Commission on Human Rights and Opportunities ex rel. Thomas George	: Commission on Human Rights and Opportunities
v.	: CHRO No. 0910466
Town of West Hartford	: March 24, 2011

<u>Ruling re: the respondent's motion to dismiss the complainant's § 46a-64 claims</u>

I

On June 3, 2009, the complainant, Thomas George, filed his affidavit of illegal discriminatory practice (affidavit) with the commission on human rights and opportunities (commission). In his affidavit, Mr. George alleges that he is legally blind and has a mobility impairment that substantially limits his ability to walk. Affidavit, ¶ 3. He further alleges that the respondent, the Town of West Hartford (West Hartford), violated the federal Americans with Disabilities Act[1] and General Statutes §§ 46a-58 (a) and 46a-64 (a) when it failed to provide him with equal services and failed to provide him with a reasonable accommodation to its policy of requiring residents to place their household recyclable and refuse receptacles curbside at the bottom of their driveway for collection. Affidavit, ¶ 4.

In October 2007, Mr. George applied for West Hartford's rear-yard refuse collection assistance program. Affidavit, ¶ 5. Residents who qualify for the assistance program are not required to bring their receptacles to the curbside. Instead, West Hartford arranges to have their receptacles collected from an open area on or immediately adjacent to their driveway. Affidavit, Attachment 2. Although Mr. George did

not provide the requisite financial information, West Hartford admitted him into the program for the 2008 calendar year. In January 2009, though, West Hartford notified him that it would not renew his participation for the 2009 calendar year because he had failed to provide it with financial information establishing that he was eligible for the program. Affidavit, ¶¶ 6 – 9.

The commission certified the affidavit on November 1, 2010, and West Hartford filed its post-certification answer and defenses on November 19, 2010. On January 13, 2011, West Harford filed a motion (motion) and accompanying memorandum (memorandum) to dismiss Mr. George's § 46a-64 claims. The commission and Mr. George filed their joint objection to the motion on March 3, 2011 (Objection). They argue that West Hartford is a place of public accommodation that serves the general public, that § 46a-64 contains a reasonable accommodation requirement and that § 46a-64 (b) (3) does not allow West Hartford to deny Mr. George a reasonable accommodation.

At the direction of the presiding human rights referee, the parties filed supplemental briefs on the interpretation and application of the clause in § 46a-64 (a) (1) "subject only to the conditions and limitations established by law and applicable alike to all person".

For the reasons set forth, the motion is granted.

II

A

In its motion, West Hartford contends that Mr. George's § 46a-64 claims fail as a matter of law.[2] Memorandum, p. 2. Section 46a-64 provides in relevant part that: "(a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of . . . physical disability, including but not limited to, blindness or deafness of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons . . . ." A "place of public accommodation, resort or amusement" is defined in General Statute § 46a-63 (1) to mean "any establishment which caters or offers its services or facilities or goods to the general public, including but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent".[3]

In determining whether an affidavit is legally sufficient, the tribunal must determine whether the allegations in the affidavit, if proven, would establish a prima facie case of discrimination. *Grof-Tisza v. Bridgeport Housing Authority*, Superior Court, judicial district of Bridgeport at Bridgeport, Docket No. FBT-CV06-5003343-s (December 14, 2010) (2010 WL 5610789, 3. If the facts provable in the affidavit, construed in favor of the complainant, would support a cause of action, the respondent's motion must be denied. The tribunal is limited to a consideration of the facts alleged in

the affidavit, though what is reasonably implied in the affidavit need not be expressly alleged. Id., 2010 WL 5610789, 1.

B

To establish a prima facie case of discrimination under § 46a-64 (a) (1), the complainant “must establish that he was deprived of services, while similarly situated persons outside the protected class were not deprived of those services, and/or that he received services in a markedly hostile manner or in a manner which a reasonable person would find objectively unreasonable, so as to give rise to an inference of unlawful discrimination.” *Dingle v. Fleet Bank*, Superior Court, judicial district of New Haven at New Haven, Docket No. NNH-CV00-0443028-s (May 20, 2002) (2002 WL 1370678, 2). The burden is on the complainant to establish that he “has been discriminated against on the basis of disability. Only after the plaintiff makes such a prima facie case does the burden shift to the defendant to establish some justification for the discriminatory treatment.” *Cameron v Commissioner of Human Resources*, 39 Conn. App. 216, 222, cert denied, 235 Conn. 924 (1995).

