COOK COUNTY COMMISSION ON HUMAN RIGHTS
69 West Washington Street, Suite 3040
Chicago, Illinois 60602

Joanne NUGENT	)	
	)	Case No. 2015PA002
v.	)	
	)	Entered: January 14, 2016
JEWEL OSCO, INC.	)	

ORDER DENYING REQUEST FOR RECONSIDERATION

On February 23, 2015, Complainant Joanne Nugent ("Nugent") filed the above-captioned complaint with the Cook County Commission on Human Rights ("Commission") against Respondent Jewel Osco, Inc. ("Jewel"), alleging disability discrimination and retaliation in violation of the Cook County Human Rights Ordinance ("Human Rights Ordinance"). *See* Cook County Code of Ordinances ("County Code") §§ 42-37(a), 42-41(a). Specifically, Nugent alleged that Jewel failed to provide a reasonable accommodation for her diabetes when she was not allowed to shop with her dog at a Jewel store located at 1500 S. Lee Street in Des Plaines, Illinois ("Des Plaines Jewel"). Compl. ¶¶ 1-2. Nugent further alleged that she has been treated rudely when shopping at the Des Plaines Jewel in retaliation for filing a disability discrimination complaint against Jewel with the Illinois Department of Human Rights ("IDHR"). *Id*. ¶ 3.

After an extensive investigation of Nugent's claims, the Commission dismissed her complaint on November 9, 2015, for a lack of substantial evidence of a violation of the Human Rights Ordinance. *Nugent v. Jewel Osco Inc.*, 2015PA002 (CCHRC Nov. 9, 2015) ("Dismissal Op."). Essentially, Nugent failed to provide sufficient evidence to support the legal conclusion that her dog is a trained service animal. *Id.* at *8-10. Thus, Jewel was not required to allow the dog in its store as a reasonable accommodation of Nugent's disability. *See* County Code § 42-37(a) (requiring public accommodations to provide disabled patrons with the same "full use" as non-disabled patrons). In addition, the evidence showed that Nugent was aware of the training requirement for service dogs at the time she filed the relevant IDHR claim. Thus, Nugent's IDHR claim was not objectively reasonable, and so her retaliation claim failed the applicable legal test when she chose to bring that claim in this forum instead of at the State. Dismissal Op. at *12-13.

On December 8, 2015, Nugent filed a Request for Reconsideration ("1st Req.") from the Commission's order of dismissal. This Request includes new recollections by Nugent of additional measures that she now says she used to train her dog. On December 14, 2015, Nugent took the unusual step of filing a second Request for Reconsideration ("2d Req."), which includes still more additional procedures that Nugent also says she used to train her dog. Notably, Nugent did not include a certificate of service with either Request, and there is no other evidence that she served either document on Jewel, the respondent in this matter.

This procedural defect is fatal. The party moving for reconsideration must serve his or her request on the non-moving party. Nugent has not done that on either of her two attempts, and for this reason, the Commission is bound by its precedent to deny her requests for reconsideration. As the Commission explained in a recent order denying reconsideration under the same circumstances:

> The Commission's procedural rules establish a two-step process by which a party to a Commission order can request reconsideration of that order. The first step requires timely filing (*i.e.* any party may obtain review of an order "by filing a Request for Reconsideration with the Commission"), and the second step requires timely service (*i.e.* the party seeking review must "serv[e] copies [of this Request for Reconsideration] on all other parties within 30 days from the date of the Commission's order"). CCHR Pro. R. 480.100(A).
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> Without notice that the Commission is even considering [the complainant]'s request for reconsideration . . . respondents have been deprived of the opportunity to be heard on the issue that [complainant] seeks to put before the Commission. The Commission has also been deprived of briefing on this issue. The requirement that a party seeking reconsideration comply with both parts of Rule 480.100(A) is not trivial, and the Commission will not overlook a party's failure to meet his or her responsibilities under this rule.

Blakemore v. Circuit Court of Cook County, et. al., 2015PA006, *1-2 (CCHRC July 10, 2015).

