transcript I at 50, 53. Around the same time, Complainant obtained subsidized housing for disabled persons in Chatham, Massachusetts through Susan Nee, who was employed by Cape Cod Organization for the Rights of the Disabled (CORD). Complainant's Exhibit 5. Nee was Complainant's independent living advocate. Transcript I at 57, 60.
7. In December of 2002, Complainant obtained a dog on the recommendation of Dr. Alcock. The dog was a miniature wire-haired dachshund named Ozzie. Complainant personally trained Ozzie over a six-month period. During the training, Complainant was in email consultation with Joan Esnayra of the Psychiatric Service Dog Society and Colleen McDaniels, a dog trainer in Seattle, Washington. Transcript I at 87-88.
8. Complainant testified that he believes that dogs have an innate ability to smell adrenalin given off by individuals prior to a panic attack. Transcript I at 86-87; II at 91-92. Dr. Alcock also testified that, in her opinion, an animal can sometimes sense an impending panic attack before the person is aware of it and get the person involved in feeding or petting activities in order to refocus the person and interrupt an escalation of the panic. Transcript IV at 60, 63. Dr. Alcock testified credibly that when Complainant attended therapy sessions, Ozzie would sense when things became difficult for Complainant, would jump into Complainant's lap, and would distract Complainant in order to interrupt and shorten the length of a panic attack. Transcript IV at 62-64.

9. According to Complainant, Ozzie notifies him with an “alert bark” approximately ten minutes before the onset of a panic attack, allowing time for Complainant to take medication and get to a “safe place.” Transcript I at 78-78; 99. Once Complainant takes his anti-anxiety medication, he holds Ozzie until he calms down. Complainant testified that if he does not heed Ozzie’s signal to take medication and calm down, the dog will engage in “deliberate disobedience” consisting of repeatedly barking and scratching at his cage, or, if not in his cage, licking Complainant’s face, pulling his ear, or pulling off the covers on Complainant’s bed in order to get Complainant to comply or to distract him. Transcript I at 78-79, 91-92.
10. Complainant takes Ozzie into stores, restaurants, and other public places. When questioned about Ozzie’s presence, Complainant identifies Ozzie as a medical service dog, shows the questioner an ID card, and explains that Ozzie alerts him to oncoming changes in his medical condition. Transcript I at 93.
11. In 2003, Michael Donahue was the Front End Manager of Respondent’s Avon warehouse. At the time, Donahue had been employed by Respondent for twelve years. His duties as Front End Manager included overseeing customer service and managing the front door, the membership desk, the food court, and the cash registers. Transcript III at 87.
12. Respondent prohibits animals in its warehouses except for service animals. Complainant’s Exhibit 9. Under Costco’s Service Animal Policy, an animal is admitted when it is visually identifiable as a service animal by the “presence of an apparel item, apparatus or other visual evidence that the animal is a service

animal” or, when lacking such visual evidence, the animal’s owner “reasonably establish[es] that the animal does, in fact, perform a function or task that the member or guest cannot otherwise perform.” Complainant’s Exhibit 9.

13. Donahue testified that on one occasion, a woman entered the Costco warehouse with a dog wrapped in a coat in the child seat of a shopping car and was initially told that she couldn’t keep the dog in the store but was permitted to do so when she revealed that the dog had a collar with the words “service dog” sewn on. Transcript III at 94-95, 145-148, 172. Another individual was regularly allowed to enter the Avon store with a small dog on a rolling table containing an 8x10 placard saying, “This is a service animal dog” and displaying the dog’s photo. Transcript III at 136-137. A third individual was permitted to bring a dog into the Waltham Costco warehouse with a collar that said “hearing dog” on the collar in magic marker. Transcript III at 169. According to Donahue, service animals are allowed to enter Costco warehouse stores if their status is visible to the public and to the workforce. Transcript III at 171, 175.
14. On December 31, 2003, Complainant and Corrine LaBrecque, a friend, visited the Avon store. Complainant was accompanied by Ozzie in a pet carrier which Complainant placed inside one of Costco’s shopping carts. According to Complainant, Ozzie’s pet carrier was a hard case with vents, a handle, and a taped envelope on which was handwritten, “Service Dog Papers.” Transcript I at 101; Complainant’s Exhibit 6 & 7. I credit that Complainant brought Ozzie into the Costco warehouse in a pet carrier, but I do not credit Complainant’s description of the carrier.

