

Gersten Savage, LLP
David Lackowitz (DL8591)
Attorneys for Plaintiff
600 Lexington Ave., 9th Floor
New York, NY 10022
(212)752-9700
dlackowitz@gerstensavage.com

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LUIS CARLOS MONTALVÁN,

Plaintiff,

-against-

MCDONALD'S USA, LLC, CLAUDIA ALVAREZ,
CARLOS SALA, JOHN DOE 1 and JOHN DOE 2,

Defendants.

FILED-X
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ OCT 28 2009 ★

BROOKLYN OFFICE

COMPLAINT

Plaintiff demands a trial

by jury

Civ. _____

4631

AMON, J.

GOLD, M.J.

-----X
Plaintiff Luis Carlos Montalván, by his undersigned counsel, for his complaint against

defendants McDonald's USA, LLC, Claudia Alvarez, Carlos Sala and John Does 1 and 2 alleges

as follows:

Nature of the Action

1. Luis Carlos Montalván, a highly decorated and combat-disabled former Captain in the United States Army, was repeatedly denied equal treatment by McDonald's due to his dependency on his service dog in violation of the Americans with Disabilities Act (ADA), among other statutes. During his attempt to document McDonald's discriminatory conduct, he was physically attacked and beaten by various McDonald's employees.

The Parties

2. In September 2007, the plaintiff, Captain Luis Carlos Montalván, departed the United States Army after 17 years of military service during which time he served as a communications specialist, military policeman, infantryman, parachutist and Tank and Scout Platoon Leader.

3. During his tours of duty in Iraq, Mr. Montalván was awarded many commendations including the Combat Action Badge, two Bronze Stars, the Purple Heart and three Army Commendation Medals for valor and meritorious service. He has mentored and trained officers at Fort Benning and has also served on various U.S. military policy development teams. Mr. Montalván is presently a member of the Council for Emerging National Security Affairs (CENSA), the Senior Vice-Commander of the Military Order of the Purple Heart, Brooklyn Chapter, and a co-Founder of the Iraq Veterans' Refugee Aid Association (IVRAA).

4. During his first tour of duty in Iraq from 2003 – 2004, Mr. Montalván was wounded by attackers wielding knives and hand grenades. During this attack, he was stabbed multiple times and suffered spinal cord damages, multiple lacerations, post-traumatic stress disorder and a severe concussion which caused traumatic brain injury.

5. Despite the severity of Mr. Montalván's wounds, in March 2005 he returned to duty to lead his fellow soldiers on a second tour of duty in Iraq. Following his return home from this final tour of duty, Mr. Montalván required considerable medical and therapeutic care. He is presently receiving continual medical treatment at various New York City veterans' facilities.

6. On November 17, 2008, Mr. Montalván completed service dog training at East Coast Assistance Dogs (ECAD) and his service dog, Tuesday, has not left his side since. Tuesday, a Golden Retriever trained to assist him with balance, mobility and emotional support,

wears a bright red vest which clearly indicates that he is not a pet, but rather a highly trained service dog.

7. Mr. Montalván is presently a writer, freelance journalist and photographer studying to obtain Master's of Science degrees in Journalism and Strategic Communications at Columbia University and he holds a Bachelor's Degree in Sociology from the University of Maryland. He has had articles published in various national publications including *The New York Times* and *The Washington Post* and in 2008 he co-authored *Winter Soldier: Iraq and Afghanistan: Eyewitness Accounts of the Occupations*. Mr. Montalván presently resides in the State of New York, New York County.

8. Defendant McDonald's USA, LLC is, upon information and belief, a publicly-held Delaware corporation which is duly authorized to do business within the State and which regularly transacts business within the State.

9. Upon information and belief, McDonald's USA, LLC owns the McDonald's restaurant located at 5121 5th Avenue, Brooklyn, New York.

10. Upon information and belief, defendant Claudia Alvarez is co-defendant McDonald's Area Supervisor who resides in the State of New York Kings County.

11. Upon information and belief, defendant Carlos Sala is a Manager at co-defendant McDonald's who resides in Kings County.

12. Upon information and belief, defendants John Doe 1 and John Doe 2 are both employees of McDonald's.

JURISDICTION AND VENUE

13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. Supplemental jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1367 over the state and local causes of action.

