



Brandeis Points to Service Animals' Move into the Mainstream

The Ohio Attorney General's Office and the Ohio Civil Rights Commission have been fighting for the rights of disabled Ohioans to have assistance animals since the mid-1990s. Ohio's efforts, along with those of other progressive states such as New York and California, have led to service animals becoming more commonplace in today's society.

The introduction of Brandeis the Service Dog on PBS' popular Sesame Street program a year ago this month demonstrates just how mainstream service animals have become since first being introduced to assist disabled individuals after World War I.

Brandeis is a yellow Labrador retriever modeled after a real service animal by the name of Hercules, who was raised and trained by Canine Companions for Independence. Canine Companions, which provides service dogs for disabled individuals free of charge, put Hercules through an extensive 18-month training course in which he learned to open doors, turn off lights, and pick up items.

Brandeis' debut on Sesame Street in October 2012 coincided with National Disabilities Awareness Month and National Blindness Awareness Month. He assists Lillana, a character who is mobility impaired and uses a wheelchair. After much training, Brandeis was given his service dog vest, which bears the message, "Please don't pet me. I'm working." He is named for former U.S. Supreme Court Justice Louis Brandeis, who served on the court from 1916 to 1939 and had a sweet tooth for animal crackers.

Service animals aren't just limited to dogs these days. Monkeys, cats, and even miniature horses also assist disabled individuals.

Helping Hands: Monkey Helpers for the Disabled provides trained service monkeys to individuals with spinal cord injuries and other mobility impairments. The animals are proficient in all sorts of daily activities, including fetching and setting up a drink of water, scratching itches, repositioning arms and feet after muscle spasms, turning on and off lights, loading DVDs or CDs, repositioning reading glasses, and turning the pages of a book.

Likewise, the Guide Horse Foundation provides miniature service horses as a safe, cost-effective, and reliable mobility alternative for visually impaired people. Trained miniature service horses demonstrate excellent judgment, have great vision, and are not easily distracted by crowds and people.

Some cats and dogs can be trained to detect seizures or panic attacks before they occur and to alert their owners of an impending seizure or provide comfort before a panic attack sets in. Tactile contact with a service cat has been shown to lower blood pressure and lessen or prevent an attack. Service cats also are known for their intelligence and good memories, allowing them to be trained to alert a deaf person when a doorbell rings, a fire alarm sounds, or a baby cries.

A Conversation with the Ohio Civil Rights Commission's Executive Director

G. Michael Payton is executive director of the Ohio Civil Rights Commission, which has been protecting Ohioans' civil rights and battling discrimination since before passage of the federal Civil Rights Act of 1964. A former assistant attorney general, Payton discussed civil rights issues with Stefan Schmidt, an associate assistant attorney general in the office's Civil Rights Section. Payton started his legal career in the AG's Civil Rights Section in 1984 and moved over to the Ohio Civil Rights Commission in 1997, becoming executive director in 2001.

Steve Schmidt: Can you give some examples of how the commission is helping Ohio families?

G. Michael Payton: Hatred and bigotry are learned behaviors. People are not born hating people. If it can be learned, it can also be unlearned. When we talk about intolerance, racism, and discrimination, sometimes we are really talking about ignorance. The best way to confront ignorance is with knowledge, and we go out into various communities and engage in education and outreach programs. I've been to a lot of schools in Ohio, sometimes with as many as 500 students at a time, where we talk about such things as bullying, tolerance, and anticipating and solving conflict. We reach thousands of students with our annual Dr. Martin Luther King program, which is a statewide contest in which young people submit art, essays, and multimedia projects that focus on the meaning of Dr. King's philosophy in life. We also help Ohio families by enforcing laws that prohibit discrimination in employment, housing, and public accommodations. That's a direct benefit to families. What it means is the right to enjoy life, liberty, and the pursuit of happiness and to work at whatever you are qualified to do and to live wherever you want without being arbitrarily denied the privilege to do so. Talent is not monopolized by any sex, race, religion, or national origin. Making sure people don't lose their employment rights for other than job performance-related reasons, in a sense, enhances the economy. I have often felt that discrimination is sometimes the antithesis of a free market.

Steve Schmidt: You're saying discrimination is just bad business?

