NO. 95205-1

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTOPHER H. FLOETING,

Respondent,

v.

GROUP HEALTH COOPERATIVE,

Petitioner.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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I. INTRODUCTION

The Washington Law Against Discrimination ("WLAD") prohibits discrimination in places of public accommodation. The Court of Appeals correctly determined that that prohibition encompasses sexual harassment, and that the well-established standard for evaluating discrimination in public accommodations under the WLAD applies equally to claims of sexual harassment. Contrary to Group Health's claims, there is no reason to import standards from employment law given the statutory differences between the WLAD's public accommodation and employment provisions, and the markedly different conduct at issue in the public accommodation context. This Court should affirm.

II. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General submits this amicus brief to urge this Court to hold that places of public accommodation may be held liable for the discriminatory or harassing conduct of their employees, including via claims for sex discrimination and sexual harassment, under the standard first announced by *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996), and recently confirmed by *State v. Arlene's Flowers*, 187 Wn. 2d 804, 389 P.3d 543 (2017).

The Attorney General has a strong interest in protecting the public's right to be free from unlawful discrimination. *See* RCW 49.60.010 (finding that discrimination "threatens not only the rights and proper privileges of [state] inhabitants but menaces the institutions and foundation of a free democratic state"); *see also City of Seattle v. McKenna*, 172 Wn.2d 551, 562, 259 P.3d 1087 (2011) (Attorney General's general "powers" and "duties" include acting "on a matter of public concern") (internal quotation marks omitted).

The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest. *Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978). Because this case concerns the standard of liability for a place of public accommodation under the WLAD for the sexually harassing conduct of an employee, this case implicates individuals beyond the named plaintiff and affects the public interest.

III. ISSUES ADDRESSED BY AMICUS

Whether the same legal standard that applies to all other forms of discrimination in places of public accommodation should apply to sex discrimination claims based on sexual harassment.

IV. STATEMENT OF THE CASE

On September 11, 2012, Mr. Floeting reported to Group Health that a Patient Access Representative, T.T., engaged in "inappropriate" conduct and made "sexual advances" while he attended regularly scheduled medical appointments at Group Health's Northgate Medical Center. CP 176 ¶¶ 10-12; CP 177 ¶ 13. According to Group Health's record of the complaint, Mr. Floeting reported that T.T. told him that she had spent the weekend locked in a bedroom with her boyfriend watching pornographic movies. CP 129; CP 131; CP 135. In his complaint, Mr. Floeting also stated that he believed T.T.'s conduct to be "sexual harassment," that he "felt very uncomfortable," that he "was embarrassed because others could hear [T.T.]," and that he "really want[ed] [the comments] to stop." *Id.*

Mr. Floeting also alleges T.T. made a series of inappropriate sexual comments, some explicit in nature, in the months leading up to the incident complained of, CP 174, ¶ 6; CP 175 ¶ 7-8; CP 176 ¶ 10; CP 254:10-20, but Group Health's records do not reflect that he complained about such conduct prior to September. CP 129; CP 131; CP 135.

Mr. Floeting alleges Group Health violated his rights under the WLAD. RCW 49.60.030(1)(b) protects the right to "full enjoyment" of any place of public accommodation, including the right to purchase any service or commodity sold by any place of public accommodation "without acts

directly or indirectly causing persons of [a protected class] to be treated as not welcome, accepted, desired, or solicited." *See* RCW 49.60.040(14) (defining "full enjoyment"). RCW 49.60.215 prohibits any "act which directly or indirectly results in any distinction, restriction, or discrimination" based on a person's membership in a protected class.

V. ARGUMENT

A. Under the WLAD, Sexual Harassment in a Place of Public Accommodation Should Be Analyzed Like All Other Forms of Discrimination in Places of Public Accommodation

In determining what standard the trial court should have applied to Mr. Floeting's claim, the Court should hold that the existing standard for public accommodation discrimination based on race, national origin, disability, and sexual orientation applies equally to discrimination based on sex.

Twenty years ago, the Supreme Court set forth the standard for establishing a prima facie case of discrimination in a place of public accommodation under the WLAD. In *Fell v. Spokane Transit Authority*, the Court established that a prima facie case of disability discrimination requires the plaintiff show: (1) the plaintiff has a disability, (2) the defendant's establishment is a place of public accommodation, (3) defendant discriminated against plaintiff by providing treatment that was not comparable to the level of designated services provided to individuals

without disabilities; and (4) the disability was a substantial factor causing the discrimination. 128 Wn.2d at 637. As the Supreme Court dictated, the first three elements are mixed questions of law and fact, while the fourth is strictly a question of fact. *Id.*

Courts have since extended *Fell's* analytical framework to cases alleging public accommodation discrimination based on other protected classes. In *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 525, 20 P.3d 447 (2001), the Court of Appeals applied *Fell's* elements to require a plaintiff alleging race or national origin discrimination in a place of public accommodation to show: (1) the plaintiff is a member of a protected class, (2) the defendant's establishment is a place of public accommodation, (3) the defendant discriminated against plaintiff by not treating him in a manner comparable to the treatment it provides to persons outside that class; and (4) the protected status was a substantial factor causing discrimination.

Most recently, this Court confirmed that the elements that apply "under the WLAD for discrimination in the public accommodations context . . . ." are the same elements applied in *Fell*. *Arlene's Flowers*, 187 Wn. 2d at 821. To "make out a prima facie case," the plaintiff must show: (1) the plaintiff is a member of a protected class, (2) the defendant is a place of public accommodation, (3) the defendant discriminated against the plaintiff, whether directly or indirectly, and (4) that the discrimination occurred

"because of" the plaintiff's status or, in other words, that the protected status was a substantial factor causing discrimination. 187 Wn. 2d at 821-22. Though the plaintiffs in *Arlene's Flowers* alleged sexual orientation discrimination, the Court did not limit its articulation of the standard to members of that protected class.

The Court of Appeals was correct to apply this same standard to the sex discrimination claim here. *Floeting v. Group Health Coop.*, 200 Wn. App. 758, 766, 403 P.3d 559 (2017). A sexual harassment claim in a public accommodation should be analyzed using the same standard that applies to any other allegation of discrimination in a place of public accommodation.

B. The Harassment Standard that Applies in the Employment and Housing Contexts Should Not Apply to a Public Accommodation

Instead of the *Arlene's Flowers* standard, Group Health argues that the analytical framework that applies to a sexual harassment claim in a public accommodation is the same framework that applies in the employment context. Petitioner's Supp. Br. at 2-3. In the employment context, a plaintiff must show (1) the conduct was unwelcome, (2) the conduct was because of sex, (3) the conduct affected the terms or conditions of employment, and (4) the harassment can be imputed to the employer because the employer (i) authorized, knew, or should have known of the harassment, and (ii) failed to take reasonably prompt and corrective action.

Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Group Health's argument is misplaced.

1. Unlike in the employment or housing contexts, RCW 49.60.030 and RCW 49.60.215 do not require discrimination that affects the "terms or conditions" of the public accommodation

Glasgow's requirement that the conduct affect "the terms or conditions of employment" stems from the specific statutory language prohibiting discrimination in employment. *See* RCW 49.60.180(3) (declaring it unlawful to "discriminate against any person . . . in other *terms or conditions* of employment" based on sex) (emphasis added). To ensure a defendant's conduct actually alters the terms or conditions of employment, *Glasgow* requires a plaintiff alleging harassment in employment show the behavior was "sufficiently severe" and "persistent" so as to create an abusive working environment. 103 Wn.2d at 406.

In contrast, the WLAD provisions prohibiting discrimination in a public accommodation makes no mention of the "terms or conditions" of a public accommodation. Instead, the public accommodation provisions prohibit any act which "directly or indirectly" causes any person "to be treated as not welcome, accepted, desired, or solicited" based on sex, or "directly or indirectly results in any distinction, restriction, or discrimination" based on sex. RCW 49.60.030(1)(b) (providing a right to "full enjoyment"); RCW 49.60.040(14) (defining "full enjoyment"); RCW

49.60.215. On their face, the WLAD's public accommodation provisions encompass more than conduct so pervasive that it affects the "terms and conditions" of the public accommodation. *See State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (noting "when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word") (citations omitted).