14. Venue for this action in the Eastern District of New York under 28 U.S.C. § 1391 is appropriate as the Restaurant which discriminated against the Plaintiff is located within the Eastern District of New York and as multiple defendants, upon information and belief, reside within the Eastern District of New York.

THE FACTS

15. On December 11, 2008, at approximately 1:40 pm, Mr. Montalván and his service dog Tuesday entered a McDonald's restaurant located at 5121 5th Avenue, Brooklyn, New York (hereinafter the "Restaurant").

16. Upon entering the Restaurant, certain employees of the Restaurant began to berate the plaintiff and advised him – erroneously – that he was not permitted to bring Tuesday into the Restaurant. The plaintiff was instructed to leave Tuesday outside. The plaintiff disregarded this unwarranted verbal abuse and unlawful instruction and walked towards the service counter with Tuesday.

17. As he approached the counter, two additional McDonald's employees reiterated in both Spanish (Mr. Montalván is a native Spanish speaker) and in English that "pets" were not permitted inside the Restaurant.

18. The Plaintiff advised that Tuesday was not a pet, but rather a certified service dog – although such advice hardly should have been necessary as Tuesday's vest clearly identifies

him as a service dog – and that the Americans with Disabilities Act expressly requires places of public accommodation to accommodate service animals.

19. Various McDonald's employees continued to harass Mr. Montalván and he asked to speak with a Manager. In response to this request, a female employee approached the plaintiff from behind the counter, identified herself as a Manager, and informed Mr. Montalván that no dogs were allowed inside the Restaurant. The plaintiff showed this employee the large, clearly-marked red vest worn by Tuesday which confirms that Tuesday is a certified service dog and reiterated that, in accordance with the Americans with Disabilities Act, it was unlawful to deny service dogs entry.

20. The aforesaid female employee, who identified herself as "Maria," subsequently served Mr. Montalván while glaring at him, and Maria and various members of the Restaurant's staff did all they could to make Mr. Montalván feel as unwanted and as uncomfortable as possible. More specifically, among other things, they hovered around the table where he and Tuesday sat down and glared at them during the entire duration of the visit.

21. As a direct result of this incident, the Plaintiff experienced a panic attack which required medication and which adversely affected the Plaintiff's final examination results at Columbia University (final exams were then being conducted).

22. In response to a complaint by the Plaintiff, by letter dated January 14, 2009, McDonald's, by its "Area Supervisor," defendant Claudia Alvarez, apologized to Mr. Montalván. During subsequent telephone conversations with Mr. Montalván, Ms. Alvarez assured Mr. Montalván that an appropriate sign regarding the admissibility of service animals would then be posted at the Restaurant and that all employees at the Restaurant would receive appropriate training.

23. Approximately six weeks later, on January 28, 2009, Mr. Montalván returned to the Restaurant at approximately 6:00 pm with Tuesday. Mr. Montalván noticed that a sign had been placed in the Restaurant's window which stated that services animals were welcome. After placing his order, Mr. Montalván walked upstairs to the second floor dining area with Tuesday.

24. After Plaintiff sat down to eat his meal, defendant Carlos Sala, who identified himself as a Manager of the Restaurant, approached the plaintiff and advised – unlawfully – that, “You are not allowed to have your dog in here.” At the time that Mr. Sala informed the plaintiff that Tuesday was not permitted inside the Restaurant, Tuesday was quietly sitting by Mr. Montalván's side and, as always, was wearing his clearly identifiable bright red vest.

25. The plaintiff asked Mr. Sala whether he had seen the sign regarding service animals posted in the Restaurant's front doors. More specifically, the plaintiff asked whether Mr. Sala was aware that the sign stated that service animals were welcome inside the Restaurant. Mr. Sala responded by stating that the sign stated “no dogs allowed.”

26. The plaintiff, by then suffering from a severe migraine, asked Mr. Sala to “please go downstairs and read the sticker.” Mr. Sala said that he would do so but approximately fifteen minutes elapsed – during which time Mr. Montalván's migraine had become almost debilitating and during which time he was unable to eat his dinner – and Mr. Sala never returned.