In this case, West Hartford is subjecting Mr. George to a condition that is applicable to all persons. West Hartford has a “curbside garbage pickup policy that requires that Town residents place their household waste receptacles at the bottom of their driveway for collection.” Affidavit, ¶ 4; Affidavit, Attachment 7. Thus, in requiring Mr. George to place his waste receptacle at the bottom of his driveway, West Hartford is not depriving him of any services; rather, West Hartford is treating Mr. George as it treats its

non-disabled residents. Further, West Hartford's requirement that waste receptacles be placed at the curbside is not objectively unreasonable.

West Hartford provides curbside recyclable and refuse collection to occupants of one-, two- and three- family homes regardless of whether they have a disability. West Hartford has arranged through its refuse contractor that anyone can, instead, receive side- or rear-yard collection for a fee payable by the occupant requesting the service. Affidavit, Attachment 7. West Hartford does have a narrow exception to its curbside policy. It has a "rear yard collection program [that] offers assistance to occupants of residential housing units where the Town provides refuse and recycling collection and where a physical disability and financial need prevent the occupants from bringing their household refuse and/or recyclables to the curbside for collection." Affidavit, Attachment 2; Affidavit, ¶ 5. West Hartford, rather than the occupant, pays to the contractor the fee incurred for the service. Affidavit, Attachment 7.

To qualify for the program, there "must be a doctor's written certification, for each member of the household, that a physical disability exists which prevents them from taking their household refuse and/or recycling containers to and from the curbside." In addition, the individual "must also meet one of the following two requirements: (1) The total household income must be less than 2 times the current Federal Poverty Income Guidelines, or (2) At least one occupant of the household must be 80 years of age or older, provided that total household income does not exceed 5 times the current Federal Poverty Income Guidelines. Households with incomes exceeding 5 times the current

Federal Poverty Income Guidelines are not eligible for participation in the program." Affidavit, Attachment 2; Affidavit, ¶ 5. Eligibility, then, is based upon a physical disability that limits mobility and upon financial circumstances. West Hartford refused to admit Mr. George into this program because he failed to provide it with the financial information needed to determine his eligibility, not because he is disabled. Affidavit, ¶ 9; Affidavit, Attachment 6.

The commission and Mr. George failed to establish a prima facie case of disability discrimination in violation of § 46a-64 (a) (1). Mr. George is not being treated different from similarly situated non-disabled residents. West Hartford provides curbside trash pickup to all residential housing units, regardless of whether the occupant is disabled or not, when the occupant, whether disabled or not, places his household waste receptacles at the curbside for collection. West Hartford's decision to deny Mr. George participation in its rear-yard refuse collection program was not because of his disability but because of his refusal to provide financial documentation to establish his eligibility.

C

West Hartford further contends that § 46a-64 does not contain a reasonable accommodation requirement and, therefore, Mr. George's claim that he was denied a reasonable accommodation for his disability also fails as a matter of law. Memorandum, pp. 3-4. The commission and Mr. George argue that § 46a-64 requires West Harford to provide him with a reasonable accommodation. Objection, pp. 12-21. Mr. George

acknowledges that West Hartford's rear-yard refuse collection assistance "program is a reasonable accommodation to the curbside pickup policy." Affidavit, ¶ 5. As previously discussed, West Hartford's rear yard collection program has two, and only two, requirements, one medical and one financial. Affidavit, Attachment 2. Essentially, then, the commission and Mr. George argue that he should be admitted into West Hartford's rear-yard collection program even if he does not meet its eligibility requirements.

