

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN RIGHTS

State of Minnesota by Velma J.
Korbel, Commissioner, Department
of Human Rights,

Complainant,

and

Elizabeth Maxson, on behalf of M.M.,

Intervenor,

v.

Abercrombie & Fitch,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS,
AND ORDER**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on April 13-14, 2009, at the Office of Administrative Hearings. The record closed on May 18, 2009, upon receipt of the Respondent's post-hearing brief.

Laura S. Weintraub, Esq., Johnson, Killen & Seiler, 230 West Superior Street, Suite 800, Duluth, MN 55802; and Stacia M. Jones, Senior Legal Counsel, 6301 Fitch Path, New Albany, OH 43054, appeared for Abercrombie & Fitch (Respondent).

Margaret Jacot, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared for the Commissioner of the Department of Human Rights (Complainant).

Ian S. Laurie, Esq., Laurie & Laurie, P.A., 1660 South Highway 100, 508 East Parkdale Plaza Building, St. Louis Park, MN 55416-1534, appeared for Elizabeth Maxson, on behalf of M.M. (Intervenor).

STATEMENT OF ISSUES

1. Did the Respondent commit an unfair discriminatory practice by failing to make a reasonable accommodation to the known disability of a disabled customer, in violation of Minn. Stat. § 363A.11, subd. 1(a)(2)(2008)?

2. If so, what are the appropriate damages, remedies, and other relief?

Based on all of the files and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Abercrombie & Fitch Co. is a publicly traded corporation that operates through a number of subsidiaries as a specialty retailer of casual sportswear apparel for men, women and children. One of its brands is Abercrombie & Fitch. The Abercrombie & Fitch store at the Mall of America in Bloomington, Minnesota, is the largest such store in the country. In August 2005, the Mall of America store had approximately 200 employees and 10 to 15 managers. The company also employs district managers and corporate employees who have customer service, human resource, and loss prevention responsibilities.¹

2. Like many retailers, Abercrombie & Fitch is highly sensitive to losses of merchandise by theft. The store at the Mall of America has a relatively high rate of merchandise loss (called “shrink” in the industry) and is subject to strict loss prevention policies and security measures, including hidden cameras to observe associate actions, undercover agents working in stores and posing as regular associates, detailed audits of return and void transactions, detailed reference checking and background searches on all associates, undercover observation of store operations by professional “shoppers,” and professional interviews of associates suspected of policy violations. Sales associates are acutely aware of the importance of loss prevention.²

3. M.M. is an 18-year-old high school student with autism, a developmental disorder characterized by qualitative impairments in social interaction and communication and repetitive patterns of behavior, interests, or activities.³ M.M. was diagnosed with the disorder at two years of age. Because of the many effective interventions implemented by her family and teachers over the years, M.M. does well in school and participates in a variety of activities; because of her difficulties with language processing and interpreting social cues, however, M.M. has compromised social judgment. She is vulnerable to

¹ Testimony of Vicki Gedrose.

² Testimony of Larry Tubaugh; Test. of V. Gedrose; MDHR Ex. 13 at 20. See *also* Testimony of Kevin Morel.

³ Ex. 16.

exploitation, and she will volunteer, in conversations with strangers, information that should be kept private or confidential. She requires the assistance of an aide at school. She does not stay home by herself, she does not shop by herself, and she has never gone into a fitting room at a store by herself. M.M. is aware that she has autism, but she does not know exactly what that means, and she is conscious of being different from other people.⁴

4. On August 23, 2005, when M.M. was 14 years old, she went shopping for back-to-school clothing at the Mall of America with her 17-year-old sister, Brittany Maxson, and her mother, Elizabeth Maxson. They tried on clothing and made purchases at several stores. Eventually the girls decided to go into the Abercrombie & Fitch store, while their mother finished shopping in a nearby department store.⁵

