CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

March 11, 1999

OPINION 99-004

TO: Alcohol License Review Committee

FROM: Eunice Gibson, City Attorney

SUBJECT: **DENIAL OF SALE OR SERVICE OF INTOXICATING BEVERAGES TO INDIVIDUALS WHO ARE FOUND HAVE A HISTORY OF ALCOHOL-RELATED OFFENSES.**

INTRODUCTION

The question was raised as to whether it would be possible to develop a method whereby alcohol vendors (i.e. liquor stores, convenience, stores, restaurants and bars) would legally be able to refuse sale or service of alcoholic beverages to individuals who are "known" to the vendors to be alcoholics.

RELEVANT STATUTES

The short answer to this question is "no." Alcoholism is a disability under the Americans With Disabilities Act ["ADA"], 42 U.S.C.A. Sec. 12102(2) (1995), which states:

> The term "disability" means, with respect to an individual--
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

While the ADA does not explicitly refer to alcoholism in its definition of disability, case law has established that alcoholism is a disability as that term is defined in 42 U.S.C.A. Sec. 12102(2). See, e.g., Duda v. Board of Educ. Of Franklin Park Pub. School Dist. No. 84, 133 F.3d 1054 (7th Cir. 1998); Huels v. Exxon Coal USA, Inc., 121 F.3d 1047 (7th Cir. 1997); Bryant v. Madigan, 84 F.2d 246 (7th Cir. 1996); and Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995).

Alcohol vendors are considered "public accommodations" under 42 U.S.C.A. Sec. 12812(a) and the Wisconsin Public Accommodations Act, Sec. 106.04, Wis. Stats.. An individual with an alcoholism disability can not be discriminated against by public accommodations.[1] The general rule against such discrimination is as follows:

No 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.

42 U.S.C.A. Sec. 12812(a) (1995).

That section further describes discrimination as including:

> [T]he imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations,... .

42 U.S.C.A. Sec. 12812(b)(2)(A)(I) (1995).

A similar finding is made under Wisconsin's Public Accommodations Act. Specifically, Sec. 106.04(9), which relates to public places of accommodation or amusement,[2] provides in relevant part:

> (a) No person may do any of the following:
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[1] 42 U.S.C.A. Sec. 12181(7)(B) reads as follows: "The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--. ...(B) a restaurant, bar, or other establishment serving food or drink. ..."

Madison General Ordinance Sec. 3.23(2)(cc) provides a similar definition.

[2] Sec. 106.04(p), Wis. Stats., reads: "Public place of accommodation or amusement" shall be interpreted broadly to include, but not be limited to, places of business or recreation; lodging establishments; restaurants; taverns, ...and any place where accommodation s, amusement, goods or services are available... .

Madison General Ordinance Sec. 3.23(2)(cc) provides a similar definition.

> 3. Directly or indirectly publish, circulate, display or mail any written communication which the communicator knows is to the effect that any of the facilities of any public place of accommodation or amusement will be denied to any person by reason of sex, race, color, creed, disability, sexual orientation, national origin or ancestry or that the patronage of a person is unwelcome, objectionable or unacceptable for any of those reasons.

Sec. 106.04(9)(a)(3), Wis. Stats.[3]

CONSTITUTIONAL ISSUES

There is no recent case law on point regarding this issue. However, Wisconsin v. Constantineau, 400 U.S. 433 (1971), does provide considerable guidance. In Constantineau, the United States Supreme Court struck down a Wisconsin law which prohibited the sale of "intoxicating liquors" or "fermented malt beverages" to persons who drank them excessively. Id. The statute allowed a wife or local government official (e.g. Mayor, Chief of Police, Alderman, Supervisors or Chairman of County Boards, District Attorneys, etc.) to place a person's name on a list which would then be "posted" in all retail liquor outlets. Contantineau, 400 U.S. at 434 n.2 and 435. The liquor stores would be prohibited, for a period of one year, from selling intoxicating beverages to any person whose name appeared on the list. Id. at 435. The sale of liquor to such a person was a misdemeanor. Id. At 436 n.2.