G. Michael Payton: I'd like to say that discrimination makes no cents, C-E-N-T-S. One of the things that we often don't think about is the cost of discrimination. For example, how much lost wealth have black families sustained as a consequence of decades of not receiving the same fair and full opportunity to buy a home. A home is the single largest purchase most of us will ever make. Ownership of a home is also a principal way parents pay for the college educations for their kids. It is the most treasured asset that we have, and that right has been restricted. If you were deprived of the opportunity to buy a home, there's no equity to cash in to help your family go to college. That loss of wealth not only harms families, but it also harms communities.

Steve Schmidt: What sort of community outreach does the commission do?

G. Michael Payton: We have high expectations as it relates to community outreach. There probably hasn't been a setting in which we haven't appeared. It ranges from bar association seminars and chamber of commerce meetings to interacting with core community groups throughout our state, including schools. I've spoken at Ohio Highway Patrol graduation ceremonies and to soldiers in full dress. The range is very broad because there is not a group that we will not work with, there is not a group that we will not meet with to facilitate their understanding and compliance with civil rights laws or how to protect their civil rights if they feel they have been violated. One of the things we should appreciate is that civil rights just doesn't involve black people or a single race or sex. Any citizen at some time in their life may need to avail themselves of the protections of the civil rights laws provided by our state, no matter if you are black or white, Jewish or Italian, male or female. These laws exist for the benefit of every single citizen.

Steve Schmidt: Do you conduct trainings for employers?

G. Michael Payton: Yes. Trainings are both reactive and proactive. Proactive would be where we offer EEO compliance workshops and seminars that suggest what an employer can do to reduce problems and avoid litigation. Reactive training focuses on fixing problems after they have arisen to make sure they don't happen again and ultimately reduce the number of charges that are filed against them.

Steve Schmidt: Does the commission involve itself with mediation and conciliation efforts?

G. Michael Payton: The law places a premium on trying to resolve charges in lieu of further involvement by the government. The law says we must do that up front. It is an opportunity to sit down and work out what is needed in order to resolve that conflict. We encourage it, and frankly it is one of the more successful things we've done since I've been here. We successfully mediate somewhere between 75 and 80 percent of all the cases in which mediation is attempted. There's nothing magical about it. It's more about people getting together, both sides, to work out a solution to their differences on a voluntary and mutual basis. Anytime people can solve conflict in lieu of costly and time-consuming litigation, the better off we are.

Steve Schmidt: What areas do you see the commission moving into?

G. Michael Payton: Every year brings different challenges, and I think one day very soon the Civil Rights Act is going to be amended to prohibit discrimination based on sexual orientation. I also think the commission will be dealing with cutting-edge issues like the use of credit scores and prior criminal convictions in employment decisions. Previously, the commission led the nation on issues like insurance redlining.

Steve Schmidt: What are some of the more memorable cases you have dealt with since becoming executive director?

G. Michael Payton: There have been a lot of cases across time, but one of the most memorable is the Zanesville water case. A cluster of black people living in a discrete area of the county were being denied drinking water across generations on the basis of their race. Our agency worked with the Attorney General of Ohio to make sure that the true promise of America was delivered to some very hardworking citizens, and we were successful in getting them running water like their white neighbors had. I was there to see the taps running and was able to see the smiling faces of the people who had been deprived of the water for so long. That will always stand out because of the nature of it and the depth of it and the number of years involved and the verdict, which was \$10.8 million. It shows the utility of civil rights laws and why they are still needed and why sometimes effective enforcement is necessary despite living in a vastly improved world from the world when I was young. I proudly work in a profession where we are fighting to protect the rights of all of Ohio's citizens.

Don't Miss this Week's Ohio Civil Rights Hall of Fame Inductions

Hopefully, your calendar is already marked for the fifth annual Civil Rights Hall of Fame induction ceremony at 10 a.m. Thursday, Oct. 3, in the Ohio Statehouse Atrium. A reception will follow in the Statehouse Rotunda.

The Ohio Civil Rights Commission began honoring Ohio's civil rights leaders with an annual Hall of Fame Ceremony in 2008. Here's a glimpse at this year's seven exceptional inductees:

- Prior to becoming an attorney, Alexander "Sandy" Spater was a Peace Corps volunteer in Nepal, where he worked as a community development specialist. Later, Spater worked in a low-income housing program in Corinth, Miss. As an attorney in his own firm and at Spater, Gittes, Schulte & Kolman, he litigated civil rights cases in Ohio and around the country. He has lectured on various civil rights issues and has testified before the U.S. Civil Rights Commission.