5. The Abercrombie & Fitch store was very busy that day and full of customers shopping for school clothing. The sisters selected some clothing to try on and waited in a long line for a fitting room. When they got to the head of the line, a sales associate counted their items and placed the items in a fitting room. When M.M. attempted to enter the fitting room with her sister, the sales associate told the girls that only one person could enter the fitting room at a time. Brittany Maxson explained to the sales associate that her sister had a disability and they needed to stay together. The sales associate said he was sorry, but the store policy was aimed at preventing theft and only one person could use a fitting room at a time. Brittany Maxson then told him that M.M. had autism and could not be left alone. He again said he was sorry, and he asked them to step aside so that others could use the fitting room. The girls complied with his request. When Brittany Maxson inquired why she could bring several shopping bags from other stores into the fitting room but not her disabled sister, the sales associate politely repeated that store policy was one person per fitting room. M.M. became agitated and began bouncing on the balls of her feet and talking to herself. She asked her sister several times why they were not allowed to use the fitting room when it was their turn.⁶

6. Brittany Maxson then used her cell phone to call her mother, and she asked her mother to come meet them in the Abercrombie & Fitch store. When Elizabeth Maxson arrived, she found the girls waiting near the fitting rooms. M.M. was upset and kept saying "It's my turn, Mom. It's my turn." Elizabeth Maxson explained to the sales associate that Brittany Maxson was a caregiver for M.M., who had a disability. The sales associate explained again that corporate policy was one person per fitting room and that he had to follow corporate policy. He advised her to call customer service if she wanted more information about the policy.⁷

⁴ Testimony of Brittany Maxson; Testimony of Elizabeth Maxson; MDHR Ex. 3.

⁵ Test. of B. Maxson; Test. of E. Maxson.

⁶ Test. of B. Maxson.

⁷ Test. of E. Maxson.

7. Elizabeth Maxson obtained the customer service telephone number at the sales desk and stepped outside the store to make the call. She explained that she wished to file a complaint because her disabled daughter was not allowed to use a fitting room with her sister. The customer service person characterized her complaint as “So, you think our fitting room policy is ridiculous.” Maxson believed this response was flippant and rude. The customer service employee offered no further assistance.⁸

8. Elizabeth Maxson returned to the Abercrombie & Fitch store and asked to speak with a manager. When the assistant manager arrived, she asked for a copy of the fitting room policy. The assistant manager said he could not find a copy of the policy and that they could not deviate from the one-person-per-fitting-room policy. He apologized and offered to let the Maxsons buy as many items as they wanted, try them on at home, and then return the items that did not fit. He did not offer to let them use a fitting room, and he did not make a note of Elizabeth Maxson’s name or telephone number. Elizabeth Maxson then left the store.⁹

9. After Elizabeth Maxson left, the assistant manager kept searching for the fitting room policy. He later found it in the Associate Handbook.¹⁰ The policy provides in relevant part as follows:

In most cases, only one person is allowed to be in the fitting room at a time. Some exceptions to this rule include parents with their kids and a disabled person’s assistant. In most other cases, do your best to manage fitting room capacity before customers enter the fitting room. Once a customer enters the fitting room they have a right to privacy.¹¹

10. In addition, the Associate Handbook contains a customer service policy with regard to customers who are disabled. That policy provides, in relevant part:

Abercrombie & Fitch is committed to customer service; which includes assisting disabled customers when they visit our stores, try on and purchase our merchandise. Abercrombie & Fitch expects you to uphold that level of customer service, first and foremost because every customer is important to us. Also, the Americans with Disability Act requires that we do our best to remove physical obstacles in the stores that could prevent use by persons with disabilities. The associates in Human Resources, your Manager

⁸ Test. of E. Maxson.

⁹ *Id.*

¹⁰ Testimony of Justin Splinter.