15. After entering the warehouse, a store greeter approached Complainant and said that pets were not allowed in the store, but relented after Complainant responded that Ozzie was a service dog. Transcript I at 110, 128, 177.
16. Complainant proceeded to the membership counter to join LaBrecque who had gone there in order to obtain membership identification. As he did so, Complainant was approached by Front End Manager Donahue who observed the pet carrier inside Complainant's shopping cart.
17. Complainant testified that Donahue said in a loud voice, "Remove that animal from the store." Transcript I at 133, 135. Complainant told Donahue that Ozzie was a service animal and showed Donahue an ID card identifying Ozzie as a service dog. According to Complainant, Donahue said that he didn't believe that Ozzie was a service dog, that he didn't care about the card or the ADA, and that he was going to follow Costco's policy about service dogs. Transcript I at 137, 140-142, 144. Complainant testified that Donahue wanted to know if Ozzie had a vest, a harness, or some type of service-dog equipment that would visually identify her as a service dog but did not inquire about what tasks the dog performed. Id. at 141; II at 80-81. Complainant testified that Donahue yelled and behaved in a hostile and aggressive manner. In notes that Complainant made immediately after the incident, however, Complainant did not describe Donahue as yelling during the incident although Complainant did describe Donahue as "rude" and "mean." Transcript I at 144; II at 65; Complainant's Exhibit 9. I find that Donahue refused to allow Ozzie to enter the store and was dismissive of the ID card and disinterested in Complainant's explanation of the Americans with

Disabilities Act but that he did not yell at Complainant.

18. Donahue testified credibly that Ozzie's pet carrier was not a hard case with vents but, rather, an unmarked, maroon duffle bag type of container with no envelopes or folders attached to it. Donahue described the pet carrier at the public hearing in a manner consistent with his April 1, 2004 affidavit. Transcript III at 115, 142-143; Complainant's Exhibit 16. According to Donahue, if an envelope had been attached to the pet carrier which identified Ozzie as a service animal (as depicted in Complainant's Exhibits 6 and 7), he would probably have allowed the dog into the store. Transcript III at 152.
19. Donahue testified that after he informed Complainant that dogs were not allowed inside the warehouse, Complainant told him that Ozzie was a service animal and produced a card or ID. Transcript III at 98. Donahue described the card as a dirty, homemade, three-piece document mounted on cardboard, containing typewritten print, covered with fingerprints, having tattered edges, frayed lamination, and a taped photograph of a dog. Transcript III at 100, 131. Donahue credibly denied that the card was the clean, twice-folded, laminated 3 x 8 1/2 inch document with laser jet typeset displaying a photo of Ozzie, referencing the Delta Society, identifying Complainant as Ozzie's owner, and citing state and federal law relative to service animals ("laser jet card") that Complainant purportedly located on the eve of public hearing after failing to produce it during discovery. Complainant's Exhibit 8. Complainant contends that he found the laser jet card a day or two before the public hearing. Transcript I at 113-115. I do not credit Complainant's testimony that he showed to Donahue the same card that he

20. Complainant told Donahue that Ozzie was a service animal who licked his hand prior to a seizure. Transcript III at 102, 110, 158. Donahue not believe that the dog could perform this function because the dog was confined inside a carrier. Id. at 103, 128.
21. Donahue obtained the service animal policy, brought it to Complainant, and made Complainant a copy of the policy after Complainant asked for one. Transcript III at 105. As Donahue returned from making a copy of the policy, Complainant handed him a cell phone. Id. Donahue testified that the person on the phone, subsequently identified as Susan Nee, spoke to him in a loud and aggressive manner about breaking the law. Id. at 107, 160. Donahue refused to give his name to Nee, told her that he wasn't an attorney, and handed the phone back to Complainant. Id. at 108. Donahue credibly denied that he hung up on Nee. Id. Donahue asserts that Complainant closed the phone and asked if the dog still had to be removed from the building. Id. Donahue answered in the affirmative and thereafter observed Complainant heading towards the exit. Id. Donahue credibly denied raising his voice during the incident. Id. at 109. He reported the incident to Jon Boyd, the warehouse manager. Id. at 119-120.
22. Complainant testified that as he was leaving the store, Donahue shook his finger in Complainant's face in an aggressive manner and said, "Don't ever come in here again without showing that card." Transcript I at 166; II at 68-69. I do not credit this assertion.
23. Complainant testified that Corrine LaBreque witnessed the "tail end" of the

