



# RIGHTS STUFF

A Publication of The City of Bloomington  
Human Rights Commission

City of Bloomington

March 2016

Volume 199

## Housing Discrimination Case Remanded to Trial Court

Heidi and Juan Rodriguez have a child, referred to in the court opinion as A.R., who has autism and epilepsy. They had been renting a single family home in New York State for two years on a month-to-month basis. The property owner is Donnie Morelli. Morelli listed the property for sale in 2011; his listing agent was Blanca Aponte.

In January, 2011, Aponte left a note on the Rodriguez home, letting them know that Mansour Farhandian intended to buy the property. The note said the new owner was willing to continue to rent the property to them, but the rent would be going up. The note said Aponte needed a decision by March 15. The Rodriguez family did not reply, despite several attempts by Aponte to follow up.

On February 6, A.R. had seizures and was hospitalized. Mrs. Rodriguez called Morelli to tell him about the seizures and to say it was "not the time" for them to be negotiating with Aponte. Aponte followed up with a text to Mrs. Rodriguez, asking her to respond to her previous notices.

A series of texts followed, including the following:

-Aponte saying that they were sympathetic, but the property was being sold and the new owner would be evicting the family;

-Mrs. Rodriguez saying they could not leave with a sick child and that she wanted the harassment to stop;

-Aponte noting that the family had not responded to the messages sent before A.R. was hospitalized;

-Mrs. Rodriguez complaining that the road to their house was icy and could pose a problem if an ambulance was summoned for her daughter;

-Aponte saying that maybe the family should move to a safer location; and

-Aponte saying the new owner did not want to rent to the family "because your daughter should be in a more convenient location to medical treatment."

Eventually, the sale fell through. The Rodriguez family continued renting from Morelli until September of that year, but found a new house to rent because they did not "feel wanted" at their old house. They then sued for discrimination in housing on the basis of disability. They lost at the trial level, but the Second Circuit Court of Appeals recently remanded the case back to the trial judge for further consideration.

The lower court found that A.R. did not have a disability as that term is

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## Taking a Cruise While on FMLA Causes Problems

Lucy Fitterer began working for the State of Washington Employment Security Department as a job service specialist in 1999. Beginning in 2005, she began taking Family and Medical Leave Act (FMLA) leave for various medical reasons. She was approved to take intermittent leave for migraines in 2009 and 2010. In 2011, her doctor submitted a note saying "Fitterer is to be excused from work January 31 to February 7 for FMLA, as well as from February 8 - 14 2011 for FMLA vacation. Patient can assume a normal work schedule on February 15."

On January 28, Fitterer called her supervisor and said she was on FMLA leave. He reminded her that her leave didn't start until January 31 and that they needed her at work that day. She came in to work; her boss said that she "appeared and seemed perfectly healthy."

While she was on leave, her stepfather stopped by her workplace. An assistant asked if Fitterer was doing ok. The stepfather replied, "Oh, yes, she and her husband are on a cruise." At that point, management began reviewing her FMLA documentation. They asked the doctor for more information about her health condition that required her to take time off under FMLA, but he did not quickly

reply. So they told Fitterer that her leave was not covered under FMLA. Eventually, the doctor did provide additional information. When asked if she was unable to work from January 31 until February 14 due to her medical condition, a requirement for FMLA coverage, he wrote, "I was told February 8-14 was approved FMLA vacation time."

On May 5, 2011, the employment security department terminated Fitterer's employment, noting that FMLA leave "is a benefit protecting employees' jobs when they need to be absent from work for serious medical conditions, including treatment or recovery." The employer said that Fitterer had not provided any evidence that she had a medical need to be off in early February, 2011.

Fitterer's union filed a grievance, and during that proceeding, her doctor provided a letter saying "A common medical practice, which I followed, was to see if a break from the problem [stress at work] for a few weeks would ameliorate it." He said the break from work had indeed alleviated the problem and after her cruise, "she was recharged and anxious to return to work."

After losing her grievance, Fitterer sued, alleging that her former employer had interfered with her rights under the FMLA. The Court found that there was no evidence that she had a serious medical condition in 2011. The evidence showed she had migraines in 2010, but there was no documentation that she still had them in 2011, when she went on her cruise. Her treating doctor was a dermatologist and rarely treated anyone for migraines. The Council found that she had no evidence that he had ever provided her any treatment for migraines. She had no evidence that she was unable to work when she went on her cruise. And she had no evidence that taking time off in February, 2011 was medically necessary.