¹¹ MDHR Ex. 13 at 18.

and District Manager are always available to assist you in making sure that we can satisfy our customers.¹²

11. The Associate Handbook also advises employees that when a customer with a disability visits an Abercrombie & Fitch store, it is the job of employees to make sure that they are able to enter the store, look at merchandise, use a fitting room and purchase merchandise in a way that is as equal as possible to non-disabled customers. If customers request an accommodation that an employee believes the store cannot provide, employees are advised to take the customer's name, address and phone number, and then call Store Communications with the request. "Depending on what it is, the Company may well grant the customer's request."¹³

12. A few weeks later, having received no response to her telephone complaint, Elizabeth Maxson summarized the incident in writing and sent it to the Customer Service Department at Abercrombie & Fitch headquarters in New Albany, Ohio. She requested that the company respond to her complaint.¹⁴ Maxson received no response to the letter.¹⁵

13. In April 2006, Elizabeth Maxson telephoned customer service again to ask for records pertaining to her telephone complaint. She was told that the records were for company use only and would not be provided to her.¹⁶

14. On May 12, 2006, Elizabeth Maxson sent another written complaint to the Customer Service Department, by certified mail. She summarized the incident and her efforts to obtain a response from the company. She alleged that the company had failed to provide reasonable accommodations for those with special needs and failed to teach employees to make modifications to corporate policy for those with disabilities. She again requested a response, but received none.¹⁷

15. When M.M. was examined about this incident by a psychologist hired by Abercrombie & Fitch in the course of this proceeding, the psychologist described her responses as follows:

[M.M.] states that during the incident she "felt bad," "felt scared," and "felt nervous." She now says, "it's all my fault. I hate autism." She then states, "all because of Abercrombie, I felt bad from it." "You see, this is what happened. People were looking at me. Pointing to me. Whispering." "I don't ever go back to Abercrombie

¹² MDHR Ex. 13 at 9.

¹³ *Id.* at 9-10.

¹⁴ MDHR Ex. 5.

¹⁵ Test. of E. Maxson.

¹⁶ MDHR Ex. 6.

¹⁷ *Id.*; Test. of E. Maxson.

again.” “I felt like Rudolph, or like Hermey.” “I felt sad.” “It’s depressing.” “Rudolph feels really bad about himself.” “Clarice makes him feel better.” When the interviewer responded that Hermey and Rudolph were misfits, [M.M.] laughed responsively and says, “I am a misfit at Abercrombie.” When the interviewer asks who makes you feel better, [M.M.] responds, “all the people at my school.” She then states, “Abercrombie told me I had to go home and try on clothes.”¹⁸

16. M.M. was embarrassed and humiliated by the incident at the store and suffered mental anguish as a consequence of it. She frequently refers to the incident when she is upset about the way other people treat her. She will no longer shop at Abercrombie & Fitch, although her mother has encouraged her to do so in order to put the incident behind her.¹⁹

17. On July 21, 2006, Elizabeth Maxson filed a charge of discrimination on behalf of M.M. with the Minnesota Department of Human Rights.²⁰ The Department investigated the charge and, on July 23, 2007, found probable cause to believe Abercrombie & Fitch had violated Minn. Stat. § 363A.11 (2006).

18. In February 2008, the Department issued a Notice and Order for Hearing and Complaint in this matter.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 363A.29, subd. 1 (2008).

2. The Department has complied with all relevant procedural requirements of law and rule and the Complainant received proper notice of the hearing in this matter.

3. The Minnesota Human Rights Act (MHRA) defines a “place of public accommodation” as a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.²¹

¹⁸ Ex. 60 at 2.

¹⁹ Test. of E. Maxson; Test. of B. Maxson; Ex. 60 at 2.

²⁰ Complaint ¶ 7.

²¹ Minn. Stat. § 363A.03, subd. 34 (2008).

4. Abercrombie & Fitch is a place of public accommodation within the meaning of the MHRA because it is a business whose goods, services, and facilities are made available to the public.