Though not necessary to this decision, the Commission will, however, use this order to briefly address two additional aspects of Nugent's argument on reconsideration for the sake of clarifying this agency's procedural rules for a serial litigant.[1] This order will also address at greater length why Nugent's requests would fail, even if the Commission were to assume away the other procedural defects.

First, although the Commission's procedural rules allow for requests for reconsideration (when they are served on all parties), there is nothing in the procedural rules that allows a Commission litigant to file multiple requests in the same matter. Had Nugent provided Jewel with any opportunity to file its own brief in this matter, the Respondent would have justifiably moved to strike Nugent's second request for reconsideration as improper. All Commission

[1] Nugent's requests for reconsideration threaten a wide variety of actions against the Commission if the agency fails to grant her motion. Aside from disputing the veracity of the personal accusations made against Commission personnel (which curiously resemble, almost-word-for-word, allegations Nugent had previously levied against the staff of the IDHR, *see* Investig. Rep. Exhs. B, D), the Commission will not encourage these bullying tactics, even from a litigant proceeding *pro se*, by treating them as if they were a legitimate line of legal argumentation.

litigants should endeavor to put their most persuasive grounds for reconsideration in their first filing. The Commission's procedural rules do not afford a second bite of the apple.

Second, when a party requests reconsideration of an order of dismissal, that party is required to "state with specificity the reason(s) supporting the Request for Reconsideration, such as relevant evidence which is *newly discovered and not available at the time of the original determination*[.]" *See* CCHR Pro. R. 480.105 (emphasis supplied). Based on Nugent's response to several written questionnaires during the course of this investigation, the Commission concluded that Nugent's dog did not have the requisite training to be a service animal. Nugent's requests for reconsideration purport to add new facts related to the training of her dog. But these new facts, like the initial evidence provided to the Commission, come from the same source: Nugent. The Commission has long held that where a party knows of potentially relevant facts but stays silent and withholds this evidence from Commission staff during the course of an investigation, alleging these facts later does not provide an adequate reason for the Commission to reconsider an order of dismissal. *See, e.g., Hart v. Market Facts, Inc.*, 1999E009 (CCHRC Apr. 22, 2004) (denying a request for reconsideration where, prior to the Commission's decision to dismiss, complainant already knew of allegedly new facts and had ample time to disclose them to investigators).[2]

Finally, as explained below, even if the Commission were at liberty to ignore these flaws, the "new" evidence Nugent now provides on her dog-training methods still fails to meet the legal standard for qualifying as a service animal whose presence must be accommodated in public places.

BACKGROUND

The relevant facts gathered in the course of the Commission's investigation of this matter are set out in the Commission's November 9, 2015 Dismissal Opinion. They are summarized here to facilitate an understanding of why Nugent's requests for reconsideration would fail even if she had served Jewel, consolidated her requests for reconsideration into a single, timely filing and not sandbagged Commission investigators who inquired about Bonnie's training as a service animal during the course of the Commission's lengthy investigation of this matter:

Nugent is diabetic. Dismissal Op. at *2. She takes insulin for her condition but sometimes suffers from hypoglycemia (*i.e.* abnormally low blood sugar, also called glucose). *Id.* This can cause her to feel dizzy, disoriented and unable to function. *Id.* Nugent alleges that her dog, Bonnie, detects and warns Nugent of impending hypoglycemia so that Nugent can eat something to ward off these potentially dangerous symptoms. *Id.*

[2] The Commission's approach in this manner is no different than that of a court which will not allow a party to revisit a summary judgment decision on the basis of a dispute of fact that was known, but not raised. *See, e.g., Aybar v. Crispin-Reyes*, 118 F. 3d 10 (1st Cir. 1997) (motions to amend trial courts' summary judgment orders do not allow a party to present new evidence that the party knew of but chose not to reveal to the court prior to dismissal); *Liburd v. Bronx Leb. Hosp. Ctr.*, 07 Civ. 11316, 2009 U.S. Dist. LEXIS 48477, *8-10 (S.D.N.Y. June 9, 2009) (denying motion for reconsideration where only allegedly new evidence was from party's own affidavit, which described previously known facts not earlier alleged).