incident. Transcript II at 53. In answers to interrogatories, however, Complainant stated that LaBreque witnessed the entire incident. Transcript II at 56. LaBreque declined to testify on Complainant's behalf, although Complainant asked her to do so. Transcript II at 72.

24. Complainant testified that after his interaction with Donahue, he felt upset, humiliated and embarrassed. Complainant left the store and had a panic attack in the parking lot which lasted about twenty minutes. Complainant had not had a panic attack for several months. Complainant's Exhibit 9 (reverse side); Transcript II at 137. Complainant testified that during the attack, he was crying, shaking, and his heart was racing. Transcript I at 166. Susan Nee called Complainant while he was in the parking lot and offered to arrange for an ambulance, but Complainant refused, stating that he would call his psychiatrist. Id. at 169-170. Complainant called Dr. Alcock who told him to double his medication. Dr. Alcock stayed on the phone with Complainant until his symptoms subsided. Transcript II at 5. Complainant remained in the parking lot during the panic attack and rocked with Ozzie in his arms. The dog nuzzled Complainant, put his paws around Complainant's neck, and licked the inside of his ear. Transcript I at 171-172. Dr. Alcock testified that the panic attack was more extreme than others experienced by Complainant. Transcript, IV at 79-80.
25. LaBrecque went shopping after Complainant left the store. Transcript I at 168. After about twenty-five minutes, LaBrecque met Complainant in the parking lot and drove Complainant home. LaBreque stayed with Complainant for several days. Transcript II at 8-9. Complainant testified that following the incident, he

- had nightmares for a few nights, couldn't leave his house for several weeks, and had several panic attacks during the following week. Transcript II at 10, 12, 17. Complainant estimated that it took a few months to return to his previous state of mobility. Transcript II at 14.
26. Medical records reflect that Complainant went to see his primary care physician, Dr. McKay, on January 7, 2004. Complainant's Exhibit 1; Transcript II at 105, 107. Dr. McKay's notes from that visit do not mention the Costco incident, but do mention that Complainant was walking every day. When questioned at public hearing about a reference in the medical notes to Complainant walking every day, Complainant testified that the reference was to walking inside his apartment. Transcript II at 107-109. I do not find Complainant's testimony to be credible.
27. Nee visited Complainant two or three times a week for several months following the incident and stayed several hours during each visit. Transcript II at 14-15. Nee's records indicate that she spoke to Complainant by telephone or in person six times in January of 2004 for a total of seven hours, three times in February of 2004 for a total of four hours, and three times in March of 2004 for a total of 5.25 hours. Nee testified that Complainant's skills and mobility regressed following the incident.
28. Complainant testified that following the Costco incident, he experienced panic attacks with greater frequency than he had before the incident, but that they gradually tapered off. Transcript II at 137-138.
29. At the public hearing, Complainant described being born with "indeterminate sex" and being assigned the female gender at birth. Transcript II at 20, 35.

Complainant's endocrinologist determined that Complainant was biochemically a male after evaluating his hormone levels, including testosterone, and other indicia of gender. Transcript II at 42. In 2003, Complainant started the process of changing his name to Mytchell Epstein Low. In March of 2004, the process became final. Respondent's Exhibit 1. Subsequently in 2005, Complainant had a bilateral mastectomy and both ovaries surgically removed. During his testimony, Complainant both acknowledged and denied that that the change in gender identity was a source of emotional turmoil. Transcript II at 43, 96, 99-100. I conclude that the gender change was a significant source of emotional turmoil for Complainant during the events at issue.