5. A “disability” is any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.²²

6. M.M. is a disabled person within the meaning of the MHRA because she has a physical, sensory, or mental impairment (autism) that materially limits one or more major life activities.

7. It is an unfair discriminatory practice for a place of public accommodation not to make reasonable accommodation to the known physical, sensory, or mental disability of a disabled person. In determining whether an accommodation is reasonable, the factors to be considered may include:

- (i) the frequency and predictability with which members of the public will be served by the accommodation at that location;
- (ii) the size of the business or organization at that location with respect to physical size, annual gross revenues, and the number of employees;
- (iii) the extent to which disabled persons will be further served from the accommodation;
- (iv) the type of operation;
- (iv) the nature and amount of both direct costs and legitimate indirect costs of making the accommodation and the reasonableness for that location to finance the accommodation; and
- (vi) the extent to which any persons may be adversely affected by the accommodation.²³

8. The request that Abercrombie & Fitch permit M.M. to use the fitting room with her sister on August 23, 2005, was reasonable and necessary to accommodate M.M.’s disability.

9. Abercrombie & Fitch knew of M.M.’s disability on August 23, 2005.

²² Minn. Stat. § 363A.03, subd. 12.

²³ Minn. Stat. § 363A.11, subd. 1(2).

10. Abercrombie & Fitch committed an unfair discriminatory practice on August 23, 2005, when it failed to make a reasonable accommodation to the known disability of M.M.

11. Minn. Stat. § 363A.29, subd. 4(a), requires the award of a civil penalty to the State when the respondent is found to have violated certain provisions of the MHRA, including § 363A.11. A civil penalty is required in this case. In determining the amount of the penalty, the following factors are to be considered: the seriousness and extent of the violation; the public harm occasioned by the violation; whether the violation was intentional; and the financial resources of the respondent.

12. Under Minn. Stat. § 363A.29, subd. 4(a), victims of discrimination are entitled to compensation for mental anguish and suffering from discriminatory practices. M.M. suffered mental anguish as a result of Abercrombie & Fitch's discriminatory conduct and is entitled to compensation for mental anguish and suffering.

13. Minn. Stat. § 363A.29, subd. 4(a), authorizes the Administrative Law Judge to award reasonable attorney's fees to a party who has suffered discrimination. An award of attorney's fees is merited in this case.

14. Minn. Stat. § 363A.29, subd. 11, requires the Administrative Law Judge to order a respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the Department for all appropriate litigation and hearing costs unless payment of the costs would impose a financial hardship on the respondent. There is no evidence that assessment of litigation and hearing costs would impose a financial hardship on the Respondent.

15. Pursuant to Minn. Stat. § 363A.09, subd. 3, an Administrative Law Judge may impose such other relief as is deemed necessary to effectuate the purposes of the MHRA.

Based upon the foregoing conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. Respondent shall cease and desist from engaging in unfair discriminatory practices based on disability.
2. Respondent shall:

(i) Review and revise its policy on providing reasonable accommodations to disabled persons and its fitting room policy to clarify how managers and associates should respond to requests for reasonable accommodations from customers with disabilities, including those disabilities that are not obvious physical impairments. The policy shall be submitted to the Commissioner for review and, upon approval by the Commissioner, should be distributed to all current and future Minnesota employees.

(ii) Provide at least one hour of training to all current Minnesota employees who interact with the public on how to implement the fitting room policy when customers with disabilities request reasonable accommodations. The Respondent shall submit a training proposal to the Commissioner for approval, including the name and qualifications of the trainer, a description of the course content, and a description of the training on this policy that will be provided to newly hired employees in Minnesota for the next five years.

(iii) Post signs near the fitting room in all Minnesota stores stating that Respondent's policy is to allow only one person in a fitting room at a time and that individuals with a disability should speak to a sales associate to request an exception to the policy. The Respondent shall submit the draft language to the Commissioner for review and approval.

3. Respondent shall remit to M.M. \$25,000 for mental anguish and suffering, pursuant to Minn. Stat. § 363A.29, subd. 4(a).