Nugent told the Commission during the course of this investigation that she trained Bonnie herself to detect and warn against impending hypoglycemia approximately five or six years ago. *Id.* Nugent described Bonnie's entire training regimen, during the Commission's initial investigation, in the following response to a Commission questionnaire:

> I would test my glucose levels at different levels then I would test and take my blood sugar at high levels and then did the same things with lower, much lower levels[;] she [*i.e.* Bonnie] recognizes the chemical imbalances either high or low. I pissed in a cup for awhile hid it[;] she would find the scent.

Dismissal Op. at *2 n.2 (citing Cp. Q. (2d) Resp. No. 1.b).

While Nugent complains generally of experiencing repeated problems with bringing Bonnie to Jewel, the instant case involves one specific incident. On an unspecified day in July 2014, Nugent claims that she was not allowed to shop with her dog at the Des Plaines Jewel. *Id.* at *4. As Nugent describes it, a cashier told Nugent several times to leave the store with her dog, and then several managers surrounded Nugent in an intimidating manner so she felt forced to leave. *Id.* Nugent claims that during this incident, she showed a Jewel employee what she describes as Bonnie's "paperwork," which Nugent later clarified is a copy of the Illinois Attorney General's Office's "Service Animal Quick Reference Card." *See id.* at *4-5. Nugent said that she first obtained this card four years ago; it includes the legal definition of a service animal. *Id*.

Nugent also alleges that both the July 2014 incident and some later instances of rude treatment at the Des Plaines Jewel were in retaliation for an IDHR complaint that Nugent supposedly filed in June 2013. *Id.* at *6. The problem is that neither Nugent nor Jewel (nor IDHR, for that matter) have any record of Nugent filing a complaint with IDHR against the Des Plaines Jewel in June 2013. As described in the Dismissal Opinion, the Commission expended significant resources pouring over IDHR case files in an effort to identify the claim to which Nugent might be referring. In the end, the closest the Commission could come was identifying two potential candidates: (1) IDHR Case No. 2014CP1484 (filed on December 2013), which describes an alleged August 21, 2013 incident at the Des Plaines Jewel store involving Nugent's dog,[3] or (2) IDHR Case No. 2013CP3856 (filed on April 11, 2014), which describes an alleged June 24, 2013 incident at a different Jewel store located in Niles, Illinois, also involving the alleged failure to allow Bonnie in the store. Dismissal Op. at *3-4. IDHR dismissed both cases for insufficient evidence of discrimination. *Id.* (citing Investig. Rep., Exhs. B, D). In both cases, IDHR staff reported in their investigation reports that Nugent had admitted that her dog is not a trained service dog. *Id*.

DISCUSSION

Nugent requests that the Commission reconsider its central finding that there is insufficient evidence from which to conclude that Bonnie was trained as a service dog. The

[3] In that IDHR case, Nugent claimed that she needed Bonnie while shopping in public as an accommodation for Nugent's arthritis.

applicable legal standard requires that a complainant in a service animal case provide evidence that (1) the dog has been individually trained to do work or perform tasks for the complainant's benefit, and (2) the work or tasks performed by the dog is directly related to the complainant's disability. *See* Dismissal Op. at *8 (citing *Orozco v. Summit Food and Liquor*, 2014PA001 (CCHRC Sept. 3, 2015)).

During the Commission's initial investigation of this matter, Nugent claimed that she needed Bonnie with her to warn her if her blood sugar level was getting dangerously low, so that Nugent could quickly eat something and stay safe. *Id.* at *2 (citing Compl. ¶ 2). Thus, in order to qualify as a service dog, the "work" for which Bonnie must have been "individually trained" is detecting and warning Nugent of glucose imbalances. But when Commission staff asked Nugent to explain in detail the specific actions she took to train Bonnie for this purpose, Nugent responded by describing an unusual (and incomplete) process in which Nugent prepared samples of her urine when her blood sugar was either too high or too low, hid these samples, and then asked Bonnie to locate the samples by their scent. Dismissal Op. at *9.

