DOCKET NO.: HHB-CV-20-6061006-S : SUPERIOR COURT

AMANDA R. WHITMAN-SINGH : JUDICIAL DISTRICT OF NEW BRITAIN

v. :

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL. : AUGUST 22, 2022

OFFICE OF CLERK
SUPERIOR COURT
2022 AUG 22 P 2:17
JUDICIAL DISTRICT OF
NEW BRITAIN

MEMORANDUM OF DECISION ON RECONSIDERATION

The plaintiff appeals the final decision of the Commission on Human Rights and Opportunities (CHRO or commission) dismissing her complaint that a public elementary school discriminated against her while she was breastfeeding her child during a meeting at the school. General Statutes § 46a-64 (a) (3) provides, "It shall be a discriminatory practice in violation of this section . . . for *a place of public accommodation*, resort or amusement to restrict or limit the right of a mother to breast-feed her child . . . ." (Emphasis added.) The CHRO hearing officer found that a school official told the plaintiff that she could not breastfeed in the meeting location. But the hearing officer did not find probable cause that school officials violated the plaintiff's right to breastfeed.

In a memorandum of decision dated November 11, 2021, this court affirmed CHRO's decision after concluding that General Statutes § 46a-63, which bars discrimination in places of public accommodation, did not apply to government entities. Section 46a-63 defines a place of public accommodation as "any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent." The court held that a separate statutory scheme addressed discrimination by government entities.

Electronic notice sent to counsel of record. Mailed to plaintiff. Sent to official reporter. A. Jordanopoulos, 8/22/22

CHRO timely moved for reconsideration, arguing that the court had decided a question that no party had briefed or argued. The court granted CHRO's motion, vacated the November 11, 2021 decision and scheduled the matter for supplemental briefing and oral argument.

For the reasons set forth below, CHRO has persuaded the court that § 46a-63 applies to both private establishments and government entities that cater their services and goods to the general public. However, contrary to the position of CHRO and its co-defendant, City of Norwalk Board of Education (City), the court concludes that a public elementary school is a place of public accommodation under § 46a-63. The court further concludes that CHRO erred in dismissing the plaintiff's breastfeeding discrimination claim under § 46a-64 (a) (3).

I

FACTUAL AND PROCEDURAL BACKGROUND

The court briefly summarizes the relevant facts. They appear in the Administrative Record, pp. 473-80.

On May 24, 2017, the plaintiff attended a meeting at the Cranbury Elementary School in the City of Norwalk to meet with the school's occupational therapist. The purpose of the meeting was to discuss the needs of one of her children. The meeting was in a classroom shared with another teacher and divided by a temporary wall. During the meeting the plaintiff began to nurse one of her other children. Several minutes later the teacher in the other part of the classroom approached the plaintiff and said, "Excuse me, Ma'am, you can't do that in here." The plaintiff's meeting was moved to another classroom, but the plaintiff was too upset and humiliated to continue with the meeting.

After complaining to the school's principal, the plaintiff filed a complaint with the CHRO alleging that the Norwalk Board of Education had restricted or limited her right to breastfeed, in

violation of § 46a-64 (a) (3). The commission issued a Finding of No Probable Cause on February 28, 2020. The commission issued a final, corrected Finding of No Probable Cause on March 4, 2020. The final decision assumed that the Cranberry Elementary School was a place of public accommodation. But for that assumption, CHRO would not have had jurisdiction over the plaintiff's claim. However, the hearing officer did not find probable cause that the conduct of school officials violated the plaintiff's right to breastfeed under § 46a-64 (a) (3). The hearing officer's decision contains no explanation why the facts as found did not constitute a violation.

The plaintiff moved the commission to reconsider its dismissal of her complaint. The commission denied her request on July 2, 2020. The plaintiff timely appealed to this court pursuant to General Statutes § 4-183.[1] The court finds that the plaintiff is aggrieved.

The parties briefed their administrative appeal, and the court heard oral argument on August 9, 2021. Significantly, CHRO's counsel rejected the hearing officer's implicit assumption that a public elementary school is a place of public accommodation. So too did the City. Through their arguments, both CHRO and the City suggested that a public elementary school could be a place of public accommodation under § 46a-63 under certain circumstances, but they declined to elaborate on what those circumstances might be.