4. Respondent shall remit a civil penalty to the Minnesota State Treasurer in the amount of \$25,000, for deposit in the General Fund of the State of Minnesota, pursuant to Minn. Stat. § 363A.29, subd. 4(a).

5. Within 20 days, counsel for M.M. shall submit an affidavit to the Administrative Law Judge as to the attorney's fees and costs claimed in this matter, pursuant to Minn. Stat. § 363A.29, subd. 4(a). The affidavit shall contain sufficient detail to identify the purpose of the work done each day.

6. Within 20 days, the Department of Human Rights and the Office of the Attorney General shall submit an affidavit to the Administrative Law Judge as to the litigation and hearing costs expended in preparing for and conducting the hearing in this matter, pursuant to Minn. Stat. § 363A.29, subd. 11. The affidavit pertaining to any fees claimed by the Office of the Attorney General shall contain sufficient detail to identify the purpose of the work done each day.

7. If the Respondent has any objection to the amounts specified in the affidavits it shall respond in writing within ten days of receipt of the above affidavits.

8. The effective date of this order shall be the date on which the Administrative Law Judge issues an order regarding attorney's fees and litigation and hearing costs.

Dated: June 16, 2009.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This Order is NOT a final decision in this case. The Administrative Law Judge will issue a final decision incorporating both liability and damages after receipt of the affidavits described in paragraphs 5 and 6 above and any objection thereto filed by the Respondent pursuant to paragraph 7.

MEMORANDUM

It is an unfair discriminatory practice under the MHRA for a place of public accommodation not to make reasonable accommodation to the known physical, sensory, or mental disability of a disabled person.²⁴ This is an unfair discriminatory practice that is distinct from claims of intentionally disparate treatment or disparate impact based on disability.²⁵ In order to prevail on a reasonable accommodation claim, the plaintiff must make a prima facie showing that the accommodation she seeks is reasonable on its face. The plaintiff must show that the requested accommodation is (1) linked to her disability-related needs, (2) necessary to afford her an equal opportunity to enjoy the goods, services, and facilities that the respondent makes available to the public, and (3) possible to implement. If the plaintiff satisfies these requirements, the burden shifts to the respondent to demonstrate undue hardship in the particular circumstances.²⁶ The Respondent's argument that a plaintiff must show intent to discriminate is supported only by citation to cases involving disparate treatment on the basis of a protected class and, as such, is unpersuasive.²⁷

²⁴ Minn. Stat. § 363A.11, subd. 1(a)(2).

²⁵ *Hinneberg v. Big Stone County Housing and Redevelopment Authority*, 706 N.W.2d 220, 225 (Minn. 2005) (there are three ways to prove disability discrimination: disparate treatment, disparate impact, and refusal to reasonably accommodate).

²⁶ See *Hinneberg v. Big Stone County Housing and Redevelopment Authority*, 706 N.W.2d at 226; *Huberty v. Washington County Housing & Redevelopment Authority*, 374 F.Supp.2d 768, 773 (D. Minn. 2005) (failure to accommodate claims under the FHAA, Rehabilitation Act, and MHRA are largely identical). See also *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (analysis is the same under the Americans with Disabilities Act, 42 U.S.C. § 12182(b)(2)(A)(ii)); *Fortyune v. American Multi-cinema, Inc.*, 354 F.3d 1075 (9th Cir. 2004) (same); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997) (same).