III. CONCLUSIONS OF LAW

M.G.L.c.272, sec.98A states that "... any physically handicapped person accompanied by a dog guide shall be entitled to any and all accommodations, advantages, facilities and privileges of all ... places of public accommodation, within the commonwealth to which persons not accompanied by dogs are entitled ...". The Commission has the authority to entertain and adjudicate complaints for violations of c. 272, sec. 98A pursuant to M.G.L.c.151B sec. 5.

A prima facie case of discrimination under G.L. c. 272, sec. 98A requires a showing that a physically handicapped person accompanied by a dog guide was denied access to, or restricted in the use of, a place of public accommodation. Complainant satisfied the requirement of being a physically handicapped person in December of 2003 when the Costco incident occurred. At that time, Complainant suffered from depression, shooting nerve pains, anxiety disorder, PTSD, cognitive difficulties, arthritic joint pain,

fibromyalgia, neuropathy, and panic attacks which were medically linked to chronic Lyme disease. Complainant had stopped working prior to the incident, was essentially housebound, and required the services of a personal care attendant to attend to daily living chores. Thus, Complainant was severely compromised in his ability to engage in major life activities such as working, self care, and walking. See Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) (“MCAD Handicap Guidelines”) II A. 5 at p. 3; Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (recognizing as major life activities such basic abilities as walking, seeing, hearing and, *in dicta*, working in a broad range of jobs).¹ The fact that Complainant’s Lyme disease led to neurological, emotional, and/or psychological deficits does not undermine Complainant’s status as a physically handicapped person under chapter 272, sec. 98A since Complainant suffered physical as well as psychological symptoms. Treating physical and psychological handicaps differently, moreover, is disfavored and has been subject to successful legal challenge. See Samartin v. Metropolitan Life Insurance Company, 97-SPA-0383 (2005) *citing* Olmstead v. L.C., 527 U.S. 581 (1999) (unlawful to provide different long-term disability benefits to disabled employees depending on whether their disabilities were physical or mental in nature).

Just as Complainant satisfies the *prima facie* requirement of physical handicap status, so does Ozzie satisfy the *prima facie* requirement of serving as a guide dog within the meaning of G.L.c.272, sec. 98A. Complainant trained Ozzie to perform such tasks as

¹ Pub. L. No. 110-325, 122 Stat. 3553 (2008) recently amended section 3(2)(A) of the Americans with Disabilities Act to introduce a new, non-exhaustive list of major life activities including concentrating, thinking, communicating and working, but the amendment has not been applied retroactively. See Young v. Precision Metal Products, Inc., ___ F. Supp. 2d ___, 2009 WL 507632 (D. Conn., Feb. 11, 2009) and cases cited.

alerting him prior to the onset of a panic attack, reminding Complainant to take medication, and refocusing Complainant's attention during a panic attack. By performing such tasks, Ozzie increased Complainant's confidence in public settings; decreased the number, duration, and severity of Complainant's panic attacks; eliminated Complainant's reliance on third parties such as firefighters during panic attacks; and increased Complainant's mobility. Ozzie's confinement in a dog carrier did not eliminate his effectiveness as a service animal since credible evidence indicates that Ozzie could sense the onset of a panic attack, emit barks from his carrier to alert Complainant to the need to find a safe place and take medication, and perform distraction and comforting techniques after being removed from his carrier.

The fact that Ozzie provided comfort and support to Complainant as well as notice of impending panic attacks does not, in my judgment, undermine his status as a "dog guide" under G.L.c.272, sec. 98A. Characterizing Ozzie as a dog guide constitutes a liberal interpretation of the term but is nonetheless appropriate because it furthers the goal of giving broad and inclusive effect to statutory language aimed at eliminating discrimination. See Stropnick v. Nathanson, 19 MDLR 39 (1997) (language of discrimination law to be given broad and inclusive effect). The interpretation also comports with proposed regulations governing Discrimination in Places of Public Accommodation in the Commonwealth of Massachusetts which characterize guide dogs as one type of "service animal." See 804 CMR 5.04 (13). Moreover, under pending revisions to the definition of "service dog" in the Americans with Disabilities Act, 42 U.S.C. sec. 12182 (a), as set forth in 28 CFR 36.104, psychiatric service animals are recognized as long as they are trained to perform tasks such as reminding an owner to

take medicine, detecting the onset of psychiatric episodes, and ameliorating the effects of psychiatric episodes by interrupting self-mutilation.