The Dismissal Opinion set forth in some detail the accepted multi-step process for training diabetic-alert dogs. First, the dog is taught to recognize the scent of the diabetic owner's breath or sweat when hypoglycemic. Then, by using a series of reward-based exercises, the dog is trained to perform a specific action (*e.g.*, nudge the owner's leg at a certain spot) to alert the owner to this medical condition.[4] Dismissal Op. at *8-9.

In concluding that Bonnie's training fell short of this standard, the Commission identified three deficiencies in Nugent's self-described training method. First, the Commission found no evidence that urine is used for scent-training to help develop the ability to detect high or low blood sugar levels. This makes sense given that the dog's detection skills are needed when owner and dog are in a public accommodation together, and presumably the owner's urine will not be readily available for the dog to smell. Second, Nugent did not describe any specific action (or "signal") which the dog was trained to do to alert Nugent when Bonnie detected impending hypoglycemia. And third, Nugent did not describe using rewards or repetition to train her dog to perform this alerting action. *Id.* at *10.

In her first request for reconsideration, Nugent claims that when she was responding to the Commission's questionnaire about Bonnie's training during the investigation, she did not know that she had to explain that she used treats to train her dog because that is, in Nugent's words, "just a given," and "common sense." 1st Req., p. 4. Nugent then goes on in this Request to state that she used ham and cheese as a reward until "[Bonnie] would detect low & high blood glucose levels without treats as a reward." *Id.* Taking at face value that Nugent may indeed have been confused by the Commission's questionnaire into failing to mention reward-based training exercises, Nugent's newly discovered evidence still fails to meaningfully contribute to Bonnie's claim of being a trained service dog. Nugent's cursory mention of the existence of treats still leaves unanswered the question of how treats were used to train Bonnie (and whether

[4] Nugent could have presented competing research for how to train a diabetic-alert dog, if such research exists, in her requests for reconsideration. She did not. This further strengthens the Commission's confidence in the completeness of its own literature review during this investigation to determine the conventional manner of conducting such training.

that bears any resemblance to commonly accepted training techniques for diabetic-alert dogs). The first request does not mention, for example, reinforcing a diabetic-alert signal through association with a reward. Instead, Nugent reiterated her prior explanation that she "pissed in cups" to train Bonnie. *Id.* If Nugent only provided Bonnie with a treat when the dog found her hidden urine, the Commission can conclude that the dog was individually trained to detect the smell of urine or even distinguish between the scent of high-blood sugar urine and low-blood sugar. But this is not sufficient evidence to conclude that Bonnie was trained *to alert* Nugent when her blood sugar fell while they were out in public.

Further weakening her case, Nugent adds in her first request for reconsideration that she supplemented her urine-based scent training method with a blood-based routine. Nugent states that over a few weeks' time, when she tested her glucose throughout the day using a finger prick, she "would let [her] dog Bonnie smell the lancet[5] so [that Bonnie] would distinguish the smell of high glucose to low glucose levels and at normal levels." 1st Req., p. 4.[6] Evidence of Bonnie's blood-based scent training fails to establish her trained service dog *bona fides* for the same reason Nugent's original urine-based training program missed the mark. As reviewed in the Dismissal Opinion, available information on scent-training diabetic-alert dogs discusses the use of sweat and saliva samples. There is a logical reason for this: in the common course, a service dog owner is unlikely to be bleeding or urinating as he or she walks about in public accommodation. Further, even if a dog was trained to recognize a diabetic-owner's dangerous blood sugar level by sniffing the drop of blood drawn during regular testing, such training fails the requirement that a service animal perform a useful task. At the moment when a diabetic obtains his or her blood sugar level through conventional medical testing, there is no longer any need to be alerted of that same information by a service animal.

While the new allegations in Nugent's second request for reconsideration initially appear to be more on point, these claims too fail to revive her case on closer examination. In this second filing, Nugent adds two facts. First, Nugent says for the first time that Bonnie was trained to fetch Nugent's insulin kit when Nugent says "Izzy-zizziny." 2d Req., p. 5. In addition, Nugent also states that Bonnie "will bark [and] talk to me sort of aggressive [sic] in a good sense when my glucose is in danger and my life." *Id.* at 10. But again, even if the Commission was not obligated to strike this second-filed request for reconsideration and Nugent's personal recollections could be deemed "newly discovered" evidence, this new information still fails to establish that Bonnie is a trained service animal.

