

# Ohio Attorney General's Civil Rights Reporter

Highlighting Civil Rights Issues and Case Law



## December 2016

### Avery the Furry Prosecutor

While all prosecutors work tirelessly, there is one that works doggedly. He is Avery II, the facility dog of the Summit County Prosecutor's Office. Loyal and loveable, Avery stands (and sits) with crime victims and witnesses, especially children and people with developmental disabilities, providing them with emotional support.

Avery is a highly trained, four-year-old yellow Labrador retriever mix. He was trained by Canine Companions for Independence, a nonprofit organization founded in 1975 that provides trained assistance dogs to organizations across the country. Canine Companions is headquartered in Santa Rosa, California, and has a branch office in Delaware, Ohio. Avery spent two years in training at Canine Companions and was carefully matched with the Summit County Prosecutor's Office based on his easygoing temperament and his ability to sit quietly for long periods of time. He knows approximately 40 commands. Most importantly, he is specially trained to provide anxiety relief when an anxious witness needs him.

Summit County Prosecutor Sherri Bevan Walsh was instrumental in adding Avery to her staff. While attending a National District Attorney's conference, she learned that New Mexico was using a facility dog to assist victims and witnesses. Recognizing the benefits, Prosecutor Walsh worked with Canine Companions so Summit County could acquire its own facility dog. She also enlisted Melanie Hart, her administrative assistant, to be Avery's primary caretaker. Melanie had to undergo a thorough application process and attend a week-long course at Canine Companions' training facility in Ohio. Avery's services to Summit County are priceless and don't cost taxpayers a dime. Canine Companions donates training updates. His veterinarian services are provided by Stow Kent Animal Hospital, and his food and other necessities are provided by Pet Supplies Plus.

Avery began his courtroom work in August 2013. He was the first facility dog used by any prosecutor's office in Ohio. Now 25 states allow facility dogs in their courtrooms to help witnesses testify, and that number is expected to grow.

Avery has assisted in more than 88 cases, including 12 trials. His responsibilities include helping participants in two specialty courts – the drug court, called the Turning Point Program, and Valor Court, which handles cases involving veterans. Avery helps relieve the

stress of both participants and their family and friends. As a special treat for participants who complete the programs, Avery fetches them a coffee mug, which is theirs to keep. Prosecutor Walsh notes that Avery is available to both the prosecution and defense counsel. “If it would help a child be less traumatized, it doesn’t matter to us if it is for the prosecutor or the defense.”

Even legal challenges haven’t stopped Avery from his courtroom work. A defendant claimed that Avery’s presence in the courtroom prejudiced his case. (See *State of Ohio v. George* (Dec. 31, 2014), 2014-WL-7454798.) But the Ninth District Court of Appeals disagreed, and that made Avery’s tail wag.

When Avery is not in the courtroom, he also helps at a battered women’s shelter. He was part of a team that gave a presentation on facility dogs to the American Bar Association in Washington D.C. Recently, he participated in DogFest Walk’n Roll in Hudson, where he helped raise money to provide more highly trained assistance dogs to those who need them. Avery’s hard work has helped make the court system a little less intimidating, earning him the right to his own badge.

For more information on Avery, follow him on Facebook at <https://www.Facebook.com/SummitCountyProsecutorAveryll/w>.

## **Meet Commissioner Lori Barreras**

Commissioner Lori Barreras’s interest in civil rights started at an early age. On her first day of kindergarten, her teacher informed the class that they could speak only English at school and made name tags and stuck them on the kids, so they could learn their names. Commissioner Barreras, who is of Hispanic descent, told her teacher that her name was Lorena, and the teacher wrote that name on her sticker. But, later in the day, when the same teacher was labeling her crayon box, she decided to change Lorena to Lori. In that instant, a scared little girl was Anglicized. That moment in kindergarten, Commissioner Barreras reflects, was the catalyst for her consciousness about civil rights issues.

Commissioner Barreras began her career as a public servant with the IRS in 1990, where she developed her interview techniques and her ability to assess truthfulness and weigh evidence, skills she finds useful as a commissioner. In 1995, she began her dream job as an Equal Employment Opportunity Commission investigator. She was involved in one of the nation’s first HIV-related cases: an employer refused to offer a pregnant employee full-time employment after learning she had contracted HIV from her husband. Commissioner Barreras says she felt great satisfaction from personally delivering the settlement check to the young mother.