The lesson from this case is, employers should review employees' requests for FMLA leave and request additional information when appropriate to do so.

*Happy Easter!*



## Woman With Diabetes Fired for Eating Chips Without First Paying For Them

Josephina Hernandez worked for Walgreen. She has diabetes, and her employer allowed her to possess candy while working in case of low blood sugar, to keep her insulin in the breakroom refrigerator and to take additional breaks to test her blood sugar or to eat. In the 13 years after her diagnosis, she asked to take an additional break only once.

In September of 2008, Hernandez was returning items to shelves when she began shaking and sweating from low blood sugar. She did not have any candy with her, so she opened a bag of chips that was in her cart and ate some of them without permission and without paying for them. When she felt better, ten minutes later, she went to the counter to pay for the chips. No one was at the counter, so she left the bag of chips on the counter and returned to her stocking duties.

A store manager saw the chips on the counter and asked whose they were. Hernandez said they were hers. She was asked to write up a statement about why she took the chips and wrote, "My sugar low, not have time." She was fired for taking the chips without paying for them, and sued, alleging she was discriminated against on the basis of her disability. Walgreens moved for summary judgment, meaning they believed their case was so strong, there was no need to go to the jury.

Walgreen, like most stores, has a strict policy against employee theft or "grazing" - eating food the store is selling without paying for it first. They say they enforce the policy equally and stringently.

Walgreen argued in the lawsuit

that being required to tolerate a theft could not be considered a reasonable accommodation under the Americans with Disabilities Act. Hernandez never asked for a reasonable accommodation in that she never asked to be able to eat store food without paying for it before she did so. Hernandez said that under the circumstances, she did not have an opportunity to request an accommodation. Her misconduct - eating the chips before paying for them - was caused by her diabetes.

The Court denied Walgreen's motion for summary judgment, and the case will now go to trial unless it is settled. The case is Equal Employment Opportunity Commission v. Walgreen Co., 34 F. Supp. 3d 1049 (N.D. CA 2014).

## Housing Discrimination Case Remanded to Court

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is defined by law, but the Court of Appeals disagreed. There was evidence that the child has an impairment that causes her to have a substantial limitation on her ability to learn, and that Aponte regarded her as an individual with a disability.

The lower court found that Aponte had not expressed lack of interest on the purchaser's part to rent to anyone with a disability, but just a lack of

interest in renting to A.R.'s family. The Court of Appeals said Aponte's comments were sufficient for a jury or trial judge to potentially find that she had discriminated against the family on the basis of A.R.'s disability.

During the trial, Aponte admitted that she never talked to the prospective buyer about A.R. and that she fabricated her comments about his not wanting to rent to the family when and if he became

the owner.

The case is Rodriguez v. Village Green Realty, Inc. d/b/a Coldwell Banker Village Green Realty and Aponte, 2015 WL 3461554 (2nd Cir. 2015).

If you have questions about fair housing, please contact the BHRC.



### 2016 Human Rights Award Winner Announced

The Bloomington Human Rights Commission has chosen the Downtown Resources Officer Program (DRO) as the recipient of its 2016 Human Rights Award. The award is intended to recognize individuals or groups who have made specific, significant contributions to improving civil rights, human relations or civility in our community.

The Bloomington Police Department launched DRO in 2014, with the intent to do more than arrest, release and re-arrest high-risk individuals. Instead, they developed a more holistic approach to helping individuals experiencing homelessness and the appropriate social service agency to assist with each

individual's unique needs. The program has significantly reduced calls for service, arrests and emergency room visits.

People experiencing homelessness have said that before they got to know the downtown resource officers, sometimes called white shirts, they were afraid of the police. Now they see the DROs as resources and allies, instead of a threat.

Mayor John Hamilton commented, "The DRO program certainly deserves this honor. This is human relations at its finest. The officers who have volunteered to serve as DROs work one-on-one,

individual to individual, to combat the challenges of homelessness daily. It is a model that works for Bloomington, and an effort of which we can be proud."

Byron Bangert, the chair of the BHRC, presented the award to the Bloomington Police Department during the February 3 Bloomington Common Council meeting.



Lisa Abbott (holding plaque), Barbara McKinney and Byron Bangert pose with the Downtown Resource Officers, winners of the 2016 Human Rights Commission award. Also pictured are social workers who work with the white shirts and BPD Chief Mike Diekhoff.