27. Mr. Montalván and Tuesday walked downstairs and approached the counter where Mr. Sala was then standing. Mr. Sala advised that he did observe the sticker but that he “forgot” to return to the plaintiff. The plaintiff asked to speak with a Manager and inquired as to whether Mr. Sala had received any training with respect to the Americans with Disabilities Act. Mr. Sala advised that the current “head manager” was not then in the Restaurant and that he had

not received any training with respect to the Americans with Disabilities Act, as he was a “new Manager.”

28. Mr. Montalván and Tuesday returned home.

29. Thereafter, at approximately 1:40 pm on January 30, 2009, Mr. Montalván returned to the McDonald’s, camera in hand, to photograph the sign in the Restaurant’s window. When he arrived at the Restaurant, he noticed signs from the New York City Department of Mental Health and Hygiene posted on the window advising that the Restaurant was closed due to health code violations.

30. As Mr. Montalván began to photograph the Restaurant’s storefront, John Does 1 and 2, both McDonald’s employees, approached the plaintiff and asked him why he was taking photographs. Mr. Montalván replied that he was simply taking pictures of a public place and that it was not their concern. Apparently unhappy with Mr. Montalván’s response, John Does 1 and 2 began to assault him with their fists and with garbage can lids. As a result of this assault, Mr. Montalván suffered from neck trauma – a painful pinched nerve in his neck which required the plaintiff to wear a neck brace for approximately eight weeks – migraine headaches and severe emotional distress.

31. The police arrived and a report was taken.

First Cause of Action (as against defendant McDonald’s USA, LLC) – Violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

32. The plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

33. The plaintiff suffers from a disability as that term is defined by the Americans with Disabilities Act, 42 U.S.C. § 12102, in that he suffers from “a physical or mental impairment that substantially limits one or more major life activities of such individual.”

34. 42 U.S.C. § 12182(a) provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

35. As set forth above, Mr. Montalván was discriminated against on the basis of his disability in that he was denied the full and equal enjoyment of the “goods, services, facilities, privileges, advantages, or accommodations” provided by and owned by McDonald’s USA, LLC, a “place of public accommodation.”

36. Additionally, McDonald’s USA, LLC failed to adopt policies or procedures to effectively train its employees on how to deal with disabled individuals such as the plaintiff.

37. Accordingly, the plaintiff seeks a permanent injunction against defendant McDonald’s USA, LLC compelling McDonald’s to make its facilities readily accessible to, and usable by, individuals with disabilities to the extent required by 42 USCS §§ 12181 et seq., including requiring the admissibility of all service animals. Plaintiff further seeks an injunction compelling McDonald’s USA, LLC to sufficiently train all of its employees in accordance with the Americans with Disabilities Act.

38. Plaintiff also demands reimbursement of all reasonable costs and legal fees incurred in connection with the instant action in accordance with the Americans with Disabilities Act.

**Second Cause of Action (as against all defendants) – Intentional
Infliction of Emotional Distress**

39. The plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

40. The defendants intended to cause, or recklessly disregarded the substantial probability of causing, severe emotional distress to the plaintiff.

41. The actions of the defendants set forth in detail above were extreme and outrageous.

42. Accordingly, plaintiff seeks compensatory damages in an amount to be proven at trial.

43. Additionally, plaintiff seeks punitive damages in an amount to be determined at trial but in no event less than \$10,000,000.

Third Cause of Action (as against all defendants)
Violation of New York Executive Law Section 296(2)(a)

44. The plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

45. At all times hereinafter mentioned, defendants owned, operated, managed and/or were employed by the McDonald's restaurant located at 5121 5th Avenue, Brooklyn, New York.

46. The discriminatory acts as set forth in detail above were in violation of New York Executive Law § 296.

47. At all times hereinafter mentioned, plaintiff's conduct and speech at said McDonald's restaurant was neither abusive nor offensive, nor was plaintiff engaged in any activity which tended to cause a breach of the peace. There was no possible reason for excluding plaintiff from said public accommodation nor for treating plaintiff differently from all other patrons except for the fact that the plaintiff is disabled and requires the assistance of a service animal.

48. By reason of the foregoing, plaintiff is entitled to recover compensatory damages in an amount to be determined at trial.