Her unique perspective comes from various experiences from the defendant and the plaintiff’s point of view. After a successful tenure at the EEOC, she was recruited to join the corporate ranks of Battelle’s human resources team. While there she modernized two different HR departments for Battelle before becoming vice president of Battelle’s largest

laboratory, the Oak Ridge National Lab, which has more than 4,000 employees. Later, she joined The Ohio State University, serving as the assistant vice president for human resources. These senior leadership positions helped develop an appreciation for the employer's perspective.

This extensive experience has proven to be invaluable to the OCRC because most of the charges the commission receives are based on employment issues. Commissioner Barreras says most of the charges she sees are the result of an inconsistent or unfair HR policy, practice, or employee. She believes the best way to stop discrimination from happening is to understand the importance of consistently applying HR practices, policies, and disciplinary decisions and using those practices to create the right culture within an employer. She believes that once discriminatory actions are discovered, they should be dealt with promptly and uniformly. In her experience, one of the biggest challenges for some large organizations is consistency. Commissioner Barreras believes it is important to have someone who can see an organization's big picture in order to promote consistent practices throughout the company.

Commissioner Barreras wants to assure the public that the commissioners will do a thorough job. They will be fair, hear all sides, and try to arrive at reasonable remedies. For those who may appear before the commission as respondents, charging parties, or counsel, she encourages each party to take the process seriously. If you ask to appear before the commissioners, she says, you need to be prepared. Commissioners will be fair, but they will ask tough questions. In addition, it's important to bring someone who knows the facts of the case with you. Commissioners prefer to speak to the source for information to assess their credibility, she says, rather than having attorneys relay the message.

The OCRC provides valuable education and outreach for organizations and individuals. Commissioner Barreras says many don't have the resources to learn all of the rules on their own. Most people don't intentionally do the wrong thing, she says, they just don't know the difference. Although the initial cost for training can seem daunting to a company or business owner, Commissioner Barreras cautions companies to think about costs an organization could incur if it doesn't invest in the training. It's more than the legal costs, she says. Companies should also consider the cost in lost employee morale, and how that affects an organization when its employees come to work every day and feel undervalued.

After three years on the job, Commissioner Barreras says she is humbled to serve, adding that the honor is attached to significant responsibility.

One of the best parts of her job, she says, is when someone approaches her after a commission meeting and thanks her for asking questions and for listening to the answers. On a number of occasions, she says, the positive feedback came even when the commission had not ruled in that person's favor. Unfortunately, there are also moments that aren't as pleasant. Commissioner Barreras says it is difficult to handle cases where something blatantly unfair happened in the workplace, but because it didn't fall under the commission's jurisdiction, the commissioners can't help; they must enforce the law.

Commissioner Barreras is the vice chair of the Greater Columbus Arts Council and also serves on Governor Kasich's Ohio Collaborative Community-Police Advisory Board. Her service in the community influences the work she does on the commission to make sure all Ohioans receive fair treatment, particularly with consistent and productive hiring policies and procedures.

As she looks back on those days in kindergarten, Commissioner Barreras is pleasantly surprised how her life has come full circle. She is confident that she is making a difference in people's lives, but she still keeps a picture of the "Lorena sticker" as a reminder of the work that still needs to be done.

## **Help for Small Businesses: Handling Administrative Complaints and Hearings**

Many charges filed with the Ohio Civil Rights Commission are resolved at an early stage, but in some cases, the commission issues an administrative complaint and a hearing is held. As part of our ongoing efforts to assist small businesses, we're outlining what happens in this stage of the process.

### ***Re-capping tips from the last issue***

In the last issue of the "Civil Rights Reporter," we discussed what happens when a charge of discrimination is filed against your small business. In short, you have the opportunity to explain what happened through a written position statement. During a typical investigation, you also will have the chance to provide the commission with witness testimony and documents. As underscored in the last issue, throughout the entire investigatory process, the parties are encouraged to reach a resolution either through informal mediation or (if a probable cause determination is made) through conciliation.