This makes sense because the conduct at issue in a place of public accommodation is different from the daily interactions of co-workers. Though an isolated instance of sexual conduct may be insufficient to prove discrimination in an ongoing employment relationship, a single interaction may violate the WLAD's prohibition against discrimination in a public accommodation because of the often abbreviated nature of the contact between a customer and a business. *See King v. Greyhound Lines, Inc.*, 656 P.2d 349, 350-51 (Or. Ct. App. 1982) (interpreting a provision similar to the WLAD and holding bus company liable for an employee's use of two racial slurs toward a customer). Indeed, courts often find liability for harmful and degrading conduct in the public sphere, even if the interaction is brief. *See, e.g., Kirt v. Fashion Bug #3253, Inc.*, 479 F. Supp. 2d 938, 966 (N.D. Iowa 2007) (store clerk accused African American customer of shoplifting); *La Reine Boutique v. Mass. Comm'n Against Discrimination*, No. 08-P-621, 2009 WL 648888, at *1 (Mass. App. Ct. Mar. 16, 2009)

(unpublished) (hair dresser subjected customers to "racially derogatory statements"); *Craig v. New Crystal Rest.*, No. 92-PA-40, 1995 WL 907560, *8 (Chi. Comm'n on Human Relations Oct. 18, 1995) (waitress called customer a "damn faggot"); *Miller v. Drain Experts*, No. 97-PA-29, 1998 WL 307868, at *3 (Chi. Comm'n on Human Relations Apr. 15, 1998) (customer service representative twice-called customer a "nigger" over the phone). Thus, the Court of Appeals was correct to observe that "[t]he sexual harassment of a patron of a business will often be a solitary or fleeting event—one capable of evading sanction under the law." *Floeting*, 200 Wn. App. at 771.

Given the short-lived nature of interactions between customers and store personnel, requiring a pattern of pervasive abuse would render the WLAD provision meaningless. We are not aware of any other jurisdiction with statutory language similar to the WLAD that has imposed a "pervasiveness" requirement in the public accommodation context. *Cf. Barbot v. Yellow Cab Co.*, No. 97-SPA-0973, 2001 WL 1805186, at *2 (Mass. Comm'n Against Discrimination Nov. 27, 2001) (requiring that a plaintiff challenging a taxi cab driver's remark that he was a "faggot" need only show he was "denied access to, restricted in the use of, *or treated differently*" in a place of public accommodation to prove "any distinction,

discrimination or restriction" in any place of public accommodation) (applying Mass. Gen. Laws ch. 272, § 98) (emphasis added).

Recognizing that the context of public accommodation discrimination is important, other jurisdictions have not required "severe" and "pervasive" conduct when analyzing harassment claims in the public sphere. *See, e.g., City of Minneapolis v. Richardson*, 239 N.W.2d 197, 202 (Minn. 1976); *Fashion Bug*, 479 F. Supp. 2d at 963 (same). In *Richardson*, the Minnesota Supreme Court considered racial slurs directed at a black child by police officers and held a prima facie case of discrimination under Minnesota law requires a showing of "treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." 239 N.W.2d at 202. In *Fashion Bug*, the court considered a store clerk's racially charged allegations of shoplifting and held a prima facie case of racial discrimination in a public accommodation under Iowa law required plaintiff prove she was discriminated against by "being subjected to markedly hostile conduct that a reasonable person would find objectively unreasonable under circumstances giving rise to an inference of discrimination." 479 F. Supp. 2d at 963.

Even the case Group Health relies on most heavily for its argument recognized that a "distinction, restriction, or discrimination" on the basis of a protected class can include one-time verbal abuse. Pet. at 15-19 (citing

Evergreen Sch. Dist. No. 114 v. The Human Rights Comm'n, 39 Wn. App. 763, 695 P.2d 999 (1985)); *Evergreen*, 39 Wn. App. at 774 (citing *King*, 656 P.2d at 351, approvingly). In *Evergreen*, the court declined to impose liability based on a teacher's inadvertent remark that was not abusive nor directed at the plaintiff. 39 Wn. App. at 775. However, in so doing, the *Evergreen* court noted that, if confronted with the same facts as *King*, where an Oregon court held Greyhound liable for racial slurs its ticket agent made to an African American customer, "it would have no difficulty reaching the same result." *Id.* at 774.

Despite this body of public accommodation case law, Group Health nevertheless asks the Court to extend *Tafoya v. Human Rights Comm'n*, 177 Wn. App. 216, 311 P.3d 70 (2013), and apply *Glasgow's* employment standard to a new context, to protect business owners from "two different standards for liability . . . in cases involving sexual harassment perpetrated by a non-supervisory employee, depending on who the victim is . . . ." Pet. At 4-5. In *Tafoya*, the Court of Appeals adapted *Glasgow's* employment standard to the housing context and required conduct be "severe" and "persistent" to be considered sexual harassment. 177 Wn. App. at 226. But the *Tafoya* court was considering a statute that, like the employment statute, prohibited discrimination in the "*terms, conditions,* or privileges of a real

estate transaction." *Id.* at 224 (citing RCW 49.60.222(1)(b)) (emphasis added).

Further, before adopting *Glasgow*, the *Tafoya* court observed the statutory similarities between the WLAD's housing discrimination provision and federal fair housing law, the significant federal authority regarding sexual harassment in housing, and the fact that *Glasgow* mirrored federal authority in housing. 177 Wn. App. at 223 (citing RCW 49.60.222(1)(b)). This differs from the current context. Unlike the housing context, there is no federal analogue to the WLAD's prohibition against sex discrimination in a place of public accommodation. *See* 42 U.S.C. § 2000a (prohibiting discrimination based on race, color, national origin and religion only); 42 U.S.C. § 12182 (prohibiting discrimination only on the basis of disability); *see also Marquis v. City of Spokane*, 130 Wn.2d 97, 110-11, 922 P.2d 43 (1996) ("[T]here is no provision in the federal law which sets forth the equivalent of the broad language of RCW 49.60.030(1)."). And, importantly, when federal courts apply federal public accommodation statutes covering race, color, or nation origin discrimination, the test looks remarkably like *Arlene's Flowers. See*, *e.g.*, *Fall v. L.A. Fitness*, 161 F. Supp. 3d 601, 606 (S.D. Ohio 2016) (requiring a plaintiff show (1) membership in a protected class, (2) attempt to make or enforce a contract for services ordinarily provided by defendant, (3) denial

of the right to enter into or enjoy the benefits of the contractual relationship, and (4) treatment less favorable than similarly situated persons outside the protected class); *McCoy v. Homestead Studio Suites Hotels*, 390 F. Supp. 2d 577, 584 (S.D. Tex. 2005) (same).

Since the WLAD provision prohibiting public accommodation discrimination nowhere references "terms or conditions," and no body of federal or state authority counsels the adoption of employment standards for sexual harassment liability in a place of public accommodation, this Court should not create a requirement that sexually explicit conduct be "pervasive" to be unlawful in the context of a public accommodation. To establish a prima facie case, a plaintiff alleging sex discrimination need only show that the defendant discriminated against the plaintiff and that sex was a substantial factor causing the discrimination. *See Arlene's Flowers*, 187 Wn.2d at 821-22.

2. Unlike the employment context, RCW 49.60.215 explicitly provides for liability if a public accommodation's "agent or employee" commits discrimination

Group Health further asks the court to impose the same employer knowledge requirement that applies in employment cases to public accommodation cases. Pet. at 5-6 (arguing that *Glasgow's* "imputed liability standard" for determining whether an employer can be held liable for sexual harassment by a non-supervisory employee "fits the precise

situation here"). In the employment context, liability under the WLAD may be imputed to an employer only where the employer "authorized, knew, or should have known" of the discriminatory conduct and "failed to take reasonably prompt and adequate corrective action." *Glasgow*, 103 Wn.2d at 407. The Court should decline Group Health's request as there is no statutory basis for its proposed construction.

First and foremost, the statutory language prohibiting employment discrimination and public accommodation discrimination is different. *See King*, 656 P.2d at 351 n.6 (holding that employment discrimination cases "have limited precedential value" when interpreting a public accommodation statute). Unlike the WLAD's statutory provision regarding employment, which prohibits an "employer" from discriminating based on sex, the WLAD's provision regarding a public accommodation prohibits "any person or the person's agent or *employee*" from discriminating based on sex. *Compare* RCW 49.60.180 (prohibiting employment discrimination), *with* RCW 49.60.215 (prohibiting discrimination in a public accommodation) (emphasis added).

By expressly prohibiting "employees" from committing any "act that directly or indirectly results in any distinction, restriction, or discrimination" on the basis of a protected class, RCW 49.60.215, "the legislature chose to fight discrimination in public accommodations by

making employers directly responsible for their . . . employees' conduct," as the Court of Appeals correctly noted, *Floeting*, 200 Wn. App. at 770. *See Evergreen*, 39 Wn. App. at 774 (stating it would "have no difficulty reaching the same result [as *King*]"); *King*, 656 P.2d at 350 n.3 (finding liability even though the "racial slurs were not authorized, approved or ratified by the defendant" and where the defendant was "opposed to such conduct"). *Cf. Johnston v. Apple Inc.*, No. 11 Civ. 3321(JSR), 2011 WL 4916305, at *6 (S.D.N.Y. Oct. 14, 2011) (holding New York City's provision against public accommodation discrimination did not require an employer know or condone the discrimination in order for the employer to be liable for the discriminatory conduct of its employee); *Henderson v. Steak N Shake, Inc.*, No. S-9735, 1999 WL 33252627, at *10 (Ill. Human Rights Comm'n Mar. 24, 1999) (refusing to "graft a 'notification' requirement onto [the] Complainant's burden of proof in a public accommodations case"). Thus, in "considering the legislative choice of words, the context of the act, and the legislature's stated goal to eradicate discrimination," the Court of Appeals correctly "read section [RCW 49.60].215 as setting forth a system of direct liability whereby an employer is directly responsible for its official unfair practices and the unfair practices of its agents and employees." *Floeting*, 200 Wn. App. at 770.