1

In their objection, the commission and Mr. George compare the state public accommodation statute, § 46a-64, with the state employment discrimination statute, General Statutes § 46a-60. They correctly point out that despite "the lack of an express requirement that an employer reasonably accommodate disabled employees, our Supreme Court held that . . . § 46a-60 contained such a duty. . . . Reading the statute freely, our Supreme Court concluded that . . . § 46a-60 contained a reasonable accommodation requirement, regardless of the lack of obvious textual support. Along the way to that result, the Court observed that a reasonable requirement is a fixture of federal law and the law of most states. . . . The Court noted our legislature's intention to make our law coextensive with federal law; . . . case law holds that this intention remains even 'though there may be differences between the state and federal statutes.'" Objection, pp. 13-14.

Section 46a-60, though, is an inappropriate comparator because of the significant textual differences between state statute § 46a-60 and state statute § 46a-

64. Unlike § 46a-60, § 46a-64 (a) unequivocally states that: “It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation . . . subject only to the conditions and limitations established by law and applicable alike to all persons . . . .” (Emphasis added.) In other words, with respect to § 46a-64 (a) (1), the statutory obligation of a place of public accommodation is to treat all persons alike. In this case, West Hartford treats Mr. George as it treats the non-disabled occupants of residential housing.

2

West Harford permits any person, disabled or not, who receives curbside pick-up to opt-out of the program and to privately contract for rear- or side-yard collection. Affidavit, Attachment 7. West Hartford is not preventing Mr. George, because of his disability, from procuring rear- or side-yard collection services at his own expense. West Hartford’s income eligibility requirement for participation in its rear-yard refuse collection assistance program is a limitation on participation in the program, not on a disabled person’s ability to opt-out of curbside collection and to privately contract for rear- or side-yard collection. See *Cameron v. Commissioner of Human Resources*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 1CV93-0524338 (April 25, 1994) (1994 WL 174756), aff’d, 39 Conn. App. 216 (1995), cert. denied, 235 Conn. 924 (1995).

III

For the reasons set forth herein, West Hartford's motion to dismiss Mr. George's § 46a-64 claims is granted.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Thomas George
Nancy B. Alisberg, Esq.
Charles Krich, Esq. /Robin Kinstler Fox, Esq.
Kimberly Boneham, Esq.
Jonathan C. Sterling, Esq.

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[1] 42 U.S.C. 12132

[2] Section 46a-54-88a of the Regulations of Connecticut State Agencies provides in relevant part that: "(d) The presiding officer may, on his or her own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant or the commission: (1) Fails to establish jurisdiction; (2) Fails to state a claim for which relief can be granted; (3) Fails to appear at a lawfully noticed conference or hearing without good cause; or (4) Fails to sustain his or her burden after presentation of the evidence."

This procedure differs from procedures in superior court in which motions to dismiss apply only to lack of subject matter jurisdiction or personal jurisdiction, Practice Book §§ 10-30 and 10-31; motions to strike are utilized for failure to state a claim for which relief can be granted, Practice Book § 10-39; motions for default or nonsuit are used for failure to appear, Practice Book § 17-19; and motions for summary judgment, judgment of dismissal and directed verdict are utilized for a party's failing to sustain its burden after the presentation of evidence, Practice Book §§ 17-49 and 15-8 and *Robinson v. Galino*, 275 Conn. 290, 297 (2005).

[3] Taken together, §§ 46a-63 and 46a-64 describe the elements of the complainant's claim. To prevail on the merits, the complainant must prove by a preponderance of the evidence that: (1) the respondent is a public accommodation, resort or amusement; (2) the respondent denied him full and equal accommodations; and (3) the respondent's

basis for said denial was his protected status; that is, his physical disability. *Corcoran v. German Social Society Frohsinn, Inc.*, judicial district of New London at New London, Docket No. CV02-0562775s (June 1, 2005) (2005 WL 1524881, 3); rev'd on other grounds, 99 Conn. App. 839 (2007); on remand (February 21, 2008) (45 Conn. L. Rptr. 1) (2008 WL 642659, 3).