The third element of the *prima facie* case – that Complainant was denied access to, or restricted in the use of, a place of public accommodation – is satisfied by the decision of Front End Manager Michael Donahue to bar Ozzie from the Costco warehouse. Donahue arrived at this decision pursuant to Costco policy that service animals may enter Costco warehouse stores only if their status is “visually identifiable” by an “apparel item, apparatus or other visual evidence” that constitutes “external evidence that it is a ‘service animal’” or if the member/guest can reasonably establish that the animal performs a “function or task that the member or guest could not otherwise perform.” Complainant’s Exhibit 9.

Donahue acknowledged that Complainant described Ozzie as a service animal trained to lick Complainant’s hand prior to a seizure and that Complainant produced an ID card identifying Ozzie by picture and name, identifying Complainant by name and address, discussing laws relative to service animals, and providing a website address for the Delta Society National Service. Notwithstanding this information, Donahue barred Complainant and Ozzie from entering Costco. Based on the foregoing, I conclude that Complainant has established a *prima facie* case of discrimination under G.L. c. 272, sec. 98A as a result of being denied access to the Avon Costco warehouse, a place of public accommodation.

Respondent mounts a variety of defenses at stage two to prove that Complainant and Ozzie were excluded from the Avon warehouse for legitimate, non-discriminatory reasons. These defenses are supported by Donahue’s credible evidence as to what

factually transpired but are nonetheless insufficient to overcome the *prima facie* case. For example, I credit Donahue's testimony that Ozzie was brought into the store in a soft-sided carrier devoid of identification material. I also credit Donahue's description of the ID produced by Complainant as a worn-out, homemade piece of cardboard rather than a crisply laminated, professionally printed card produced by Complainant, for the first time, on the eve of public hearing. Likewise, I credit Donahue's assertion that he did not yell at Complainant even though he likely spoke in a terse manner.

Despite Donahue's credible testimony about the factual circumstances and his good faith implementation of the Costco policy, his actions nevertheless violated G.L. c. 272 §98A, the Massachusetts statutory provision governing service animals. Although the provision, prior to 2004,² required that handicapped persons accompanied by guide dogs display, upon request, written evidence of the dog's guide status, it never required that the evidence be openly displayed. See Canuel v. Mentavlos and Savas Pizza, 16 MDLR 1062 (1994). Thus, Complainant was not statutorily required to publicly label Ozzie as a service dog in December of 2003. The requirement that a handicapped individual display upon request, written evidence of the dog's guide status was fulfilled by the ID presented by Complainant. Even if the document were dirty, tattered, and homemade as described by Donahue, section 98A did not require an ID that was new, spotless, or professional. Moreover, Donahue's concern about apprising other patrons of Ozzie's status may have conformed to Costco policy, but it did not conform to state law.

An alternative basis for liability is G.L.c.272, sec. 98 which provides that, "Whoever makes any distinction, discrimination or restriction on account of . . . any

² This requirement was deleted from the current version of the statute, effective July 1, 2004. See St. 2004, c. 149, sec. 211.

physical or mental disability . . . relative to the admission of any person to, or his treatment in any place of public accommodation . . . shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B . . .” To make out a *prima facie* case of discrimination under this provision, a complainant must prove that: 1) he is a member of a protected category, 2) he was denied access to or restricted in the use of a location and 3) the location was a place of public accommodation.” Sten-Clanton v. Fung Wah Bus Transportation, Inc., 29 MDLR 95 (2007). In Sten-Clanton v. Fung Wah, a *prima facie* case of discrimination was recognized under G.L. c. 272, secs. 98 as well as under 98A where a blind couple was prohibited from boarding a commercial bus accompanied by a guide dog.

Respondent attempted to rebut the *prima facie* case by arguing that a different animal had previously urinated on the bus more than a year earlier and that the Sten-Clanton’s dog could not fit under the bus seats. These reasons were rejected on the basis that the prior incident was an isolated circumstance involving an untrained animal and there was credible evidence that the Sten-Clanton’s dog would fit under the bus seats.