Further, as a matter of public policy, the *Glasgow* standard for holding employer's liable for the acts of its employees in employment discrimination cases should not be transferred to the public accommodation context. *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 810 (5th Cir. 2000) (rejecting the workplace comparison because "in a public accommodation case . . . , a rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule"); *Floeting*, 200 Wn. App. at 771 ("The first act of discrimination would be without liability—a 'one free bite' rule directly at odds with the goal of this antidiscrimination enactment."). The relationship between two co-workers is different than the relationship between an employee and a member of the public. *Craig*, 1995 WL 907560, at *9. While an employee may not consider a co-worker to be an agent of the employer, an employee who harasses a customer because of the person's membership in a protected class acts as an agent of the public accommodation. *Id. See also Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694, 706 (D. Md. 2000) (noting in the public accommodation context, "the interactions of a highly mobile public with [sales staff] are necessarily ad hoc and transient, [and] are almost never with higher-ranking personnel of the enterprise"). Placing the burden on the public accommodation incentivizes the owner of the public accommodation to take the strongest possible affirmative measures to prevent the hiring and retention of

employees who engage in discriminatory acts. *Totem Taxi, Inc. v. N.Y. Human Rights Appeal Bd.*, 65 N.Y.2d 300, 308 (1985) (Alexander, J., concurring).

The Legislature apparently agreed with this policy: in places of public accommodation, the WLAD does not require a place of public accommodation authorize or know of its employee's discriminatory conduct before the business may be liable. In prohibiting any "employee" from discriminating in a public accommodation, the WLAD explicitly requires the public accommodation, rather than the innocent victim of discrimination, to bear the costs of its employee's discrimination.

VI. CONCLUSION

The Attorney General respectfully requests that the Court recognize that the standard first announced in *Fell* and confirmed in *Arlene's Flowers* to apply in race, national origin, disability, and sexual orientation discrimination claims in a place of public accommodation is also the standard applicable to sex discrimination in a place of public accommodation.

RESPECTFULLY SUBMITTED this 14th day of May, 2018.

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Attorney General

s/ *Patricio A. Marquez*
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, by consent of the parties, a true and correct copy of the foregoing document upon the followings:

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DATED this 14th date of May 2018, at Seattle, Washington.

s/ *Chamene M. Woods*
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AMICUS CURIAE'S APPENDIX OF UNPUBLISHED, NON-WASHINGTON AUTHORITIES

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RESPECTFULLY SUBMITTED this 14th day of May, 2018.

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Appendix 1

2001 WL 1805186 (MCAD)

Massachusetts Commission Against Discrimination

WILSON BARBOT, COMPLAINANT
v.
YELLOW CAB COMPANY, RESPONDENTS

DOCKET NO. 97-SPA-0973
November 27, 2001

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

***1** On November 12, 1997, Wilson Barbot ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission"), against the Yellow Cab Company ("Respondent") claiming that Respondent discriminated against him in a place of public accommodation on the basis of sexual orientation.

On November 5, 1998, the Investigating Commissioner issued a Probable Cause Finding and an Order of Entry of Default against Respondent. On March 9, 2001, the Commission certified the case for public hearing. Respondent failed to respond to the complaint or attend the certification conference, and has otherwise refused or failed to participate in this matter in any respect. A public hearing was held before me on August 30, 2001. Respondent did not attend the public hearing after receiving proper notice. At the public hearing, Complainant testified and introduced evidence regarding Respondent's alleged acts of unlawful discrimination and the damages he allegedly sustained there from. In reaching my decision, I have considered the entire record, including the testimony and exhibits introduced at the public hearing.

II. FINDINGS OF FACT

1. Complainant, Wilson Barbot, is a gay male who at all times pertinent hereto, resided in Springfield, MA.

2. According to Complainant, Respondent owns and operates a taxicab service in Springfield, MA.

3. On October 31, 1997, Complainant and a friend, Gary Anthony Franklyn were picked up by one of Respondent's taxi's for transport to the Blue Eagle Restaurant on Washington Street in Springfield, MA. Complainant testified that as the taxi approached the restaurant, the driver refused to pull over in front of the restaurant and instead pulled over one block further down the street.

4. Complainant then gave the taxi driver $5.50 for the fare of $3.50. The driver then gave Complainant only one dollar back in change. Complainant testified that he told the driver that he owed him more change. According to Complainant, the taxi driver then got out of the car, walked over to Complainant's door, yelled at him to get out of the car, and screamed obscenities at him including, "faggot", "fags", and "mother fucker." The driver then tossed the change at Complainant and continued to yell for him to get out of the car. Complainant testified that he felt very scared and nervous because the taxi driver appeared very angry. Complainant believed that the driver was going to hit him. Complainant and Franklyn then exited the vehicle, but the driver continued to act in an intimidating and threatening manner and repeatedly called them "faggots."

5. As Complainant and Franklyn walked back to the restaurant, the cab turned around and headed toward them. Complainant testified that when the taxi passed them, the driver put up his middle finger and shouted, "faggots", out the cab window. As the cab passed Complainant, he took down the license plate number (MA #14442) and the cab number (60).

***2** 6. Complainant testified that the incident greatly affected his life. He has not used a taxi since the incident and every time he sees a yellow cab he is reminded of the fear and shock he felt at the time. Although Complainant had been undergoing counseling prior to the incident, he testified that has remained in counseling continuously since the incident, in part for the emotional distress caused by Respondent's discriminatory actions. In addition, after the incident, he was prescribed medication for depression and sleep deprivation.

III. CONCLUSIONS OF LAW

Massachusetts General Laws, c. 272, § 98, makes it an unlawful practice to make any distinction, discrimination or restriction on account of sexual orientation relative to a person's admission to, or his treatment in, any place of public accommodation. Rome v. Transit Express, 19 MDLR 159, 161 (1997); Stoll v. State Street Stock Exchange, Inc., 18 MDLR 141, 142 (1996). Any such act of discrimination is subject to the remedies enumerated in G. L. c. 151B, § 5, which grants the Commission authority to adjudicate such complaints.

The elements of proof necessary to establish a claim of discrimination in a case of public accommodation are similar to those in employment discrimination cases. See, Bachner v. Charlton's Lounge and Restaurant, 9 MDLR 1274, 1287 (1987). In order to establish a prima facie claim of discrimination in a public accommodation, Complainant must prove that (1) he is a member of a protected class; (2) he was denied access to, restricted in the use of, or treated differently in (3) a place of public accommodation. Id. In this case, Complainant is a member of a protected class by virtue of his sexual orientation. In addition, Respondent adversely treated Complainant on the basis of his sexual orientation when the cab driver repeatedly yelled the word """faggot" and other obscenities at Complainant. Complainant also testified that the taxi driver refused to drop Complainant and his companion off at the correct address. I note that G.L. c. 272, § 98 specifically provides relief for "any" distinction, discrimination or restriction on account of sexual orientation and this includes adverse treatment in a place of public accommodation. Stoll, 18 MDLR at 142. Finally, the conduct complained of occurred in a taxicab, which is a "carrier" and, therefore, a place of public accommodation. Rome, 19 MDLR at 161. Consequently, I conclude that Complainant has established a prima facie case of public accommodation discrimination on the basis of sexual orientation.

Once Complainant has established a prima facie case, Respondent has the burden of articulating a legitimate nondiscriminatory reason for its actions. Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent's proffered reason is a pretext for unlawful discrimination. Here, Respondent failed to attend the public hearing or present any evidence to rebut Complainant's case. Consequently, I conclude that Complainant has established an unrebutted prima facie case of unlawful discrimination in a place of public accommodation on the basis of sexual orientation in violation of G.L. c. 272, § 98.

IV. REMEDY

***3** Upon a finding of unlawful discrimination in a place of public accommodation, the Commission is authorized pursuant to G.L. c. 151B, § 5 to award damages to compensate the aggrieved party for injuries suffered as a result of the unlawful conduct. This includes damages for emotional distress proven by the Complainant. The Commission has consistently held that credible testimony by a complainant is sufficient evidence upon which to base an award of damages for emotional distress under G.L. c. 151B. College-Town v. MCAD, 400 Mass. 156, 508 N.E.2d 587 (1987); Bournewood Hospital v. MCAD, 371 Mass. 303, 315-317 (1976).

In this case, Complainant testified credibly that he was shocked and in fear of physical harm during the cabdriver's homophobic ranting. He testified that he suffered depression and sleep deprivation as a result of the incident, necessitating the taking of prescription medication. He also testified that he has not used a taxi since the incident and every time he sees a yellow cab he is reminded of the fear and shock he felt at the time. Although Complainant is still taking the prescription medication prescribed to him shortly after the incident, I am not convinced that the emotional distress suffered by Complainant as a direct and proximate result of Respondent's actions was of a long-term duration.