The court issued its November 11, 2021 ruling affirming CHRO's decision on the alternative ground that § 46a-63 does not regulate state and local government entities. The court granted CHRO's motion to reconsider that ruling. The parties submitted supplemental briefs and the court heard further oral argument on April 25, 2022.

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[1] General Statutes § 4-183 (a) provides: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal."

II

DISCUSSION

A

Scope of Review

The question a court must answer in an administrative appeal is "not whether [it] would have reached the same conclusion [as the agency] but whether the record before the agency supports the action taken." (Internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 99 n.3, 671 A.2d 349 (1996). To the extent that the plaintiff challenges certain factual findings, General Statutes § 4-183 (j) states that the court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." A court may not disturb an agency's factual findings if they are supported by substantial evidence in the record. Such evidence exists if the record provides "a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 689, 99 A.3d 1038 (2014). "The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Internal quotation marks omitted.) *Huck* v. *Inland Wetlands & Watercourses Agency of Greenwich*, 203 Conn. 525, 542, 525 A.2d 940 (1987).

Where, as here, a court interprets a statute that an administrative agency is charged with enforcing, the agency's interpretation is entitled to deference if it has been "formally articulated and applied for an extended period of time, and that interpretation is reasonable." *Crandle* v. *Conn. State Employees Retirement Commission*, 342 Conn. 67, 269 A.3d 72 (2022).

B

Does Section 46a-63 Apply to Governmental Entities?

CHRO offered several arguments why the term "establishment" in § 46a-63 includes government entities, provided that the entity also "caters or offers its services or facilities or goods to the general public." The court rejected those arguments for the reasons stated in its now-vacated November 11, 2021 ruling. However, CHRO offers a new argument on reconsideration.

When the court granted CHRO's motion for reconsideration, the court asked the parties to submit supplemental briefs that addressed whether and how § 46a-63 waived the state's sovereign immunity from suit. Our state Supreme Court has repeatedly held that "[a]ny statutory waiver of immunity must be narrowly construed" and that "[t]he state's sovereign right not to be sued may be waived by the legislature [only if] clear intention to that effect is disclosed by the use of express terms or by force of a necessary implication." (Internal quotation marks omitted.) *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 272 A.3d 603 (2022) (citing *Struckman* v. *Burns*, 205 Conn. 542, 534 A.2d 888 (1987)).

Distilled to its essence, CHRO's argument on appeal is that the term "establishment clearly and unambiguously includes government entities, provided they also satisfy the other requirements of the § 46a-63, to wit, they cater or offer their services or facilities or goods to the general public. The court's November 11, 2021 ruling rejects the argument that the statute is clear and unambiguous. And, as previously noted, the court concluded that a different statutory scheme proscribed discrimination by government entities. However, CHRO has pointed the court to another statutory provision that has persuaded the court to change its mind about how the ambiguity in § 46a-63 should be resolved.

In 1967, Public Act 67-715 was signed into law. Among other things, the act amended the public accommodations statute to preclude the Office of the Attorney General from representing CHRO's predecessor in cases in which "a state agency or a state officer" was the respondent. CHRO Supp. Br., p. 15. The court agrees with CHRO that this amendment reflects the General Assembly's intent to include government entities within the meaning of "establishment." "The only way a public accommodations provision precluding the Attorney General's office from prosecuting cases against state respondents would have significance is if it was intended to be applicable to actual cases, specifically those in which public accommodations claims were being pursued against state agencies or officials. Any other reading would render such a provision entirely meaningless. . . ." CHRO Supp. Br., p. 16.

In sum, the court concludes after reconsideration that § 46a-63 does not categorically exclude government entities. Such entities are places of public accommodation if they cater or offer their services or facilities or goods to the general public. The court now considers whether public elementary schools are places of public accommodation under § 46a-63.

C

Are Public Schools Places of Public Accommodation?