- Anison James Colbert was born in the Youngstown area and was a pioneer in the funeral service industry, becoming the first African-American in Ohio to receive a national funeral director's license. Colbert is well-known for his disaster relief work in the Xenia area after the devastating 1973 tornado. He established and served as director of Concerned Citizens of Xenia, which addressed issues such as finding employment for low-income and minority citizens.
- Charles O. Ross joined The Ohio State University in 1970 and served as the inaugural chairperson of the Black Studies Department. Ross engaged in mass community mobilization and grassroots activism at the university and in the community during a period of social upheaval in Columbus. He was instrumental in raising community awareness on issues such as targeted law enforcement and excessive force. He was an advocate for the recruitment and retention of African-American students, faculty, and staff and urged diversity on the university's Board of Trustees.
- Lawrence Eugene "Larry" Doby joined Jackie Robinson in breaking the major league baseball color barrier in 1947 when he joined the Cleveland Indians, becoming the first African-American in the American League. Doby was an All-Star center fielder seven consecutive times, and he and teammate Satchel Paige became the first African-American members of a World Series-winning team when the Indians claimed the title in 1948. He was also the first African-American player to hit a home run in the World Series and the All-Star Game. In 1978, he became the second African-American manager in the big leagues. He was inducted into the National Baseball Hall of Fame in 1998.
- Marjorie Perham began running *The Dayton Tribune* in 1961. In 1963, she took over as publisher and editor of *The Cincinnati Herald*. In more than three decades at the *Herald*, she became a respected figure in the Cincinnati community through her newspaper work and involvement in numerous civic organizations. In 1982, she became the second African-American to serve as a trustee of the University of Cincinnati. She has chaired the board of the National Afro-American Museum and Cultural Center.
- Pastor Robert Lee Harris has been an advocate for the disabled since he contracted meningitis at an early age, leaving him paralyzed in both legs and his left hand. Pastor Harris is an accomplished artist with more than 30 years of visual art and video production experience. He is the community relations coordinator for BRIDGES for a Just Community and has worked for 13 years as education coordinator for the Cincinnati Human Relations Commission. His many awards include the Victory Award, the Ohio Humanitarian Award—Employment Equality, and the Maurice McCracken Award for Peace and Justice.
- Judge Sara J. Harper was the first African-American woman to graduate from Case Western Reserve University Law School. While president of the Cleveland NAACP, Harper fought against strip searches of females arrested for minor traffic infractions. A former prosecutor, she was the first woman to serve on the judiciary of the U.S. Marine Corps Reserve and she co-founded the first victims' rights program in the country. In 1990, Harper became the first woman to win a seat on the Ohio Court of Appeals, and in 1992, she became the first African-American woman to serve on the Ohio Supreme Court.

Significant Cases

[Nicholas A. Keith v. County of Oakland](#), U.S. Court of Appeals for the Sixth Circuit, 2013 U.S. App. LEXIS 595 (Jan. 10, 2013)

Issue: Whether assessments by a physician and an aquatic safety consultant were sufficient to determine whether a deaf job applicant was qualified for the position of lifeguard.

Facts: Nicholas Keith, who has been deaf since his birth, successfully completed the Oakland County, Mich., lifeguard training program with the assistance of an American Sign Language interpreter. He was hired for a lifeguard position with the county, contingent on passing a medical exam by a county-appointed physician.

Shortly thereafter, Keith was examined by Dr. Paul Work. When Work entered the examination room, he looked at Keith's medical history and stated, "He's deaf; he can't be a lifeguard." Work's report described Keith as "physically sound except for his deafness" and stated that Keith could be a lifeguard only with "constant accommodation" (never identified) and that even such accommodation likely would not be adequate.

The county also consulted Wayne Crokus, an aquatic safety consultant who asserted Keith would pose a safety hazard. Although Crokus had a background in aquatic safety and lifeguard training, he had no education or experience regarding the ability of deaf people to work as lifeguards, and he did not conduct any research into the issue upon learning about Keith. He did not communicate, observe him during training, or speak with Work. Relying on the recommendations of Work and Crokus, county staff withdrew the job offer.

Keith sued, alleging the county violated the ADA. The district court granted the county's motion for summary judgment, holding that although Work did not make an individualized inquiry, the county — the ultimate decision maker — did.