Under these circumstances, I conclude that Complainant is entitled to an award of $5,500.00 in compensation for the emotional distress he suffered as a result of Respondent's unlawful discrimination in a place of public accommodation.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent is hereby ordered:
1. To pay Complainant, Wilson Barbot, the sum of $5,500.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

2. To conduct basic annual training sessions for all managers, supervisors, and employees of Respondent's company with respect to the requirements of G.L. c. 272, §§ 98 and 98A and the non-discriminatory treatment of patrons in places of public accommodation. With respect to such training:
a. Each training session for employees must be at least two (2) hours in length and each training session for managers and supervisors must be at least three (3) hours in length. All company employees, agents, and independent contractors that perform services for Respondent or lease or operate Respondent's vehicles, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. The Respondent shall repeat this training, once each calendar year for the next five (5) years, for all new employees, agents and independent contractors who were hired or began performing services for Respondent or leased or operated Respondent's vehicles after the date of the initial training session.

***4** b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention training program, available from the Commission's Director of Training. Within one week of the Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.

c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Commission's Director of Training with one-month advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.

d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

e. In the event that Respondent's business is sold or materially changed, any and all successor purchasers, assignors or owners of Respondent's business (hereinafter referred to as the “new owners”) shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;

iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,

iv. Respondent continues to retain an interest in the successor entity.

f. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 27th day of November, 2001.

Edward R. Mitnick

2001 WL 1805186 (MCAD)

End of Document

Appendix 2

1995 WL 907560 (Chi.Com.Hum.Rel.)

Commission on Human Relations

City of Chicago

IN THE MATTER OF
DANIEL CRAIG, COMPLAINANT
AND
NEW CRYSTAL RESTAURANT, RESPONDENT

Case No. 92-PA-40
October 18, 1995

FINAL RULING ON LIABILITY AND DAMAGES

***1** On October 2, 1992, Complainant Daniel Craig filed a complaint against Respondent New Crystal Restaurant, located at 4000 N. Sheridan Road in Chicago. Mr. Craig alleged that he was discriminated against concerning his use of New Crystal Restaurant based on his sexual orientation. On June 30, 1994, the City of Chicago Commission on Human Relations (the "Commission") found that there was substantial evidence with respect to his claim. An administrative hearing was conducted on March 3, 1995. [1] Complainant and Respondent simultaneously filed Memoranda citing the points and authorities supporting their arguments on or about April 3, 1995.

On June 8, 1995, the First Recommended Decision on Liability and Damages was issued. On July 13, 1995, Respondent filed objections to the First Recommended Decision. On August 2, 1995, Complainant filed his response to Respondent's objections. Complainant did not file any objections to the First Recommended Decision. The Hearing Officer issued his Final Recommended Decision on Liability and Damages on September 11, 1995.

CONTENTIONS OF THE PARTIES

Mr. Craig contends that on September 5, 1992, after voicing his displeasure with the service at the restaurant, Gloria Matteson, a waitress employed by Respondent, called him a "damn faggot." Mr. Craig claims that Ms. Matteson's comment constitutes a violation of the Chicago Human Rights Ordinance ("CHRO"). In addition, Mr. Craig claims that Respondent is liable for the alleged violation.

Respondent contends that the alleged comment, even if made, is not sufficient to constitute a violation of the CHRO. In addition, Respondent contends that it is not liable for the alleged violation because it did not authorize the waitress to make the alleged comment and did not become aware of the alleged comment until Craig filed a complaint against it with the Commission.

FINDINGS OF FACT

1. Daniel Craig's sexual orientation is homosexual. (Tr. 71). Mr. Craig has lived in New York City for the past two and one-half years and is currently employed as a legal secretary. (Tr. 69).

2. New Crystal Restaurant is a corporation located in Chicago. At the time of the alleged violation, the corporation was owned by Marina Kitsis. Ms. Kitsis sold the corporation to Peter Hambesis in June, 1994. As part of the sale, Ms. Kitsis

agreed to defend and hold the New Crystal Restaurant harmless for acts occurring prior to the sale of the restaurant. (Tr. 187-189).

3. Ms. Kitsis' son, William Kitsis, helped her manage the restaurant. (Tr. 202). In addition, Kostas Panayotou, one of the cooks at the restaurant, helped manage the restaurant. (Tr. 220).

4. At the time of the alleged violation, the New Crystal Restaurant had a relatively large percentage of customers whom the owners and employees of New Crystal Restaurant believed to be gay. (Tr. 32-33, 61, 189-191, and 202-210).

***2** 5. There is no evidence that New Crystal Restaurant's owners or its employees discouraged any of these customers from patronizing New Crystal Restaurant or otherwise discriminated against any of these customers based on their sexual orientation.

6. There is no evidence that New Crystal Restaurant had a written policy prohibiting discrimination based on sexual orientation at the time of the alleged violation. However, Ms. Matteson, the waitress who allegedly committed the violation, admitted that she knew that the owners of New Crystal Restaurant expected her to be pleasant to all customers and not to discriminate based on sexual orientation. (Tr. 34-35). Ms. Matteson also admitted that she was not authorized to discriminate against Mr. Craig (or any other customers) by the owners of New Crystal Restaurant. (Tr. 34-35).

7. At the time of the alleged violation, Mr. Craig lived in Chicago. He frequently ate at the New Crystal Restaurant and, as a result, was familiar with the waitstaff at the restaurant, including Gloria Matteson. (Tr. 71-72 and 143).

8. On September 5, 1992, Mr. Craig went to the New Crystal Restaurant for breakfast. Mr. Craig sat down at the counter and a waitress named Sandy DeLucio took his order. After taking his order, Ms. DeLucio got into an argument with the cook. As a result, Ms. DeLucio did not attend to Mr. Craig's order. Another waitress, Gloria Matteson, saw that Ms. DeLucio was not attending to Mr. Craig's order and served Mr. Craig his food. (Tr. 72-73).

9. After he was served, several waitresses including Ms. DeLucio, Ms. Matteson, Beverly Meadows and a waitress named Debbie, congregated in a booth in the dining room. (Tr. 18-19 and 73).

10. After finishing his meal, Mr. Craig walked over to the waitresses and asked for his check. One of the waitresses gave Mr. Craig his check. Mr. Craig was displeased with the service he had received. As a result, Mr. Craig told the group of waitresses that as a regular customer he resented not getting better service. In addition, he stated that if it were his restaurant, he would probably fire all of them. (Tr. 74).

11. After making this statement Mr. Craig turned around and started to walk toward the cashier. Mr. Craig testified that he heard Ms. Matteson state: “I don't know who he thinks he is, that holier than thou damn faggot.” Mr. Craig testified that there was no doubt in his mind that Ms. Matteson had made the statement because he recognized her voice. (Tr. 74-75). The comment was made loudly enough and while Mr. Craig was close enough for him to clearly hear it. (Tr. 21 and 74-75).

12. Ms. Matteson testified at the hearing and admitted she knew that Craig was gay prior to the incident. Ms. Matteson corroborated Mr. Craig's testimony in almost every detail except that she said that Ms. DeLucio made the offending comment rather than herself. (Tr. 17-21).

13. Based on the testimony, there is no doubt that Mr. Craig was called a damn faggot by either Ms. DeLucio or Ms. Matteson. It is impossible to say for sure which waitress made the statement. Based on the evidence presented, it is more likely than not that the statement was made by Gloria Matteson. This finding is based on Mr. Craig's testimony that there was no doubt in his mind that the statement was made by Ms. Matteson because he recognized her voice.

***3** 14. Mr. Craig became very angry after hearing the comment. Since he did not want to deal with the situation while he was so angry, Mr. Craig left the restaurant and went home. (Tr. 75).

15. There is no evidence that any of the owners or managers of New Crystal Restaurant were present during the incident. Ms. Kitsis was not at New Crystal Restaurant during the incident. In addition, her son, William Kitsis, was not present during the incident. (Tr. 204). Kostas Panayotou, the manager of the restaurant, was also not present. (Tr. 222). In addition, there is no evidence that any of the owners or managers were informed about the incident on the day that it occurred.

16. Later that day, Mr. Craig returned to New Crystal Restaurant to consult with Olene Retamal, another waitress at New Crystal Restaurant. (Tr. 152). Mr. Craig was close friends with Ms. Retamal. (Tr. 84). Ms. Retamal was not present at the restaurant when the incident occurred. (Tr. 42). After he arrived, Mr Craig heard Ms. Matteson describing the incident to Ms. Retamal. During her description of the incident to Ms. Retamal, he heard Ms. Matteson use the word "faggot." Ms. Matteson's use of the word "faggot" in this instance was not directed at Mr. Craig. In addition, her use of the word "faggot" in this instance was not meant to insult Mr. Craig. (Tr. 43 and 176-176).