Claiming that Bonnie's repertoire includes fetching Nugent's insulin kit *on command* does nothing to cure the deficiencies in Nugent's claim that Bonnie has been trained to detect

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[5] Lancets are small, sharp objects used to prick the skin in order to draw a small drop of blood to use for testing blood glucose levels. *See* "Lancets and Lancing," online at http://www.diabetes.co.uk/insulin/Diabetes-lancets-and-lancing.html (visited Dec. 10, 2015).

[6] Here, Nugent does not claim that she was confused by this method's obviousness into failing to mention it until after the Commission closed its investigation in this matter. Moreover, Nugent's "new" evidence on reconsideration consists of her own memories of a personal experience, known only to and by her. This is not the type of evidence which required discovery and could have been kept unavailable by others until this late point in the Commission process. As noted above, Commission litigants are typically barred from relying on just this sort of evidence to raise an issue on reconsideration.

and alert Nugent to impending hypoglycemia before Nugent is aware of the problem.[7] On the other hand, Nugent's new allegation about Bonnie barking does addresses a critical gap in Nugent's story up to this point by identifying the signal that Bonnie purportedly uses to alert Nugent when she is hypoglycemic. Mentioning this for the first time after an eight-month investigation and in the second of two successive requests for reconsideration is, however, too little in addition to being too late. Even if the Commission were to stretch – assuming that the treats mentioned in the first request for reconsideration were related to the barking mentioned in the second request for reconsideration – stringing together these separate allegations would bear a passing resemblance to only half of the conventional training methodology for diabetic-alert dogs.

Nugent's continued reliance on urine-based, and now blood-based, scent training remains a critical detriment to the viability of her claim. As the Dismissal Opinion made clear, a dog must be trained to both *detect* (*i.e.* recognize a diabetic's low blood sugar problem before it is apparent from regular testing) and then to *alert* (*i.e.* engage in a specific signaling behavior to communicate its early detection with its owner). As noted above, Nugent's description of how she trained Bonnie to detect and recognize her low blood sugar – by sniffing Nugent's urine and blood when high and low – remains outside the parameters of recognized service dog training. Neither method is described in any of the many publicly-available descriptions of the training methods of recognized experts. Also, as discussed above, both are logically infeasible to achieve a protectable benefit for a diabetic person when going about in public. So, even if Nugent could finally succeed in describing how she allegedly trained Bonnie to use an accepted method of alerting, Nugent's claim still fails because her described methods of training Bonnie to detect low blood sugar remain legally insufficient.

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In sum, the Commission must dismiss Nugent's requests for reconsideration for failing to serve any notice of this proceeding on Jewel. Further, the new evidence provided by Nugent in her requests for reconsideration is not of the type that should be considered by the Commission under its own rules and well-established principles for reconsideration of dismissal orders. Nonetheless, the Commission has reviewed all of the extensive new evidence put forward by Nugent in several filings and nothing in Nugent's requests for reconsideration would have provided the Commission with substantial evidence to reach any other result than the dismissal that the Commission has already ordered.

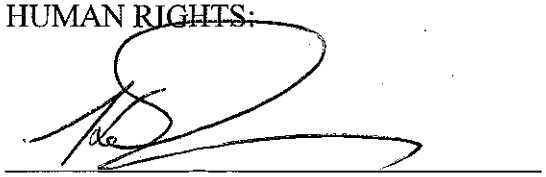
CONCLUSION

For the foregoing reasons, the Commission orders that Complainant's Request for Reconsideration be DENIED.

[7] It is further unclear how this task would be helpful to a diabetic in a public accommodation even if the service animal knew when to perform it on its own. Either Nugent brings her insulin kit with her when she is out in public (in which case a service animal would not need to fetch the same), or she does not (in which case there is nothing for the service animal to fetch).

January 14, 2016

COOK COUNTY COMMISSION ON HUMAN RIGHTS:



Kenneth A. Gunn,
Chairperson