### ***Moving forward***

What happens, though, if the matter cannot be resolved after conciliation? Quite simply, the case progresses to the next phase of the process. The commission issues an administrative complaint and schedules the matter for an evidentiary hearing. Once this formal complaint is issued, the commission refers the matter to its legal counsel, the Ohio Attorney General's Office, and an assistant attorney general is assigned the case.

### ***Answering the complaint***

Your own attorney will be of great assistance to you when responding to the commission's complaint. As the responding party, or "respondent," you have 28 days from the time the complaint is served to file your response, which is called an answer. It is not uncommon to get an extension of time to file an answer, but state rules prohibit extensions within 30 days of the hearing. Be careful. Failure to file an answer could result in default in which all the allegations in the administrative complaint are deemed admitted. (See Ohio Administrative Code (OAC) Section [4112-3-06\(F\)](#).)

Your attorney must file a written notice of appearance with the Ohio Civil Rights Commission. The person who files the notice of appearance may not withdraw from the proceedings without permission from the administrative law judge who will oversee the proceedings and

issue a final report and recommendation. The person who filed the charge of discrimination, the “complainant,” is a separate party, who may be represented by his or her own attorney.

### ***Preparing for the hearing***

To prepare for the hearing, the parties may gather evidence from each other through a process called discovery. The administrative law judge has the ability to control the scope of discovery, and both the commission and the respondent have the same rights of discovery. Through the discovery process, the parties often issue interrogatories, requests for production of documents, and requests for admissions. Depositions are also very common. In many ways, the type of discovery conducted is similar to that conducted in common pleas court, though generally the administrative forum is designed to be less formal than court.

The person who filed the charge also must receive copies of all discovery and other items filed with the administrative law judge. If a party fails to respond to discovery requests, the administrative law judge may issue an order for sanctions against that party, such as ordering a claim to be taken as established, prohibiting the sanctioned party from introducing evidence, striking a portion of the pleading, or recommending the dismissal of the complaint. The role of the administrative law judge is to make a record for the commission, so that the commissioners, who must ultimately decide the case, will have a record developed through sworn testimony.

Before a hearing is held, the administrative law judge will conduct a pre-hearing conference. These conferences generally are held by telephone a month or two before the scheduled hearing date. The purpose of the pre-hearing conference is to clarify the issues; address matters that may expedite the hearing or avoid unnecessary repetition of evidence; acknowledge certain facts; authenticate and exchange documents; disclose witnesses; establish a discovery cut-off; and determine whether settlement is possible. (See OAC [4112-3-07\(E\)](#).)

### ***What to expect at the hearing***

Hearings are not as formal as jury trials, but they are conducted in a similar manner to trials in common pleas court. (This is true even though the administrative law judge is not bound by Ohio’s Rules of Evidence.) Witnesses are sworn under oath, and they testify under direct and cross examination. They also may be questioned by the administrative law judge. Additionally, the administrative law judge will rule on objections. At the hearings, which are open to the public, everyone is expected to conform to the same standards of ethical conduct as in court. Although rarely a problem, the administrative law judge has the authority to bar someone who engages in inappropriate behavior. (See OAC [4112-3-07\(H\)](#).)

After the hearing is complete, the recorded testimony is transcribed, and the administrative law judge encourages the parties to submit post-hearing briefs. The briefs provide the parties an opportunity to summarize the evidence in their favor and cite other cases that support their position. The commission’s brief is due 21 days after receiving the transcript. The respondent’s and complainant’s briefs are due 21 days after being served with the commission’s brief. (See OAC [4112-3-07\(H\)\(7\)](#).)

After the arguments have been fully briefed, the administrative law judge will submit a written report to the panel of commissioners. The report will include the administrative law judge's findings of facts, conclusions of law, and recommended course of action (either to issue a dismissal order or to issue a cease and desist order). Because the report is a recommendation, the commission reviews it before adopting a course of action. (See [OAC 4112-3-09\(A\)](#).)