17. Mr. Craig telephoned the New Crystal Restaurant on two occasions and left messages for Ms. Kitsis or her sons with Ms. Retamal. (Tr. 76-82 and 173). In addition he gave Ms. Retamal two letters to give to Ms. Kitsis or her sons. (Tr. 76-82). Mr. Craig was attempting to contact Ms. Kitsis to discuss the incident. (Tr. 80).

18. Mr. Craig admitted that he did not know if Ms. Retamal gave these messages or letters to Ms. Kitsis or her sons. (Tr. 169-172). Ms. Kitsis and her son William denied receiving the messages or the letters. Ms. Retamal, who testified at the hearing on Complainant's behalf, did not testify that she ever gave these messages or letters to Ms. Kitsis or her sons. Thus, the weight of the evidence establishes that Ms. Kitsis and her sons never received these messages or letters.

19. Mr. Craig never personally discussed the incident with Ms. Kitsis or her sons. (Tr. 86.)

20. On October 2, 1992, Mr. Craig filed a Complaint with the Commission. (Complaint).

21. Ms. Kitsis's son, William Kitsis, first learned about incident when he received a copy of the Complaint after it was filed with the Commission. (Tr. 205). Ms. Kitsis first learned about the incident when her son William Kitsis told her about it. (Tr. 192-198). William Kitsis did not tell Ms. Kitsis about the Complaint until several months after he received the Complaint because he did not want to upset her and he believed it would be resolved without her getting involved. (Tr. 213).

22. After receiving the Complaint, William Kitsis spoke to Ms. Matteson and Ms. Meadows about incident. He did not speak to Ms. DeLucio because she had quit before he received the Complaint. Both Ms. Matteson and Ms. Meadows denied knowing anything about the incident. In addition, at the time he discussed the issue with Ms. Matteson she did not tell him that Ms. DeLucio made the statement. Mr. Kitsis believed that he could not do anything to Ms. Matteson because it was Mr. Craig's word against Ms. Matteson's word. In addition, Mr. Kitsis and Ms. Matteson met with an employee of the Commission who asked them questions. At that time, Ms. Matteson stated that Ms. DeLucio made the statement (Tr. 212-217).

***4** 23. At some point after the complaint was filed, Ms. Retamal told William Kitsis and his brother Al Kitsis that she thought they should apologize to Mr. Craig. (Tr. 58-59 and 64). No one from New Crystal Restaurant has apologized to Mr. Craig.

24. After the incident, Mr. Craig continued to go to the New Crystal Restaurant. When he went there, he would only allow Ms. Retamal to wait on him. He did however, allow Ms. Matteson to refill his coffee on several occasions. (Tr. 84).

25. Other than on the date of the alleged violation, Mr. Craig was never insulted because of his sexual orientation or otherwise treated differently by any employees or agents of New Crystal Restaurant. In addition, he was never denied service by any employees or agents of New Crystal Restaurant. (Tr. 85-86).

26. Complainant felt distressed by the incident. Mr. Craig testified that he did not remember having felt so offended about anything prior to this incident. (Tr. 83 and 139). Mr. Craig further testified that he felt semi-nauseous on the day of the hearing and that every time he hears the word "faggot" it makes the hair on the back of his neck rise and his blood turn cold. (Tr. 93).

27. Mr. Craig came to Chicago from New York in August, 1994 for a Commission-ordered conciliation conference. Based on the evidence presented, in August, 1994, Mr. Craig's expenses connected with his trip to Chicago were $257.40 for air fare, $193.74 for a motel room, $164.91 for car rental, and $90 in excess baggage charges for transporting his dog. The total amount expended by Mr. Craig connected to his trip was $606.05. (Tr. 113-137 and Cp. Exs. A, C, D, E, F, L).

28. Mr. Craig came to Chicago from New York for a Commission-ordered administrative hearing in December, 1994. Based on the evidence presented, in December, 1994, Mr. Craig's expenses connected with his trip to Chicago were $179.00 for air fare, $183.94 for a motel room, $122.07 for car rental, $12.25 for parking, $23.48 for a meal and $90 for boarding his dog, The amount expended by Mr. Craig connected to his trip was $610.74. (Tr. 113-137 and Cp. Exs. B, G, H, I, J, K, and M).

29. Mr. Craig came to Chicago from New York for a Commission-ordered administrative hearing in March, 1995. No receipts were presented relating to expenses connected with this trip. Mr. Craig estimates, and it is reasonable to assume, that the expenses were the same as in August and December, 1994.

30. Mr. Craig estimated that he spent $400.00 on telephone calls. His estimate was based on his review of his records for the last six months multiplied by five. No supporting documentation was presented to support Mr. Craig's estimate. (Tr. 86-87).

31. Mr. Craig testified that he suffered loss of income because he was discharged from his job as a legal secretary with a law firm in New York as a result of the time he had to spend on this case. (Tr. 70 and 94). Mr. Craig did not present any admissible or credible evidence to support this allegation. Mr. Craig also testified that the proceedings have caused him stress which he was advised by his doctor to avoid. (Tr. 90).

***5** 32. The administrative hearing scheduled for December 12, 1994 was not held because Respondent did not attend the hearing. [2] In addition, Respondent did not notify Mr. Craig that it would be unable to attend the hearing prior to the hearing. An attorney for Respondent appeared at the hearing and requested a continuance of the hearing. Complainant requested a default judgment against Respondent for failing to appear at the hearing. The default judgment was denied, however the Hearing Officer indicated that he would consider imposing the costs Complainant expended attending the hearing on Respondent as a sanction for its failure to attend the hearing or notify Mr. Craig that it would not be able to attend the hearing. (Supp. Tr. 2-9).

33. Respondent had adequate notice that the hearing would be held on December 12, 1994. In addition, Respondent had failed to comply with previous orders of the Commission by failing to attend the pre-hearing conference and failing to comply with discovery. Respondent's arguments as to why sanctions should not be imposed were considered (Tr. 257-268) but were not sufficient to excuse its failure to attend the hearing or notify the Complainant and the Hearing

Officer that it did not plan to attend the hearing. Consequently good cause exists to award sanctions for Respondent's failure to attend the hearing.

CONCLUSIONS OF LAW

1. Complainant has proved by a preponderance of the evidence that Respondent's waitress discriminated against him concerning the full use of a public accommodation based on his sexual orientation under Section 2-160-070 of the CHRO.

2. Respondent is liable for the conduct of its waitress under Section 2-160-070 of the CHRO.

3. Complainant suffered emotional injury damages as a result of the discrimination entitling him to an award of compensatory damages.

4. Respondent is liable for Complainant's costs in attending the administrative hearing scheduled for December, 1994 as a sanction for Respondent's failure to attend the hearing.

DISCUSSION

Complainant alleges that Respondent violated section 2-160-070 of the CHRO by discriminating against him based on his sexual orientation. Complainant's claim is discussed below.

I. RESPONDENT'S EMPLOYEE'S CONDUCT WAS DISCRIMINATORY UNDER THE CHRO

Section 2-160-070 of the CHRO states, in relevant part, that:
No person that owns, leases, rents, operates, manages or in any manner controls a public accommodation shall withhold, deny, curtail, limit or discriminate concerning the full use of such public accommodation by any individual because of the individual's race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status, or source of income.

Under section 510.110(d) of the Commission's Rules and Regulations Governing the Chicago Human Rights Ordinance, the Chicago Fair Housing Ordinance, and the Chicago Commission on Human Relations Enabling Ordinance (the "Commission's Rules"), restaurants are public accommodations under the CHRO. Thus, Respondent is a public accommodation under the CHRO.

***6** Complainant alleges that Respondent violated section 2-160-070 of the CHRO. Complainant does not allege that Respondent refused to serve him because of his sexual orientation. Instead, Complainant alleges that he was discriminated against because of his sexual orientation solely because he was called a "faggot" by one of Respondent's employees after asking a group of employees for his check and telling them he would fire all of them if he owned the restaurant. In addition, Complainant alleges that the same employee used the term "faggot" when he returned to the restaurant later that day.

Respondent contends that Complainant cannot establish that he was discriminated concerning the full use of its restaurant based on a single, isolated incident of verbal abuse. According to Respondent, Complainant must show that the verbal abuse was sufficiently pervasive to create a hostile environment to establish a violation of the CHRO.

In support of its position, Respondent cites to section 345 of the Commission's Rules. Section 345.110 of the Commission's Rules pertains to harassment (other than sexual harassment) in employment discrimination cases. According to section 345.110:

Slurs and other verbal or physical conduct relating to an individual's membership in one of the protected classes constitutes harassment when this conduct:

(a) has the purpose or effect of creating an intimidating, hostile or offensive working environment;

(b) has the purpose or effect of unreasonably interfering with an individual's work performance;

(c) otherwise adversely affects an individual's employment opportunities.

See also Commission's Rules, sec. 410.7 (defining sexual harassment in housing discrimination cases in a similar manner).