²⁷ See, e.g., *Monson v. Rochester Athletic Club*, 759 N.W.2d 60 (Minn. App. 2009), *rev. denied*, (Mar. 17, 2009) (disparate treatment on the basis of sexual orientation); *Potter v. LaSalle Sports*

The Commissioner and the Intervenor have demonstrated that the request to allow someone to be with M.M. in the dressing room is linked to her disability. The evidence is undisputed that M.M. is vulnerable and cannot be left on her own. Allowing her to have assistance in the dressing room is necessary to afford her an equal opportunity to enjoy the goods and services sold by the Respondent. Advising her to purchase clothing, try it on at home, and return what does not fit, does not provide an equal opportunity to enjoy those goods and services at the Respondent's store.²⁸

The Respondent does not dispute that the requested accommodation is reasonable; in fact, it maintains that the requested accommodation is entirely reasonable and expressly permitted by its policies and that, if the Respondent had known of the disability, it would have permitted the accommodation. The Respondent argues that Brittany Maxson did not request an accommodation based on M.M.'s disability. It maintains that its sales associate had no idea that M.M. was disabled, and that once its assistant manager learned of M.M.'s disability, he offered to allow her mother or sister to assist M.M. in the dressing room. The Commissioner and the Intervenor offer a starkly different account of the facts. They maintain that Brittany Maxson explained M.M.'s disability three times to the sales associate, as did Elizabeth Maxson, but he nonetheless declined their request to share the fitting room based on the loss prevention policy. They also maintain that when Elizabeth Maxson spoke to the assistant manager, he also declined their request based on his obligation to follow the fitting room policy, but he suggested that they buy as much merchandise as they wanted, bring it home to try on, and return the items that did not fit. For a variety of reasons, the Administrative Law Judge has concluded that the testimony of the Maxsons is more credible than that of the store employees.

First, the record supports the conclusion that although the written policies of Abercrombie & Fitch required employees to permit a disabled person and an assistant to share a fitting room, the company's practice clearly allowed loss prevention concerns to narrow the express words of the policy. The sales associate involved in this incident explained his training by loss prevention personnel on the fitting room policy (which took place in the early summer of 2005) as follows:

They explained the policy in that the one person per fitting room was a general rule of thumb. However, if a person of disability or

& *Health Club*, 368 N.W.2d 413 (Minn. App. 1985) (disparate treatment on the basis of affectional preference); *State by Beaulieu v. Clausen*, 491 N.W.2d 662 (Minn. App. 1992) (disparate treatment on basis of disability).

²⁸ See Minn. Stat. § 363A.11, subd. 2(2) (goods, services, facilities, privileges, advantages, and accommodations must be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual).

special needs came in, the policy allowed for that to be altered slightly.²⁹

The “slight alteration” was that, if a person is “clearly disabled,” the person is allowed to have more than one person in a fitting room, but not more than two persons. He indicated his belief that the company defined “clearly disabled” as someone using a wheelchair, walker, or crutches; in other words, a disability that could be visually confirmed.³⁰ The record supports the inference that store employees believed visual confirmation was necessary because people “make up excuses” to get around the policy and try to go into fitting rooms together all the time (especially girls).³¹

Second, the record further reflects that because M.M. did not have a “visible” disability, the sales associate believed that no exception could be made to the one-person-per-room policy. The assistant manager testified in his deposition that shortly after the incident, he asked the sales associate what had happened:

I remember the gist of it is that he had two girls that wanted to go into a fitting room together. It’s against the policy. *There wasn’t anything that was visible to him where assistance was needed, so –* Because Abercrombie’s policy allows if there’s someone that needs assistance, someone else can go in with them. *That wasn’t visible to him, and from there the situation took off.*³²

The sales associate testified that neither Brittany Maxson nor Elizabeth Maxson told him that M.M. was disabled, and that he did not learn of it until July 2006 when the charge of discrimination was filed. The assistant manager’s deposition testimony quoted above substantially contradicts this version of events. In addition, the assistant manager unequivocally testified in his deposition that he knew, from talking to the sales associate, that there was an issue regarding one of the girls having a disability, and that he knew of the issue before Elizabeth Maxson came back to the store seeking a copy of the fitting room policy.³³ Although the assistant manager later changed his testimony, the Administrative Law Judge believes that the first version is more accurate because it is consistent with the testimony of Brittany Maxson and Elizabeth Maxson that they did indeed inform the sales associate of M.M.’s disability. Moreover, even if the ALJ were to accept that Brittany Maxson failed to mention her sister’s disability, it defies belief that Elizabeth Maxson failed to make this clear to the sales associate.