Outcome: Reversing summary judgment, the Sixth Circuit held that genuine issues of material fact existed regarding whether the county had made an individualized inquiry to determine Keith's ability to perform the job. The court observed that the county was willing to accommodate and hire Keith after making its own assessment by observing him during lifeguard training. However, it rescinded its offer based on the input of Work and Crokus, neither of whom made efforts to determine whether, despite his deafness, Keith could nonetheless perform the essential functions of the position, either with or without reasonable accommodation. The county's adoption of these generalizations about the abilities of deaf people created a triable issue of fact regarding whether the county made an individualized inquiry regarding Keith's ability to perform the job.

Legal Significance: It may not be sufficient for an employer to rely on the conclusions of subject matter experts who have purportedly reviewed the abilities of a job applicant if the experts did not actually consider the job applicant's unique abilities.

[Association of Apartment Owners of Liliuokalani Gardens at Waikiki v. Taylor](#), U.S. District Court for the District of Hawaii, 2012 U.S. Dist. LEXIS 124418 (Aug. 31, 2012)

Issue: When a landlord has a no-pets policy and a tenant with an animal assistant asks for the policy to be waived, what does the Federal Fair Housing Act (FHA) require?

Facts: Taylor leased an apartment at Liliuokalani Gardens, which had a no pets policy, but he entered into his rental agreement on the condition he be allowed to keep his dog as an accommodation. Taylor provided information from his doctor, including that he suffered from agoraphobia and social phobias that called for a dog to assist him. The association asserted this did not provide sufficient information to establish how his dog was a necessary accommodation, and there was no indication the dog had any training as a service or assistance animal. A key decision, *Prindable v. Association of Apartment Owners*, 304 F. Supp. 2d 1245, held the FHA required specialized training for an assistance animal. The party's arguments and the court's analysis revolved around whether *Prindable* was still good law.

Outcome: The court concluded the FHA allows disabled persons to secure an accommodation for not only trained "service animals," but also "assistance animals," which do not need specialized training to perform specific disability-related tasks. This includes "emotional support animals" for non-physical disabilities. The court found that *Prindable* did not require training before a dog could be considered the basis of a viable request for an accommodation.

The court determined there is a difference between “service animals” and “assistance animals,” and the FHA included both as reasonable accommodations. The first step of the analysis is to examine the individual’s medical condition and determine whether it is a disability. If so, it is then necessary to determine what is needed to alleviate the effects of that disability. The next step is to determine if the requested accommodation, i.e., an untrained assistance animal, is necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling. If so, the housing provider must grant the requested accommodation. The court denied both parties summary judgment motions and summarized its decision as follows:

“In some instances, a plaintiff may have a disability that requires an assistance animal with some type of training; in other instances, it may be possible that no training is necessary. *** (T)his analysis ensures that only those with proper disabilities are afforded accommodations such as assistance animals; it will not *** result in everyone who wants a pet being afforded an assistance animal ***. (B)ecause the animal must alleviate the disability, only those with disabilities will be afforded this accommodation.”

Legal Significance: This case rejects the idea that a disabled person only has the right to an accommodation of a trained service animal. Training or lack thereof is a factor to consider, but lack of training does not mean victory for the landlord. This case reinforces that disability/failure to accommodate cases are very fact-intensive and must be decided on a case-by-case basis. It’s necessary to analyze the disability, what is needed to ameliorate that disability, and whether the requested accommodation is necessary.

[Mayorga v. Alorica Inc.](#), U.S. District Court for the Southern District of Florida, 2012 U.S. Dist. LEXIS 103766 (July 25, 2012)

Issue: Whether medical conditions resulting from a high-risk pregnancy can be considered a disability within the meaning of the ADA.

Summary: Silvia Mayorga worked as a customer service representative for Alorica Inc. During her employment, Mayorga became pregnant. She suffered from a number of complications related to her pregnancy, and she was admitted to the emergency room on three separate occasions. As a result, Mayorga’s doctor ordered her on bed rest for three weeks. Mayorga requested three weeks of unpaid leave from her direct supervisor, who initially denied the request, stating: “I am not going to treat you special because you are pregnant.” However, a human resources representative subsequently approved three weeks of unpaid leave.