In addition, Respondent cites to several employment discrimination cases involving claims of sexual harassment in which courts have held that isolated incidents of harassment may not create a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e et seq., unless the harassment is sufficiently pervasive so as to alter the conditions of employment. See, e.g., Downes v. F.A.A., 775 F.2d 288, 292 (Fed. Cir. 1985). Similarly, the Commission has also held that an employer may not be liable for isolated incidents of sexual harassment unless the incidents taken as a whole are sufficiently pervasive to have created a hostile environment. Barnes v. Page, CCHR No. 92-E-1 (9-23-93).

In opposition to Respondent's argument, Complainant argues that public accommodations cases are distinguishable from other types of discrimination cases; and, as a result, an isolated incident of verbal abuse may be sufficient to violate the CHRO in the public accommodation context. This issue was addressed in King v. Greyhound Lines, Inc., 656 P.2d 349 (Or. App. 1982).

King involved an action brought under Oregon's Public Accommodations Act, ORS 30.670 et seq. Oregon's Public Accommodations Act provided, in relevant part, that:
***7** “all persons . . . shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race . . . .”

King, 656 P.2d at 349 n.1.

In King, the plaintiff, an African American customer, tried to return a bus ticket he bought from the defendant. When plaintiff attempted to return the ticket, defendant's ticket agent called him a “nigger.” In addition, the ticket agent used the term “boy” in referring to the plaintiff.

The Oregon court found that the ticket agent's verbal abuse was sufficient to establish a violation of the Oregon Public Accommodations Act. In so holding, the court determined that Oregon's statutory prohibition against discrimination in public accommodations:
encompasses more than the outright denial of service. It also proscribes serving customers of one race in a manner different from those of another race.

King, 656 P.2d at 351.

The court also stated that:
[T]he chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.

King, 656 P.2d at 352.

The defendant in King, like the Respondent in this case, cited employment discrimination cases holding that a single incident of verbal abuse is insufficient to establish discrimination. The court stated:
[T]hese cases have limited precedential value because they are not public accommodations cases. The relationship between a place of public accommodation and a member of the general public is fundamentally different from an employer-employee relationship. For instance, an individual instance of harassment may be insufficient to prove discrimination in an ongoing employment relationship, while a similarly isolated incident could amount to a violation of the Public Accommodations Act because of the singular nature of the contact between the customer and the business.

King, 656 P.2d at 351 n. 6.

Similarly, Section 2-160-070 of the CHRO prohibits discrimination concerning the full use of a public accommodation. Section 520.110 of the Commission's Rules states that:
"Full use" of a public accommodation means that all parts of the premises open for public use shall be available to persons who are members of one of the protected classes at all times and under the same conditions as the premises are available to all other persons, and that the services offered to persons who are members of one of the protected classes shall be offered under the same terms and conditions as are applied to all other persons.

Based on the language of the CHRO and the Commission's Rules, a public accommodation cannot treat persons differently based on their sexual orientation. In addition, based on the singular or abbreviated nature of the contacts between members of the public and public accommodations, it follows that in many cases a single incident of verbal abuse may result in the person using the public accommodation being served differently than other customers because of his or her membership in a protected group. Where such is the case, the single incident will be sufficient to establish a violation of the CHRO. See Head v. St. Joseph's Hospital, CCHR No. 93-PA-13 (9-8-93); Plochl v. Chicago National League Ball Club, CCHR No. 92-PA-46 (10-4-93)

***8** On the other hand, not every insult or derogatory comment will necessarily rise to the level of a violation. The nature of the verbal abuse and the context in which it is used are relevant. See Evergreen Sch. Dist. v. Washington St. Human Rights, 629 P.2d 999 (Wash. App. 1985) (holding that use of racial stereotype by teacher was not actionable under state human rights act where the statement was not meant to be abusive and was not directed at plaintiff student); see also Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984) (discussing various cases involving verbal abuse).

The term used in this case, "faggot," is a discriminatory term. In Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984), the court noted that the use of the term "nigger" automatically separates the person addressed from every non-black person and held that the use of the term is discrimination per se. Similarly, the term "faggot" often has the purpose and effect of separating the person addressed from other non-heterosexual persons. In addition, with respect to the incident in which Complainant was called a "faggot" while attempting to pay for his meal, the person making the statement knew that Complainant was gay, directed the statement at Complainant, and made the statement to belittle Complainant.

The fact that Complainant was called a "faggot" after Complainant expressed his displeasure with the service at the restaurant by telling the person making the comment that he would fire her if he owned the restaurant does not justify its use. Complainant's behavior did not give Respondent's employee the right to respond to him in a way that demeaned him because of his sexual orientation. In fact, it is under such adverse circumstances that persons often resort to such slurs. See, e.g., King, 656 P.2d at 350 (plaintiff was called a "nigger" by defendant's ticket agent when he attempted to return his bus ticket); Bailey, 583 F. Supp. at 925 (plaintiff was called a "nigger" after disclaiming responsibility for work that his manager felt was not done correctly).

Thus, Complainant was treated differently than other members of the public who complained about their service because of his sexual orientation. Consequently, based on the facts of this case, Complainant was discriminated against concerning his full use of a public accommodation within the meaning of the CHRO with respect to the comment made after he complained about the service. [3]

On the other hand, Respondent's employee's use of the term "faggot" when Mr. Craig returned to the restaurant did not violate the CHRO. This statement was made by Respondent's employee to another employee to inform her what had transpired earlier and was overheard by Complainant. It was not made to insult Complainant. Moreover, Complainant was at the restaurant to consult with one of Respondent's employees who was a close friend of his. Thus, the statement was not made in the course of serving Complainant or while Complainant was attempting to "use" a public accommodation.

II. NEW CRYSTAL IS LIABLE FOR THE ACTIONS OF ITS EMPLOYEE

***9** The sole respondent in this case is New Crystal Restaurant. Respondent contends that in determining whether it is liable for its employees' violation of the CHRO, the Commission should apply Illinois law governing the vicarious liability of employers for the torts of their employees. Alternatively, Respondent argues that the Commission should apply the standard set forth for holding employers liable for the acts of non-supervisory employees in harassment cases under the CHRO. Section 345.130 of the Commission's Rules states, in part, that:

With respect to the conduct of non-managerial or non-supervisory employees, an employer is responsible for acts of harassment in the workplace on the basis of the victim's membership in one of the protected classes (other than sex) where the employer (or its agents or supervisory employees) knew or should have known of the conduct and failed to take reasonable corrective action.

Complainant argues that Respondent should be strictly liable for the acts of its employees. In support, Complainant cites to housing discrimination cases which hold that in housing discrimination cases, principals are liable for the discriminatory acts of their agents regardless of whether the principals knew of or authorized such acts. See Chicago v. Matchmaker Real Estate Sales Center, 982 F.2d 1086, 1096-1098 (7th Cir. 1993) (holding owners liable for housing discrimination by sales agents).

The CHRO and the Commission's Rules do not specifically provide the conditions under which owners of public accommodations should be held liable for the acts of their employees. In addition, this appears to be a case of first impression before the Commission.

The Illinois common law standard for imputing an employee's torts to his or her employer, which Respondent argued should be adopted by the Commission in its Post-Hearing Memorandum and its Objections to the First Recommended Decision, should not be applied because it has not been applied in other types of discrimination cases decided under the CHRO (or the Illinois Human Rights Act). [4] For example, as set forth above, in employment discrimination cases decided under the CHRO, an employer is strictly liable for the acts of their supervisory employees and liable for the acts of their non-supervisory employees if the employer becomes aware of the conduct and fails to take reasonable corrective measures. See CHRO, Section 2-160-040 and Commission's Rules, secs. 345.120 and 345.130; see also Board of Dir., Green Hills v. Illinois Human Rights Commission, 113 Ill. Dec. 216, 219-220, 514 N.E.2d 1227 (Ill. App. 5th Dist. 1987) (applying same standards to employment discrimination cases decided under the Illinois Human Rights Act).

In addition, the standard for holding employer's liable for the acts of their non-supervisory employees applied in employment discrimination cases are not necessarily transferrable to public accommodations cases. The relationship between two non-supervisory employees is different than the relationship between non-supervisory employees and members of the public. Within the context of the employment situation, non-supervisory employees who have been

discriminated against do not usually believe that other non-supervisory employees are not acting as agents of their employers when they discriminate. However, a non-supervisory employee who denies or provides unequal service to a member of the public because of the person's membership in a protected category appears to be acting as an agent of the owner of the public accommodation. See Matchmaker, 982 F.2d at 1096 (holding principals liable for discriminatory acts of their agents in housing discrimination cases, where the acts of the agent are within the scope of the agent's apparent authority, even if the principal neither authorized nor ratified the acts.) In addition, as recognized in Matchmaker, 982 F.2d at 1097, it makes more sense to place the burden of responsibility for the discriminatory acts of a principal's agent on the "innocent" principal who generally benefits from its dealings with the public rather than the "innocent" member of the public who was discriminated against.