Fourth Cause of Action (as against defendants John Doe 1 and John Doe 2) – Assault

49. The plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

50. The intentional acts of defendants John Doe 1 and John Doe 2, as set forth above in greater detail, placed the plaintiff in imminent apprehension of harmful conduct. Furthermore, defendants John Doe 1 and John Doe 2 intentionally, knowingly and/or willfully assaulted the plaintiff by punching him repeatedly about the face and body and by striking him with garbage can lids.

51. As a direct result of the aforesaid intentional acts by defendants John Doe 1 and John Doe 2, the plaintiff sustained the injuries detailed above.

52. Accordingly, the plaintiff seeks compensatory damages in an amount to be determined at trial.

53. Additionally, the plaintiff seeks punitive damages in an amount to be determined at trial but in no event less than \$10,000,000.00.

Fifth Cause of Action (as against defendants John Doe 1 and John Doe 2) – Battery

54. The plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

55. As set forth in greater detail above, defendants John Doe 1 and John Doe 2 intentionally, knowingly and/or willfully assaulted the plaintiff by punching him repeatedly about the face and body and by striking him with garbage can lids.

56. As a direct result of the aforesaid intentional acts by defendants John Doe 1 and John Doe 2, the plaintiff sustained the injuries detailed above.

57. Accordingly, the plaintiff seeks compensatory damages in an amount to be determined at trial.

58. Additionally, the plaintiff seeks punitive damages in an amount to be determined at trial but in no event less than \$10,000,000.00.

Sixth Cause of Action (as against all defendants) – Violation of New York City Human Rights Law § 8-107(4)

59. The plaintiff repeats and realleges the allegations set forth above as though fully set forth herein.

60. At all times hereinafter mentioned, defendants owned, operated, managed and/or were employed by the McDonald's restaurant located at 5121 5th Avenue, Brooklyn, New York.

61. The discriminatory acts as set forth in detail above were in violation of the New York City Human Rights Law § 8-107(4).

62. At all times hereinafter mentioned, plaintiff's conduct and speech at said McDonald's restaurant was neither abusive nor offensive, nor was plaintiff engaged in any activity which tended to a breach of the peace. There was no possible reason for excluding plaintiff from said public accommodation nor for treating plaintiff differently from all other patrons except for the fact that the plaintiff is disabled and requires the assistance of a service animal.

63. By reason of the foregoing, plaintiff seeks compensatory damages in an amount to be determined at trial.

64. Additionally, the plaintiff seeks punitive damages in an amount to be determined at trial but in no event less than \$1,000,000 along with reimbursement of all costs and reasonable legal fees incurred in connection with the instant action.

WHEREFORE, Plaintiff Luis Carlos Montalván, demands judgment as follows:

- A. On his First Cause of Action, a permanent injunction against defendant McDonald's USA, LLC compelling McDonald's to make its facilities readily accessible to, and usable by, individuals with disabilities to the extent required by 42 USCS §§ 12181 et seq., including requiring the admissibility of all service animals. Plaintiff further seeks an injunction compelling McDonald's USA, LLC to sufficiently train all of its employees in accordance with the Americans with Disabilities Act along with reimbursement of all costs and reasonable legal fees incurred in connection with this action;
- B. On his Second Cause of Action, compensatory damages in an amount to be determined at trial and punitive damages in an amount to be determined at trial but in no event less than \$10,000,000.00;
- C. On his Third Cause of Action, plaintiff seeks recovery of compensatory damages in an amount to be determined at trial;
- D. On his Fourth Cause of Action, compensatory damages in an amount to be determined at trial and punitive damages in an amount to be determined at trial but in no event less than \$10,000,000.00;
- E. On his Fifth Cause of Action, compensatory damages in an amount to be determined at trial and punitive damages in an amount to be determined at trial but in no event less than \$10,000,000.00;
- F. On his Sixth Cause of Action, compensatory damages in an amount to be determined at trial and punitive damages in an amount to be determined at

trial but in no event less than \$10,000,000.00 along with reimbursement of all costs and reasonable legal fees incurred in connection with this action; and

G. Interest, fees and such other relief which this Court deems just and proper.

Dated: New York, New York
October 26, 2009

GERSTEN SAVAGE, LLP
Attorneys for Plaintiff

By: 

David Lackowitz (DL 8591)
600 Lexington Avenue, 9th Fl.
New York, New York 10022
(212) 752-9700