Just as the Respondent in the Sten-Clanton case failed to satisfy its burden of articulating legitimate, non-discriminatory reasons for denying access to a service animal in a place of public accommodation, so does Respondent in this case fail to satisfy its burden at stage two. Respondent’s assertion that Ozzie was not visually identifiable as a service animal is negated by Complainant producing an ID card that could have been attached to Ozzie’s carrier. Donahue acknowledged that animals are allowed to enter Costco warehouse stores if their status is publicly displayed by a service collar or placard and that he would probably have admitted Ozzie if his pet carrier had been accompanied

by an envelope designating it as a service animal carrier. The fact that Complainant carried Ozzie's ID in his wallet rather than on Ozzie's carrier is not a legitimate reason for denying access to Complainant and Ozzie.

Respondent's alternative argument -- that Complainant failed to identify a task that Ozzie performed for Complainant -- also fails to rebut a *prima facie* case under chapter 272, sec. 98. There is credible evidence in the record that Ozzie was trained to notify Complainant of impending panic attacks by letting out an "alert bark" which reminded Complainant to proceed to a safe location, take anti-anxiety medication, and remove Ozzie from his carrier so that the dog could distract and comfort him. Donahue testified that he did not believe that Ozzie could lick Complainant's hand while confined inside a carrier but had Donahue questioned Complainant, he would have learned that Ozzie was trained to perform several critical tasks for Complainant. Based on the foregoing, I conclude that Respondent failed to satisfy its burden of articulating a legitimate, nondiscriminatory reason for prohibiting Ozzie from entering the Costco warehouse. The Costco policy might pass muster in other states but, as implemented in this case, falls short of the requirements set forth in the Massachusetts public accommodations law, G. L. c. 272, sec. 98 and 98A.

IV. INDIVIDUAL LIABILITY

In order for an individual to be held liable for a violation of M.G.L. c. 151B, the person must deliberately disregard the rights of another, exercise control over another's employment, or exhibit an intent to discriminate or interfere with the exercise of rights. See Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003). These factors do not apply to Front End Manager Michael Donahue. Rather than display

deliberate disregard for the rights of Complainant, Donahue made a good faith effort to implement Costco's service animal policy under difficult circumstances. See Rushford v. Bravo's Pizzeria, 23 MDLR 171, 175 (2001) (no individual liability where individual's conduct was not particularly egregious or heinous); compare Deeter v. Bravo's Pizzeria and Restaurant, 23 MDLR 167, 170 (2001) (individual respondent jointly and severally liable where he engaged in particularly odious and loathsome unwelcome verbal and physical conduct); Rafferty v. Keyland Corp., 22 MDLR 125, 127 (2000) (president/owner of corporation who made persistent verbal and physical sexual overtures to employee held personally liable for sexual harassment).

Donahue appears to have been genuinely confused by the fact that Complainant had no recognizable handicap, that Ozzie was brought into the store in an unlabeled carrier, and that the tasks attributed to Ozzie could not be physically performed from inside a carrier. While an in-depth discussion between the parties might have persuaded Donahue that Ozzie was trained to initiate a series of steps designed to ameliorate the effects of an oncoming panic attack, the circumstances inside the Costco warehouse on December 31, 2003, were not conducive to such communication. The telephone participation of CORD Advocate Susan Nee was likewise unhelpful because her tone was off-putting to Donahue and her information contradicted Donahue's training. I credit Donahue's assertion that he terminated their conversation by handing the phone back to Complainant but that he did not hang up on Nee. The circumstances, in short, fail to establish that Donahue displayed a deliberate disregard for the rights of Complainant. Accordingly, I decline to hold him individually liable for discrimination.

V. EMOTIONAL DISTRESS DAMAGES

Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony as well as Complainant's testimony regarding the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation provides support for an award for emotional distress but is not necessary for such damages. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the distress, the length of time Complainant suffers from emotional distress, and whether Complainant has attempted to mitigate the harm. Id.