In *Quinnipiac Council, Boy Scouts of America, Inc.* v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987), the Connecticut Supreme Court held that the Boy Scouts of America was a place of public accommodation under § 46a-63. The court explained that "the question of coverage [under the statute] must reflect the legislative purpose of eliminating discriminatory conduct by those who serve the general public. From that vantage point, the organizational status of the enterprise that is the service provider cannot be the determinant of statutory coverage. A hospital, for example, cannot refuse its services to a

member of the general public simply because the hospital is a nonprofit corporation. . . . Similarly, a private university that opens its theater facilities for the entertainment of the general public cannot refuse admission for reasons of race or sex or other grounds made illegal by [the public accommodations statute]." (Internal citations omitted.) Id., 204 Conn. 299. See also *Corcoran* v. *German Social Society Frohsinn*, 99 Conn. App. 839, 844, 916 A.2d 70 (2007) (quoting *Quinnipiac Council*).

If the Boy Scouts of America—a private organization that offers its scouting program and services solely to young people, i.e., non-adults—is a place of public accommodation, it is difficult for the court to understand how and why CHRO contends on appeal that a public elementary school is not. Indeed, the CHRO hearing officer thought that the status of a public school as a place of public accommodation was so obvious that the issue did not warrant any discussion.

Yet CHRO now contends that the Cranbury Elementary School was not a place of public accommodation *in the factual context of this case.* CHRO Brief (dated 6/2/21) (CHRO Br.), pp. 7-9. "For its students, Cranbury is a place of public accommodation. But for others—such as parents, guardians, relatives, friends, and neighbors of Cranbury students—the legal relationship to Cranbury very much depends on context."[2] CHRO Br., p. 7. The court cannot square that

[2] During oral argument, the court posed numerous hypotheticals to CHRO's counsel to determine the factual contexts in which a public elementary school would be a place of public accommodation for persons other than students. Counsel refused to answer the court's hypothetical questions. Instead, counsel insisted that the court only needed to decide whether Cranbury Elementary School was a place of public accommodation under the specific facts of this case.

Judges pose hypothetical questions during oral argument because they need to understand how their decisions in the cases before them may affect the resolution of future cases. This is especially true in statutory interpretation cases. The refusal of CHRO's counsel to answer the court's hypothetical questions is troubling, particularly after CHRO argued in its briefs that factual context is relevant to determining whether an establishment is a place of public accommodation. It

argument with the text of the statute, the holding of *Quinnipiac Council* and the examples cited therein.

Public schools exist to offer their educational services to the public. That they do so for students in kindergarten through grade 12 does not undercut their status as places of public accommodation. An establishment that offers its services to the public is an "establishment" within the meaning of § 46a-63 even if directs its services towards a subset of the general population.

D

Did School Officials Restrict or Limit the Plaintiff's Right to Breastfeed?

There are few human acts more basic and natural than a mother holding a young child to her breast to nurse. Sadly, our society has sexualized that natural human act to the point that mothers who need to breastfeed their children are often asked, if not required, to leave public places, such as restaurants, theaters, parks, etc., to do so.

To the court, the plain language of § 46a-64 (a) (3) reflects the General Assembly's clear and unambiguous intent to protect women who breastfeed against such discrimination. But CHRO, the state agency tasked with enforcing laws prohibiting discrimination on the basis of "race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability," balks at enforcing § 46a-64 (a) (3). It is difficult to imagine CHRO not finding probable cause under the statute if a school official told a person of color, a transgender person or a gay or lesbian couple holding hands during a meeting, "You can't do that in here."

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behooves counsel to be prepared to answer hypothetical questions on further appeal to the Appellate or Supreme Courts.

According to CHRO, the text of the statute— "It shall be a discriminatory practice in violation of this section . . . for a place of public accommodation, resort or amusement to restrict or limit the right of a mother to breast-feed her child"—actually means: "*If, but only if, a right to breastfeed exists elsewhere in the law, then it is enforceable under § 46a-64 (a) (3).*" In other words, CHRO maintains that a party asserting a claim under the statute bears the burden of proving that the right to breastfeed exists under some other law, such as a statute or the federal constitution. CHRO Br., pp. 10-16.

The court is not persuaded. When the General Assembly passes a statute that states, simply, that a person may not infringe on another person's "right to do X", the "right to do X" is presumed to exist.