Ms. Constantineau's name was posted by the chief of police and she brought suit against the chief for damages and injunctive relief. The State of Wisconsin intervened and litigated the constitutionality question. The federal district court found the statute unconstitutional. Id. At 435. The Supreme Court agreed, stating "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Id. At 437. Because the Wisconsin statute lacked these requirements, the statute was unconstitutional on its face. Id. At 439. Even though Ms. Costantineau never attempted to purchase alcoholic beverages, the court nevertheless found a due process violation simply because her name was sullied before she had an opportunity to be heard.

The Supreme Court reinterpreted its Constantineau decision in Paul v. Davis, 424 U.S. 693 (1976). In Paul v. Davis, a city's chief of police created a flyer that listed the names of active shoplifters, warning retailers in the Louisville, Kentucky area. Id. At 695. Unfortunately for Mr. Davis, his name appeared on the list without ever being charged as a shoplifter. After this posting, Davis' employer warned him that he would be fired if he was ever caught in a similar situation again. Id. At 696. Davis then brought the Sec. 1983 suit. Id. The Supreme Court had to decide if an injury to a person's reputation was enough to state a claim for relief under sec.

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[3] Madison General Ordinance Sec. 3.23(5)(b) contains nearly identical language.

1983 and the Fourteenth Amendment. It held that it was not. Id. At 694. The Court reasoned that Constantineau and other cases did not establish a "constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause." Id. at 702. There must be something more. In other words, the government will not be subject to a sec. 1983 claim simply by putting an individual's name on a list if that list does not prohibit that person from exercising a right. However, the police chief who had published the erroneous list, and the City, would still be liable in damages for defamation because the list set forth facts which were not true or which were not substantially true.

The Contantineau and Paul decisions tell us that: (1) the government may deny a person's state-created right to buy alcohol if due process is sufficient; and (2) the government's denial of an individual's right to buy alcohol, combined with the government "posting" his/her name on a list (thereby creating a social stigma), *without due process*, subjects that governmental body to sec. 1983 claims.

CONCLUSION

Although it is not possible to refuse sale or service to an individual based upon the mere fact of their alcoholism, it is possible to develop a method which would limit such sales without violating individual rights. Whether such a system should be used is a policy question. Such a method would have to be comprised of objective, clearly defined criteria which would then be applied to relevant individuals and result in a determination being made that would declare that an individual has a history of alcohol-related offenses. For example, the criteria could include: (1) number of conveyances to detox for that individual in a 12-month period; (2) number of police contacts in a 12-month period in which the person's use of alcohol was a substantial factor in the contact; and (3) number of convictions where the person's use of alcohol was a factor. This criteria could encompass offenses such as trespass, disorderly conduct, aggressive panhandling, open intoxicants on a public street, unlawful use of a bus shelter, obstructing sidewalk, depositing human waste, etc. A threshold, as to when the criteria would result in a finding that a person has a history of alcohol-related offenses would have to be determined in advance to comport with the objectivity of applying the criteria.

Under such a system, individuals are not being refused sale or service because they are alcoholics, rather, they are being refused sale or service because, after application of the various objective criteria, they have been declared to be persons with a history of alcohol-related offenses.

In addition to the elements listed above, there would have to be an established length of time an individual's name would be on any "list" which designates the individual as being ineligible to purchase alcoholic beverages. There would have to be a procedure that would allow one to have

their name removed from the list. Finally, there would have to be guidelines established as to whether the list is posted in public view or where only the vendor and its employees can see it.

The method would also have to provide due process protections to those individuals against whom the criteria is applied. Specifically, affected individuals would be entitled to notice of any determination made regarding their status as it relates to purchasing alcohol, as well as the opportunity to be heard. As can be seen from the foregoing, carrying out these procedures could consume significant time and effort for police and other City staff.

In conclusion, I believe that it is legally possible for the City to develop a method which would allow vendors of intoxicating beverages to legally refuse to sell those beverages to individuals who have been found to have a history of alcohol-related offenses. However, whether such a method should be established, and the specific components of such a method, is ultimately the decision of the Madison Common Council.

Eunice Gibson
City Attorney

EG:JAZ:sob

cc: Mayor
City Clerk

CAPTION: It is possible to develop a method whereby alcohol vendors can legally refuse sale or service to individuals who have been found to have a history of alcohol-related offenses as long as the method provides due process to the individual subject to the finding.

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