Upon returning to work from her three-week leave of absence, Mayorga was informed that she had been terminated. A human resources representative told her: “Sorry. I cannot accommodate you. This is a company. We need you here. So, since you can’t be here because you are pregnant, we cannot accommodate you. Re-apply after you have your baby.”

As a consequence, Mayorga filed a complaint alleging violations of the ADA and Florida Civil Rights Act. Alorica moved to dismiss her claim of disability discrimination for failure to state a claim, arguing pregnancy is not recognized as a disability under the ADA.

Outcome: The court denied Alorica’s motion, holding Mayorga’s complaint sufficiently alleged that Alorica discriminated against her based on her disability.

The court acknowledged that it is well-established that pregnancy, absent unusual circumstances, is not considered a disability under the ADA. However, analyzing the ADA regulations, the court held that where a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy or significantly intensifies the symptoms associated with a healthy pregnancy, such medical condition may fall within the ADA’s definition of a disability.

In Mayorga's case, her allegation that she suffered from a physiological impairment — namely, that her baby was in a breech presentation and that she had significant pregnancy-related complications resulting in her three emergency room admissions and numerous pregnancy-related symptoms — was sufficient to survive Alorica's motion to dismiss.

Legal Significance: Although typically pregnancy is not a disability within the definition of the ADA, the mother may be protected if she suffers unusual physiological effects.

[**Bhogaita v. Altamonte Heights Condominium Association Inc.**](#), U.S. District Court for the Southern District of Florida, 2012 U.S. Dist. LEXIS 178183 (Dec. 17, 2012)

Issue: When a disabled tenant makes an accommodation request for an emotional support animal, a skeptical housing provider is entitled to seek information. But how much?

Summary: Ajit Bhogaita was a veteran of the U.S. Air Force who suffered from post-traumatic stress disorder (PTSD). He lived in a condominium that prohibited pets weighing more than 25 pounds. Bhogaita's treating physician prescribed an emotional support animal to help him cope with his disability. However, the dog Bhogaita acquired exceeded the condominium's weight limit. After the condominium association sent Bhogaita a notice demanding him to remove his dog, Bhogaita responded with a note from his doctor. The note stated that Bhogaita had PTSD and that the dog was prescribed as an emotional support animal to help him deal with his anxiety. Unsatisfied, the condominium association sent Bhogaita three letters, making an additional 19 requests, about the nature of his impairment, including how his impairment substantially limited a major life activity, how long had he been receiving treatment, what specific training his dog received, and why he needed a dog exceeding the condo's weight limit.

Outcome: Bhogaita sued the condominium association, claiming it failed to provide him a reasonable accommodation under federal and state fair housing laws. The court agreed: "By persisting in its intrusive quest for more — and largely irrelevant — information, AHCA (Altamonte Heights Condominium Association Inc.) constructively denied Bhogaita's request."

Legal Significance: The upshot is that when a housing provider receives a request for an accommodation, it is permitted to request information about that person's disability, such as a letter from a doctor. However, when that housing provider requests detailed information about the nature of the disability, such requests are considered unreasonable.

[**Larkins v. Regional Elite Airline Services LLC**](#), U.S. District Court for the Southern District of Ohio, 2013 U.S. Dist. LEXIS 60729 (Apr. 13, 2013)

Issue: Whether the executed release of all claims by a black employee when he believed his position had been eliminated is enforceable after he learns he was replaced by a white male 20 years younger than him.

Summary: Henry Larkins was a 51-year-old black male working as a human resources generalist at his employer's Kentucky facility. The employer announced the closing of the Kentucky facility as part of a reduction in force and said Larkins' position would be eliminated and the remaining human resources generalists at the employer's other facilities would assume his responsibilities. Larkins offered to work out of one of the remaining facilities, but a lateral transfer was unavailable to him. On his last day of employment Larkins was given a waiver releasing any and all rights and causes of action he had or may have had against Regional Elite Airline Services, up to the date of his signing in exchange for his severance pay. After he signed, Larkins was told by the customer service manager that his position had not been eliminated. Instead, it had been offered to the customer service manager, a 29-year-old white male with no previous human resources experience, who had been instructed to keep the offer secret until after Larkins executed the release.