Notably, before it dismissed the plaintiff's complaint, CHRO consistently interpreted § 46a-64 (a) (3) to mean that a place of public accommodation could not require a mother to go to a special room or use a cover in order to breastfeed. See *Guide to Connecticut Breastfeeding Nondiscrimination and Workplace Accommodation Laws*. Administrative Record, pp. 165-70. The Guide is a joint publication of CHRO, the Connecticut Department of Public Health, the Connecticut Department of Labor and the Connecticut Breastfeeding Coalition.

Notwithstanding its own longstanding interpretation of the law, CHRO now argues that § 46a-64 (a) (3) is ambiguous and that the court may consider legislative history to resolve the ambiguity. CHRO Br., p. 13. The legislative history includes the statement of then-Representative Ellen Scalettar, who stated that the statute does not create a right to breastfeed. Instead, it means "that to the extent to which a woman does have a right to breastfeed, nothing in this bill will limit that right." CHRO Br., p. 15.

If § 46a-64 (a) (3), is ambiguous, the court acknowledges that this particular statement from the legislative history supports CHRO's interpretation. But § 46a-64 (a) (3) is not ambiguous with respect to the existence of the right itself. *Cf. CHRO ex rel Vargas* v. *State Dept. of Correction*, No. HHBCV136019521S (Jan. 10, 2014) (Prescott, J.) ("[t]he statute provides, and the parties agree, that if the prison visiting room is a place of public accommodation within the meaning of the statute, the DOC could not 'restrict or limit' a mother's right to breastfeed her child by requiring her to cover her breast while the child is feeding.") Because the statute is not ambiguous, the court cannot rely on legislative history to vary or contradict the statute's plain meaning.

Even if § 46a-64 (a) (3) is ambiguous, however, the legislative history is not dispositive. The court must also show appropriate deference to CHRO's longstanding interpretation of the statute. As CHRO noted in its briefs, "it is the well established practice of [our] court[s] to accord great deference to the construction of [a] statute by the agency charged with its enforcement." CHRO Br., p. 22 (citing *Cadlerock Properties Joint Venture, L.P.* v. *Comm'r of Environmental Prot.*, 253 Conn. 661, 669, 757 A.2d 1 (2000)). "This is particularly so when the interpretation 'has been formally articulated and applied for an extended period of time, and that interpretation is reasonable.'" *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 717, 6 A.3d 763 (2010). The Supreme Court recently clarified that judicial scrutiny of a longstanding administrative interpretation is not a precondition of judicial deference, for "a time-tested interpretation, like judicial review, provides an opportunity for aggrieved parties to contest that interpretation." *Crandle* v. *Conn. State Employees Ret. Commission*, 342 Conn. 67. It also provides time for the General Assembly to amend or clarify the statute if it disagrees with the agency's interpretation. Id. ("In certain circumstances, the legislature's failure to make

changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute").

CHRO's longstanding, time-tested interpretation of § 46a-64 (a) (3) is reflected in the commission's *Guide to Connecticut Breastfeeding Nondiscrimination and Workplace Accommodation Laws.* CHRO offers no credible explanation for its sudden "about face" as to the meaning of the statute. The state appellate precedents governing judicial deference to an agency's longstanding interpretation of a statute that it enforces require this court to defer to CHRO's time-tested interpretation of § 46a-64 (a) (3)—not the interpretation adopted for the purpose of this litigation.

III

CONCLUSION

For the foregoing reasons, the court concludes: (1) General Statutes § 46a-63 applies to private and governmental establishments that cater their goods and services and open their facilities to the public; (2) public elementary schools are places of public accommodation within the meaning of § 46a-63; (3) the CHRO hearing officer erred in concluding that probable cause did not exist to find that the City of Norwalk Board of Education violated the plaintiff's right to breastfeed her child under § 46a-64 (a) (3).

The commission's final decision and Finding of No Reasonable Cause is REVERSED. Judgment shall enter for the plaintiff. The case is remanded to CHRO for further proceedings consistent with this opinion.

SO ORDERED.

August 22, 2022

(Klau, J.) 8/22/22

Daniel J. Klau, Judge

[illegible], 8/22/22
Court Officer