²⁹ Ex. 17 (Morel Depo.) at 31.

³⁰ Ex. 17 at 38-39.

³¹ Ex. 18 (Splinter Depo.) at 21, 35.

³² Ex. 18 at 20 (emphasis added).

³³ Ex. 18 at 48.

Finally, the Administrative Law Judge does not accept the testimony of the assistant manager that, in his discussion with Elizabeth Maxson, he offered to allow both girls to use a fitting room. Elizabeth Maxson's testimony was consistent and clear. She wrote a letter shortly after the event, in which she described the incident and asked for a response other than an apology.³⁴ When no response of any sort was provided, she wrote another letter, explicitly stating that no accommodation was offered and as a consequence, her daughters were unable to shop at the store.³⁵ It makes little sense that she would have pursued her complaint if M.M. had been offered the opportunity to use the fitting room with her sister. In the eleven months prior to filing the charge of discrimination, the Maxsons sought only an acknowledgement that the policy was wrong; they sought no compensation from the company on behalf of M.M.

In addition, the record reflects that the assistant manager and other managers were "frantically" looking for a copy of the fitting room policy while Elizabeth Maxson was there, but they were unable to find it until after she left. It is reasonable to conclude that after finding and reading the policy, they learned what should have been done in response to her request. Because they took no information from her, however, they were unable to contact Elizabeth Maxson to remedy the situation.

Remedies

The Commissioner requests that the Respondent be required to revise its policy on providing reasonable accommodations to customers with disabilities to clarify that there are disabilities that are not obvious physical impairments. The Respondent's current policy requires reasonable accommodations, but the examples cited focus on mobility, visual, and hearing impairments.³⁶ It is reasonable to require the Respondent to review and revise this policy to make clear that there are other types of disabilities that cannot be visually confirmed and that reasonable requests for accommodations of such disabilities must be permitted. It is also reasonable to require revision of the fitting room policy to expressly clarify how sales associates and managers should respond to requests for accommodation and to require the posting of signs regarding the policy near fitting rooms.

The Commissioner also requested that the Respondent be required to provide at least 1.5 hours of training on these policies to all Minnesota employees who interact with the public. The Commissioner also seeks to require training for newly hired Minnesota employees for the next five years. It appears from the record that the Respondent tends to hire relatively young sales associates and managers who have little training or experience in human resources issues when they are hired and that there is a substantial amount of

³⁴ MDHR Ex. 5.

³⁵ MDHR Ex. 6.

³⁶ MDHR Ex. 13 at 9-10.

turnover in employment.³⁷ In addition, it appears that once hired, sales associates receive little if any training on accommodation of disabilities in general; their knowledge of company policy is obtained largely from reading the Associate Handbook. Assistant managers receive more training on discriminatory employment practices; specifically, they are required to complete an Inclusion Awareness Training Course pursuant to a consent decree entered into as the result of class action litigation commenced by the Equal Employment Opportunity Commission alleging employment discrimination on the basis of race and sex.³⁸ This awareness training is focused on preventing discrimination in the employment context, but it does not address accommodating the disabilities of customers. The Administrative Law Judge believes that one hour of training would be reasonable and helpful in preventing future incidents of this nature.

Because the Administrative Law Judge has found that Respondent violated Minn. Stat. § 363A.11, a civil penalty must be ordered. In determining the amount of the civil penalty, the Administrative Law Judge must consider (1) seriousness and extent of the violation, (2) the public harm occasioned by the violation, (3) whether the violation was intentional, and (4) the financial resources of the respondent. The Commissioner urges the Administrative Law Judge to require Respondent to pay “a significant” civil penalty, but it does not suggest an amount. The Commissioner contends that a large penalty is necessary because the Respondent is a large national corporation with a large number of employees in the state of Minnesota, and the amount of the penalty must be great enough to deter Abercrombie from committing future violations of the MHRA. The purpose of a civil penalty, however, is not to deter a future violation, but to penalize past discrimination appropriately, based on consideration of the statutory factors.