Larkins' complaint raised several claims, including race discrimination under federal law, age discrimination under state law, the federal Age Discrimination in Employment Act (ADEA), fraud, infliction of emotional distress, and conspiracy. Ohio provides three avenues for a plaintiff to bring an age discrimination claim, one imposing a 180-day statute of limitations (Ohio Revised Code 4112.02(N)) and the remaining having a six-year statute of limitations (ORC 4112.14 and 4112.99). The complaint did not specify a provision of the Ohio Revised Code upon which his age claim was based and neither did the plaintiff's response to a motion to dismiss. The court applied the 180-day state of limitations, and the plaintiff's state law age claim was dismissed.

Larkins' race, fraud, infliction of emotional distress and conspiracy claims also were dismissed because he did not tender back the severance pay he received for signing the release. The only remaining issue was the effectiveness of the waiver of claims in the release.

Outcome: The release did not waive Larkins' ADEA claim. Larkins did not know that his position had been given to a younger man until after he signed the release, and although the position had been offered before he signed, the transfer was not effectuated until after Larkins signed the release.

Legal Significance: The employer's conduct that gave rise to the federal age discrimination claim occurred beyond the time covered by the release the employee signed.

[Gregory Waldon, et al., v. Cincinnati Public Schools](#), U.S. District Court for the Southern District of Ohio, 2013 U.S. Dist. LEXIS 58689; (Apr. 24, 2013)

Issue: Can an employer be held liable for disparate impact discrimination when it terminates employees in accordance with the mandates of a new state law?

Summary: In 1977, Gregory Waldon was sentenced to prison on a conviction for felonious assault. The school district supported his request for parole by guaranteeing employment, notwithstanding his criminal conviction. In 1988, Britton was convicted in the sale of marijuana valued at \$5. Both Waldon and Eartha Britton are African-American. Waldon had been employed by the defendants for more than 35 years and Britton for 18 years when the State of Ohio passed a law (House Bill 90, effective Nov. 14, 2007) that mandated that "*** if an employee had been convicted of any of a number of specified crimes, no matter how far in the past they occurred, nor how little they related to the employee's present qualifications, the legislation required the employee to be terminated." As a result, both Waldon and Britton were fired even though neither of them had any adverse marks on their employment record. All told, the school district terminated 10 employees as a result of the legislation, nine of whom were African-American. Plaintiffs filed suit, claiming the school district's mass terminations had a disparate impact on African-Americans. The school board claimed that it acted solely because of the state law and, therefore, could not be held liable for any discriminatory effect.

Outcome: Title VII trumps state mandates. The school board cannot use the state law as a defense in a disparate impact case. "Although there appears to be no question that defendant did not intend to discriminate, intent is irrelevant and the practice that it implemented allegedly had a greater impact on African-Americans than others." Further, "*** in relation to the two plaintiffs in this case, the policy operated to bar employment when their offenses were remote in time, when Britton's offense was insubstantial, and when both had demonstrated decades of good performance. These plaintiffs posed no obvious risk due to their past convictions, but rather, were valuable and respected employees, who merited a second chance."

Legal Significance: Legislatures and employers are free to place limits on the hiring of persons with criminal backgrounds only to the extent that the limitations are related to the job to be performed or which distinguish between criminal backgrounds that pose an unacceptable level of risk and those that do not.

NOTE: The law in question has subsequently been amended so as to allow persons with prior convictions to demonstrate rehabilitation.

[K&D Management LLC v. Deirdre Masten](#), Court of Appeals of Ohio, Eighth Appellate District, 2013-Ohio-2905 (July 3, 2013)

Issue: Is a holdover tenant prohibited from alleging Ohio Revised Code 4112 discriminatory retaliation (as opposed to ORC 5321.02 retaliation) during an eviction proceeding — and, if not, must the discrimination allegation be resolved by the court prior to granting the eviction?

Summary: Deirdre Masten had a one-year lease with landlord K&D. During the lease, Masten reported unlawful discrimination, and so was therefore protected against retaliation under ORC 4112.02(l). K&D subsequently issued a notice of non-renewal of Masten’s lease, requiring her to vacate the property at the end of the lease. Masten remained on the property after the expiration of the lease, thus becoming a “holdover” tenant.

K&D filed an eviction action. Masten answered the complaint and also filed a counterclaim alleging that she was being evicted due to unlawful retaliation under ORC 4112. The trial court granted summary judgment on K&D’s action for eviction — ordering Masten to leave the premises within 30 days — but allowed Masten’s allegations in her counterclaim to proceed. In short, the trial court ordered Masten to vacate the premises even though she might subsequently prevail on her counterclaim, rendering the eviction unlawful, but too late to be of any relief.