Complainant testified credibly that he became very upset as a result of his interaction with Donahue, left the store, and had a panic attack in the parking lot which lasted about twenty minutes. During the attack, Complainant was crying, shaking, and his heart was racing. Complainant called Dr. Alcock, who instructed Complainant to double his medication and stayed on the phone with Complainant until the attack subsided. Complainant remained in the parking lot during the panic attack while he rocked with Ozzie in his arms. The dog nuzzled him, put his paws around Complainant's neck, and licked the inside of Complainant's ear. I credit Complainant's assertions that the panic attack was more extreme than others experienced by him and that following the Costco incident, Complainant experienced panic attacks with greater frequency than he had before the incident, although they gradually tapered off. I also credit the testimony of CORD Independent Living Advocate Susan Nee that Complainant's skills and

mobility temporarily regressed following the incident.

On the other hand, I do not credit the totality of Complainant's description of the aftermath of the panic attack. Complainant's testimony that he couldn't leave his house for several weeks following the incident is contradicted by the fact that he went to see his primary care physician, Dr. McKay, one week after the incident. Dr. McKay's notes from that visit do not mention the incident at Costco. The notes, moreover, indicate that Complainant was walking daily. I interpret the reference to walking daily to refer to exercise outside the house rather than inside.

A second reason for declining to credit Complainant's assessment of the trauma caused by the Costco incident is my belief that Complainant experienced emotional distress from a variety of sources rather than from a single incident at the Costco warehouse which lasted several minutes. Beginning in 1999, Complainant's physical health began to deteriorate. Around that time Complainant also began to experience ongoing anxiety, PTSD, depression, cognitive difficulties, and immobilizing panic attacks. Prior to the Costco incident, Complainant's physical and emotional conditions forced him to stop working. Dr. Alcock connected Complainant's condition, in part, to a history of extreme child abuse by Complainant's stepfather, loss of housing, and a series of destructive personal relationships. Several of Complainant's treating physicians also connected various symptoms to chronic Lyme disease.

Another factor contributing to Complainant's emotional state in and around December 2003 was Complainant's evolving sexual identity. This factor complicates the issue of assigning causation for Complainant's incapacitating emotional distress. During his testimony, Complainant both acknowledged and denied that that the change in gender

identity was a source of emotional turmoil in 2003 and immediately thereafter. I conclude that it was a major source of trauma at that time.

Based on the foregoing and my observations of all of the witnesses, I am persuaded that factors other than the Costco incident played the predominate role in Complainant's emotional state during the early part of 2004, although the incident at Costco on December 31, 2003 undoubtedly contributed to Complainant's distress for a brief period of time. See Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002) (recognizing that emotional distress may be caused by factors separate and apart from the discriminatory act); Raffurty v. Keyland Corporation, 22 MDLR 125, 128 (2000) (noting that complainant often experience more than one source of emotional distress). The other sources of emotional distress were ongoing, multi-faceted, and substantial whereas the Costco incident was a single incident, of short duration, and not particularly egregious. Under these circumstances, I am unwilling to attribute the majority of Complainant's emotional distress after December 31, 2003 to the Costco incident. In some situations it is appropriate to "take Complainant as you find him" in the sense of laying all emotional distress following a discriminatory act at the doorstep of Respondent, but that principle does not apply where the incident is minor in comparison to trauma from other sources. Accordingly, I conclude that Complainant is entitled to \$8,000.00 in emotional distress damages.

VI. ORDER

This decision represents the final order of the Hearing Officer. Respondent Costco Wholesale Corporation is hereby ORDERED to:

(1) Cease and desist from engaging in discrimination based on handicap.

(2) Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$ 8,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Conduct at its Avon warehouse store a training session concerning service animals for all employees and supervisors.

- a. The training session must be at least two (2) hours in length. All employees and supervisors are required to attend.
- b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The training may be provided by the Commission, or may be provided by a trainer who is a graduate of the MCAD's certified "Train the Trainer" course.

Alternatively, Respondent may submit a resume of a potential trainer to be approved by the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.

- c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval and provide the Director of Training with one-month's advance notice of the training date and location. If the Commission decides to send a representative to observe the training session, Respondent will provide the Commission representative with unfettered access to the training.

- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic(s), the names of persons required to attend the training, the names of persons who attended the training, and the date and time of each training session.
- e. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 18th day of June, 2009.

Betty E. Waxman, Esq.
Hearing Officer