If one of the parties disagrees with the administrative law judge's report, he or she can submit written objections to the commission's central office within 20 days from the date of the report. The other parties may file responses to those objections within 14 days from the date the objections were served. The commission will consider objections before it approves, modifies, or disapproves the report. (See [OAC 4112-3-09\(B\)](#).) If the recommendation is adopted, the commission issues a final order.

### ***Beyond the hearing phase***

For complainants and small business owners alike, the entire process from investigation to litigation can be time consuming and, at times, stressful. It is not uncommon for several years to lapse from the time a charge of discrimination is filed until a final decision is issued. Of course, not all cases go through the entire process. Like many lawsuits, cases before the Ohio Civil Rights Commission settle. Your best course of action is to make sure you consult with your legal counsel to navigate the different procedural steps and develop the best case strategy.

Curious to know more about this phase of the process? Check out the next issue of the "Civil Rights Reporter" when we discuss the nuances of appealing a commission decision.

## **Title II of the Americans with Disabilities Act**

Title II of the Americans with Disabilities Act prohibits any public entity from discriminating against "qualified" individuals with disabilities in the provision or operation of public services, programs, or activities. (See *Williams v. City of New York*, 121 F. Supp.3d 354(S.D. N.Y.) and *Lewis v. Truitt*, 960 F. Supp. 175 (1997).)

**Question:** Do ADA obligations to accommodate a person with a disability apply to a police officer when making an arrest?

**Quick Answer:** The answer is yes, if doing so could easily be accomplished without endangering the officers or the public safety and without interfering in the lawful execution of the officers' duties.

In the case of *Williams v. The City of New York*, the plaintiff is deaf, as is her husband, and they primarily rely on American Sign Language (ASL). They are landlords and called for police assistance when their tenants were vacating the premises. They anticipated trouble because of a history of hard feelings. When the officers arrived, they concluded there were "arrestable offenses" and took both a tenant and Williams into custody. In Williams' case, they did so without making any effort to communicate with her. The court noted that "[a]t no

time from the police officers' initial on-the-street interaction with Plaintiff, when they concluded that probable cause existed for her arrest, until her release from NYPD custody almost 24 hours later, did the NYPD provide Plaintiff with an ASL interpreter or any auxiliary communication aid." For this reason the city's motion for summary judgment was denied, with the court noting the city may be found liable for discrimination on the basis of disability at the scene of an arrest.

In the case of *Lewis v. Truitt*, police officers, without a warrant, attempted to remove a 9-month-old child from the home of the child's grandfather at the request of child protective services because the child's mother had committed suicide, and there was a dispute regarding who would be granted custody. The grandfather questioned the police's authority to remove the child and, because he was deaf, asked that the officers communicate with him in writing. In spite of assurances by other members of the household about his deafness, the officers believed he was lying and pulled him to the floor by his hair, handcuffed him, placed him under arrest, and proceeded to kick and hit him. The city's motion for summary judgment was denied, and the issue of an ADA violation proceeded to trial. The *Lewis* court relied on a statement from the House Judiciary Committee stating: "In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid of seizures. Such discriminatory treatment based on disability can be avoided by proper training."

The preceding cases are easily distinguished from those where courts have held that Title II contains an "exigent circumstances" exception that absolves public entities of their duty to provide any reasonable accommodation. In *Waller ex rel. Estate of Hunt v. Danville*, 556 F.3d 171 (4<sup>th</sup> Cir. 2009), officers were absolved of any duty to reasonably accommodate Hunt's mental illness when confronted with a hostage situation where the hostage had been missing for days. Hunt used threatening language toward the officers who were attempting to negotiate the release of the hostage, and when the officers forced their way in, Hunt came toward them brandishing what looked like a knife. In *Gohier v. Enright*, 186 F.3d 1216 (10<sup>th</sup> Cir. 1999), an officer observed a man walking down the middle of the street after midnight. The officer got out of his car and identified himself saying, "Police, stop!" The man, a paranoid schizophrenic, advanced on the officer while holding a slender object the officer thought was a knife. As the officer retreated toward his car, the man stopped and said, "Do you like your car? It's gone," and opened the car door. The officer moved forward to stop him, but the man lunged toward the officer, making a stabbing motion with the object, and the officer shot him.