Ohio’s landlord/tenant law, ORC 5321.02, prohibits landlords from retaliating against tenants who report violations. Another Ohio law, ORC 1923, provides landlords with a speedy mechanism for evicting “holdover” tenants who remain on the property after the lease expires. These provisions collide in ORC 5321.03(A)(4), which prohibits holdover tenants from “slowing down” the speedy eviction process by raising ORC 5321.02 retaliation as a defense to their eviction.

Outcome: On appeal, the Eighth District noted the tension between the competing interests — a landlord’s right to speedily reclaim its property from a holdover tenant and a tenant’s right under ORC 4112 to be free from unlawful discrimination. While ORC 5321.03(A)(4) contains a general prohibition against affirmative defenses — including retaliation — in an eviction action against holdover tenants, the Eighth District held that the lower court erred in not allowing Masten to assert her retaliation defense against K&D’s eviction action. Noting the remedial purpose of ORC 4112, and the liberal construction required by ORC 4112.08, the court vacated the eviction and remanded the case to allow Masten the opportunity to present any evidence she might have that her lease was not renewed due to discriminatory retaliation.

By way of acknowledging the competing interests, the court noted, “Our decision is not, however, intended to make a trial court a prisoner to tenants’ assertions of discriminatory practices.” A tenant must still be able to make out a prima facie case for discrimination. “Nonspecific, conclusory statements without factual support will not overcome a properly supported motion for summary judgment.” In short, eviction of a holdover tenant can still be speedy — unless the tenant is able to present evidence supporting a prima facie case of unlawful discrimination. When the tenant — even a holdover tenant — presents such evidence as a defense to the eviction, the court must decide the discrimination issue before granting the eviction.

Legal Significance: A trial court must resolve allegations of discriminatory eviction prior to granting the actual eviction.

[McMillan v. City of New York](#), U.S. Court of Appeals for the Second Circuit, 2013 U.S. App. LEXIS 4454 (Mar. 4, 2013)

Issue: Whether timely arrival at work is an essential function, as a matter of law.

Summary: Plaintiff Rodney McMillan had schizophrenia, which was treated with medication. Despite this impairment, McMillan worked for 10 years as a case manager for the city’s Human Resources Administration before assuming a role as case manager in a different division within the city.

The city had a flex-time leave policy, but employees were required to arrive by 10:15 a.m., otherwise the employee was considered tardy. It was undisputed that although McMillan was awake by 7:30 a.m., his morning medications made him “drowsy” and “sluggish.” As a result, he often arrived late to work, sometimes after 11 a.m. The city made no allegations that McMillan malingered; rather, it was undisputed that his inability to arrive at work by a specific time was the result of the treatment for his disability.

Prior to 2008, and for a period of at least 10 years, McMillan’s tardy arrivals were either explicitly or tacitly approved. At some time in 2008, his supervisor refused to approve any more of McMillan’s late arrivals. As explanation, she stated that she “wouldn’t be doing [her] job if [she] continued to approve a lateness every single day.”

McMillan proposed that he could work past 7 p.m. (the office was open until 10 p.m.) so that he could arrive late and still work the required 35 hours per week. Alternatively, McMillan asserted that he would be willing to work through lunch to bank time. His requests were rejected, even after he provided a doctor’s note. As a result, he was fined eight days’ pay for his late arrivals and ultimately terminated for his “long history of tardiness.”

McMillan filed suit, but the Southern District of New York granted the city’s motion for summary judgment, finding timely arrival at work was an essential function of McMillan’s job, and thus could not be accommodated. McMillan appealed.

Outcome: The Second District faulted the lower court’s heavily reliance on its assumption that physical presence is “an essential requirement of virtually all employment.” Similarly, the court rejected the city’s representation that arriving at a consistent time was an essential function of McMillan’s position because the city’s flex time policy and its long history of permitting McMillan flexibility in his schedule without apparent consequence belied this contention.

Legal Significance: As the Second Circuit emphasized, this case highlights the importance of conducting a fact-specific analysis in ADA claims. Although in many employment contexts, a timely arrival is an essential function of the position, it was not evident that it was an essential function of McMillan’s job. Employers should be careful not to rely on generalizations about the essential functions of a position when making decisions regarding reasonable accommodations.