The violation proved in this case was serious, and the “extent” of the violation was limited to M.M., although the underlying failure to train sales associates and managers to understand the company’s obligations suggests the public harm may have been broader than this single case. It is of note that the Respondent failed to respond at all to Elizabeth Maxson’s multiple attempts to obtain an acknowledgement of the violation. And although the Administrative Law Judge does not believe the Respondent intended to keep a disabled person from trying on clothing, it is clear that the Respondent’s employees did not believe that M.M. was disabled because her disability could not be visually confirmed. The Respondent continued to deny that M.M. was a disabled person up until the first day of hearing, when it stipulated to her disability.³⁹ The Respondent’s prolonged refusal to accept a diagnosis that has been with M.M. since the age of 2, in conjunction with the Respondent’s failure to follow its own written policies on the accommodation of disability, further illustrate the seriousness and extent of the violation and the need for a reasonable penalty.

³⁷ The sales associate, assistant manager, and general manager involved in this incident are no longer employed by the Respondent.

³⁸ Ex. 14 at 27-30.

³⁹ See, e.g., Answer ¶ 4.

There is no evidence that the Respondent is unable to pay a penalty; the Respondent is a publicly traded corporation with many employees in Minnesota. Considering all these factors, the Administrative Law Judge believes a civil penalty in the amount of \$25,000 is appropriate.

In all cases in which a respondent has engaged in an unfair discriminatory practice, the Administrative Law Judge may order the respondent to pay the charging party damages for mental anguish or suffering, punitive damages, and reasonable attorney's fees. The Respondent argues that there is no evidence of increased emotional distress because M.M. did not seek treatment for it from a health care provider.⁴⁰ Damages for "mental anguish" under the MHRA are different from those that must be proved to establish a cause of action for intentional infliction of emotional distress. Under the MHRA, damages for mental anguish are expressly permitted and need not be supported by evidence of severity or physical injury, but rather may be established by subjective testimony.⁴¹

It is clear that this incident caused M.M. to suffer humiliation, embarrassment, and mental anguish. She was singled out and required to hear her sister and mother repeatedly ask for accommodations based on her disability, in front of a long line of customers, at a store that markets itself to young people as a purveyor of a particularly desirable "look."⁴² This was a mistake that has had profound emotional implications; it would be a sad experience for many teenage girls to recognize that they are "misfits" at Abercrombie & Fitch; but because of M.M.'s disability, she is likely to perseverate about the experience in a way that other girls might not.⁴³ The Administrative Law Judge believes M.M. should receive damages for mental anguish in the amount of \$25,000.⁴⁴ M.M. has not requested punitive damages, nor would they be justified on this record, but her counsel urges that damages for mental anguish be doubled or tripled. The MHRA permits an award of up to three times the charging party's actual damages, but does not allow for the multiplication of damages for mental anguish.⁴⁵

K.D.S.

⁴⁰ Ex. 60.

⁴¹ *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670, 677 (Minn. App. 1991); *Gillson v. State*, 492 N.W.2d 835, 842 (Minn. App. 1992).

⁴² See MDHR Ex. 13 at 27 (A&F Look Policy).

⁴³ Ex. 56 at 3.

⁴⁴ Although M.M. was a minor when her mother intervened in this action on M.M.'s behalf, M.M. is now an adult. Consequently, the award of damages is made directly to M.M.

⁴⁵ Minn. Stat. § 363A.29, subd. 4(a); *Ray v. Miller Meester Advertising, Inc.*, 664 N.W.2d 355, 370 (Minn. App. 2003).