***10** Other jurisdictions that have considered this issue have reached mixed results. See e.g., King, 656 P.2d 349-352 & n. 3 (holding employer liable under Oregon law prohibiting discrimination in public accommodations for racial slurs where slurs were not authorized, approved or ratified by the employer and where employer was opposed to such conduct or any type of racial discrimination); but see Totem Taxi v. N.Y. State Human Right A. Bd., 480 N.E.2d 1075, 1077 (N.Y. 1985) (holding that employer must encourage, condone or approve of employee's act of discrimination to be held liable for it under New York State Human Rights Law prohibiting discrimination in public accommodations); Div. of Hum. R. v. St. Elizabeth's Hosp., 487 N.E.2d 268 (N.Y. 1985) (following Totem Taxi).

In its Objections to the First Recommended Decision, Respondent argues that the Commission should adopt the reasoning of the New York Courts in Totem Taxi, 480 N.E.2d at 1077 and St. Elizabeth's Hosp., 487 N.E.2d at 268, which held that an employer could not be held liable for the discriminatory acts of its employees unless the employer encouraged, condoned or approved of the employee's act of discrimination. However, for the reasons stated above, it is more consistent with the purpose of the CHRO to hold employers strictly liable for the discriminatory acts of their employees in the public accommodation context.

Thus, based on a review of the CHRO, the Commission's Rules and other relevant cases and materials, owners of public accommodations should be held liable for the acts of their non-managerial and non-supervisory agents if done during the course of serving a member of the public whether or not the owners knew about or authorized the alleged discrimination. This standard is being adopted, rather than the standards argued for by Respondent, because it is more consistent with the purpose of the CHRO. Consequently, the Commission holds Respondent liable for the actions of its employee even though it did not authorize or know about the violation in this matter.

III. COMPENSATORY DAMAGES

The Complainant has proved that harassment which he was subjected to caused him emotional distress. Complainant did not present any expert testimony at the hearing that would have aided in determining whether he suffered emotional distress. However, Complainant's testimony is sufficient to establish his emotional injury. See McCall v. Cook County Sheriff's Office, et al., CCHR No. 92-E-122 (December 21, 1994).

Complainant was humiliated by the statement made by Respondent's employee. He testified that he was angry and upset when the comment was made. In addition, he testified that he was and continues to be greatly offended by the incident.

The incident, however, was an isolated one. Moreover, Complainant was not entirely innocent in that his comment to the group of employees indicating that he would fire them if he was their employer was somewhat obnoxious.

***11** Moreover, Complainant did not present any evidence that he was particularly susceptible to distress because of prior experiences. Complainant did not testify that the incident caused him any physical or psychological injury such as loss of sleep, loss of appetite, or depression. In addition, Complainant continued to eat at New Crystal Restaurant after the incident occurred.

The Commission has awarded damages in the amount of $500.00 to $1000.00 for emotional distress where the evidence of emotional distress was slight. See Lawrence v. Atkins, CCHR No. 91-FHO-17-5602 (7-29-92); Akangbe v. 1428 W. Fargo Condominium Assoc., CCHR No. 91 FHO-7-5595 (3-25-92); Castro v. Georgeopoulos, CCHR No. 91-FHO-6-5591 (12-18-91). Given the limited duration and severity of the offensive conduct in this case, and the effect the conduct had on the Complainant, the Commission awards $750.00 in emotional injury damages to the Complainant. [5]

IV. OUT OF POCKET DAMAGES

Complainant requests damages for the cost of traveling to the Commission from his residence in New York on three occasions for hearings scheduled by the Commission. Since he lives in New York, each trip involved purchasing an airline ticket, renting a car, and reserving a motel room. In addition, Complainant had to either pay to bring his dog with him or board his dog. Complainant also paid for parking and for a meal on at least one occasion.

Furthermore, Complainant contends that he spent $400.00 on telephone calls relating to the case. He also contends that he was discharged from his job as a legal secretary with a law firm in New York because he had to come to Chicago so often for this case. [6]

At issue is whether Complainant is entitled to damages resulting from the litigation of this case. Section 2-120-510(1) of the Chicago Commission on Human Relations Enabling Ordinance ("CCHREO") provides that the Commission may "take such action as may be necessary to make the individual complainant whole." In addition, it states that: "relief may include . . . the costs . . . incurred in pursuing the complaint before the Commission or at any stage of judicial review."

In Castro v. Georgeopoulos, CCHR No. 91-FHO-6-5591 (12-18-91), the complainant sought to recover damages for lost earnings and parking fees he incurred litigating his case. The Commission stated that it "knew of no precedent -- and Complainant offered none -- which would support reimbursing Complainant for these expenses." Castro, at 16 n. 7. Similarly, Complainant in this case has cited no authority holding that Complainant is entitled to the expenses he seeks. Thus, based on the Commission's decision in Castro, it is recommended that Complainant's request for damages resulting from his pursuit of the litigation be denied. [7]

V. PUNITIVE DAMAGES

This case was brought solely against New Crystal Restaurant. While Respondent is liable for the conduct of its employees in this case, Respondent is not found liable for punitive damages in this case.

***12** In Matchmaker, 982 F.2d at 1100, the housing discrimination case cited by Complainant in support of his position that Respondent should be liable for the conduct of its employee, the court stated that a principal should be liable for punitive damages for the acts of its agent only if the principal knew of or ratified the acts. While this standard may not be applicable to all cases involving the public accommodations section of the CHRO, it seems applicable to a case such as this one in which the agent was a non-managerial employee and the Respondent did not know of the act at or near the time of its occurrence and did not ratify it.

In addition, punitive damages would serve no deterrent purpose in this case. Ms. Kitsis, Respondent's owner at the time of the violation, has sold Respondent to a new owner. At the same time, she has agreed not to hold the new owner liable for conduct occurring prior to the sale. Based on her lack of involvement or knowledge concerning the violation, punitive damages would serve no useful purpose.

VI. FINE

Section 2-160-120 of the CHRO provides, in part, that:
Any person who violates any provision of this ordinance shall be fined not less than $100 and not more than $500 for each offense.

In the First Recommended Order, it was recommended that no fine be issued in this case. After reviewing the CHRO, it has been determined that a fine must be issued where the Commission has found a violation of the CHRO. Thus, for the reasons stated in section V of this Discussion, it is recommended that the minimum fine of $100.00 be issued in this case.

VII. ATTORNEY'S FEES

Section 2-120-510(1) of the Ordinance provides that the Commission has the power to order Respondent to pay all or part of the Complainant's costs, including reasonable attorneys fees. The Commission has routinely found that a prevailing Complainant is entitled to reasonable attorneys fees and costs. See, e.g. Huezo v. St. James Properties, CCHR No. 90-E-44 (10-4-91). Therefore, the Commission awards Complainant reasonable attorney's fees and costs to be determined as set forth below.

VIII. SANCTIONS

Complainant should be awarded sanctions for Respondent's failure to attend the hearing scheduled for December, 1994. Respondent was notified of the hearing on several occasions. In addition, Complainant was forced to travel from New York to Chicago to attend the hearing because Respondent did not notify Complainant or the Hearing Officer that it would not be attending the hearing. Pursuant to Respondent's request, it was not defaulted for failing to attend the hearing. However, it is unreasonable to force Complainant to bear the burden of traveling from New York to Chicago because Respondent failed to attend the hearing.

In its Objections, Respondent argues that Ms. Kitsis did not attend the hearing because she was insured and she mistakenly thought her insurance would cover her liability. However, as set forth in Finding of Fact No. 33, this explanation does not provide good cause for failing to attend the hearing because orders were entered on November 30, 1994 and December 2, 1995 warning Ms. Kitsis of the consequences of failing to appear at the hearing. In addition, Respondent made no attempt to comply with any of the orders entered in this matter until December 30, 1994 when Mr. Regas filed his appearance for Respondent. Thus, an award of sanctions is appropriate in this case. See Commission's Rules, sec. 240.110(o) (allowing Hearing Officer to recommend order of default or some other remedy where a party fails to appear at an administrative hearing); Starrett v. Duda/Sorice, CCHR 93-H-6 (4-20-94) (complainant fined $300 for failing to appear at Hearing).

***13** In the First Recommended Order, sanctions in the amount of $586.76 were awarded. In its objections, Respondent objects to the amount of the sanctions. Respondent argues that Complainant increased his expenses by spending $183.94 for a motel room although it was not necessary for him to stay in Chicago overnight. Respondent also objects to Complainant spending $90.00 for boarding his dog. Finally, Respondent objects to the amount of the sanctions because, in addition to attending the hearing, Complainant visited friends in Indiana.

In light of Respondent's objections, the amount awarded to Complainant as sanctions is reduced to $344.25. This amount includes the amount Complainant spent on airfare ($179.00), half the amount he spent for a motel and rental car ($153.00), and the cost of parking ($12.25). It was reasonable for Complainant to spend one night in Chicago in light of the early hour of the hearing. However, in the absence of other evidence, Respondent should not have to pay for Complainant to spend two days in Chicago. In addition, the sanctions should not include Complainant's costs for boarding his dog.

CONCLUSION

For the reasons stated in this Final Ruling, the Commission finds that Complainant was discriminated against concerning his use of Respondent's public accommodation.

The Commission also awards Complainant $750.00 in compensatory damages for emotional distress and $344.25 as a sanction for Respondent's failure to attend the first scheduled administrative hearing. In addition, Respondent is fined $100.00 for violating the CHRO. Respondent shall pay interest on these amounts, at the prime rate, adjusted quarterly compounded annually, and starting from the date of the violation. [8]

Finally, the Commission awards Complainant his reasonable attorney's fees and costs. Pursuant to Regulation 240.120(c), Complainant shall serve the Hearing Officer and all other parties a statement of attorney's fees and costs supported by arguments and affidavits within 21 says after receipt of this Order. Accordingly, Complainant's statement of attorney's fees and costs in the instant case must be served by November 13, 1995. This statement shall also be filed with the Commission. The supporting documentation shall include the following:
1. The number of hours for which compensation is sought, itemized according to the work that was performed and the individual who performed the work;

2. The hourly rate customarily charged by each individual for whom compensation is sought, or in the case of a public law office which does not charge fees or which charges fees at less than market rates, documentation of the rates prevalent in the practice of law for attorneys in the same locale with comparable experience and expertise; and

3. Documentation of costs for which the party seeks reimbursement.

All other parties shall file any responses/objections to the statement of fees within 14 calendar days after service of such statement. Such responses shall be served upon the Administrative Hearing Officer, all other parties, and shall be filed with the Commission. Complainant may submit a reply brief, within five calendar days after receipt of the response.

***14**

By: Clarence N. Wood
Chair/Commissioner

Footnotes

1 References in this opinion to the transcript of the administrative hearing will be cited as (Tr. ____). References to Complainant's Exhibits will be cited as (Cp. Ex. __) and references to Respondent's Exhibits will be cited as (Rp. Ex. ___).

2 Citations to the transcript of the proceedings held on December 12, 1994 will be referred to as (Supp. Tr. ___).

3 In its Objections to the First Recommended Decision, Respondent argues that this case is distinguishable from King because Complainant had numerous non-discriminatory contacts with the New Crystal Restaurant. Although Complainant often ate at the New Crystal Restaurant, his contacts with it were not similar to the contacts an employee would have with his or her employer in the employment context. Thus, the incident at issue is sufficient to constitute a violation in the public accommodation context.

4 Under Illinois common law an employer is liable for the acts of its employee if the conduct is within the "scope of employment." The employee's conduct is within the scope of employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master . . . ." Pyne v. Witmer, 129 Ill. 2d 351, 135 Ill. Dec. 557, 561, 543 N.E.2d 1304 (1989) (quoting Restatement (Second) of Agency sec. 228 (1958)). "If the employee commits an intentional tort with the dual purpose of furthering the employer's

interest and venting personal anger, respondeat superior may lie; however, if the employee acts purely in his own interest, liability under respondeat superior is inappropriate." Sunseri v. Puccia, 97 Ill. App. 3d 488, 52 Ill. Dec. 716, 721, 422 N.E. 2d 925 (1st Dist. 1981) (citations omitted).

Under this standard, Illinois courts have held that a security guard at grocery store who stopped a young girl after she made a purchase and sexually molested her while searching her acted outside the scope of his employment because employee acted purely in his own interest. See Webb v. Jewel Companies, Inc. 137 Ill. App. 3d 1004, 92 Ill. Dec. 598, 600-602, 485 N.E.2d 409 (1st Dist. 1985); see also Randi F. v. High Ridge YMCA, 170 Ill. App. 3d 962, 120 Ill. Dec. 784, 524 N.E.2d 966 (1st Dist. 1988) (teacher's aide employed by day care center did not act within scope of employment where she allegedly beat and molested three-year-old girl because employee acted purely in her own interest); cf. Sunseri, 52 Ill. Dec. 716 (holding that bartender who assaulted patron may have been acting within scope of employment).

5 In its Objections to the First Recommended Decision, Respondent argues that, based on Ms. Kitsis's financial condition, the award for emotional distress is excessive. Respondent has not cited any authority to support its contention that the Respondent's financial condition is a factor in determining the amount of an award for emotional distress. Therefore, it is not considered here.

6 Even if otherwise compensable, Complainant's request for damages resulting from his job loss is also denied because Complainant failed to provide sufficient evidence either that he lost his job because of this case or the amount of money he lost because of his job loss. In addition, Complainant's estimate of his telephone bills seems excessive without further documentation.

7 It is possible that some of these expenses may compensable as costs. See Castro, CCHR Case No. 91-FHO-6-5591 at 16 n. 7 and 20 n. 9.

8 The term "Prime Rate" means a variable rate of interest per annum equal to the rate of interest from time to time published by the Board of Governors of the Federal Reserve System as the "Bank Prime Loan" rate in the Federal Reserve statistical release H.15 (519) entitled "Selected Interest Rate" or any successor publication to the Federal Reserve system reporting the Bank Prime Loan rate or its equivalent. The Statistical release generally sets forth a Bank Prime Loan rate for each business day. The applicable Prime Loan rate for any date not set forth shall be the rate set forth for the last proceeding date on which a rate was set forth. In the event the Board of Governors of the Federal Reserve System ceases to publish a Bank Prime Loan rate or equivalent, the term "prime rate", "base rate" or other similar rate announced from time to time by any of the Banker's Trust Company, Chase Manhattan Bank, N.A. or Chemical Bank (with the understanding that any such rate may merely be a reference rate and may not necessarily represent the lowest or best rate actually charged to any customer by such bank).

1995 WL 907560 (Chi.Com.Hum.Rel.)

End of Document

Appendix 3

1999 WL 33252627 (Ill.Hum.Rts.Com.)

Human Rights Commission

State of Illinois

IN THE MATTER OF:
VELMA J. HENDERSON, COMPLAINANT
AND
STEAK N SHAKE, INC., RESPONDENT

CHARGE NO: 1996CP2939
EEOC NO:
ALS NO: S-9735
March 24, 1999

NOTICE

***1** You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order And Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order And Decision of the Commission.

Gail M. Bradshaw
Executive Director

RECOMMENDED ORDER AND DECISION

CHARGE NO: 1996CP2939
EEOC NO:
ALS NO: S-9735

This matter is before me on Complainant's Request For Attorney's Fees after the issuance of a Recommended Liability Determination ("RLD") in favor of Complainant Velma J. Henderson. The RLD in its entirety is incorporated herein by reference. Pursuant to this RLD, Complainant submitted her attorney's fee petition. Respondent has filed a response. The matter is ready for decision.

Contentions of the Parties

Complainant requests an award of $7,073.50 for her attorney's fees and costs. Respondent argues that no fees should be awarded because the fee petition was not timely filed, and alternatively suggests that certain amounts be deducted and that the overall petition be reduced due to the limited success of Complainant on her claim.

Determination

Complainant is entitled to an award of attorney's fees and costs in the amount of $7,073.50.

Findings of Fact

1. Complainant was represented in this matter by Attorney William E. Elston.

2. Attorney Elston has more than 38 years of legal experience. He practices in the Chicago area in a variety of legal fields, has acted as a labor law arbitrator and as corporate counsel for municipalities. Attorney Elston bills clients at an hourly rate of $125.00.

3. The reasonable hourly rate for Attorney Elston is $125.00.

4. Attorney Elston has submitted an itemized list of dates of service, the service performed, and time spent on each activity. Activities are billed in one-tenth of an hour increments.

5. Complainant has requested compensation for 52.9 hours for legal work performed by Attorney Elston. The reasonable amount of hours expended by Attorney Elston is 52.9.

6. Complainant has requested reimbursement for $461.00 in costs for transportation by airplane to the public hearing. The amount of reasonable fees is $461.00.

7. Complainant established good cause for filing her fee petition nine days after the due date for filing the petition.

Conclusions of Law

1. Pursuant to Section 8A-104(G) of the Human Rights Act, as a successful claimant, Complainant is entitled to an award of reasonable attorney's fees. 775 ILCS 5/8A-104(G).

2. The verified motion for fees filed by Complainant's attorney and the listing of professional services rendered is sufficient to justify awarding the fees and costs requested.

Discussion

***2** Complainant is entitled to an award of attorney's fees. She has requested a fee award of $7,073.50, including costs. For the reasons stated below, the request of fees and costs is reasonable.

As a preliminary matter, I will address Respondent's argument that since the fee petition was filed late, no fees should be awarded. Complainant had earlier timely requested and received an extension of time to file her request for attorney's fees. The fee petition was then filed after the extended due date, without a separate motion requesting leave to file the untimely petition. Complainant's counsel did assert in the text of his fee petition that he received the Order granting the extension just as he was leaving the state for a few days, and that he prepared the petition upon his return. Late filings without leave of court are not to be encouraged, and moreover, Complainant's counsel does not explain why he waited until receiving the Order granting an extension to prepare his petition. Nevertheless, Respondent does not assert that the delay of nine days prejudiced Respondent in any way, and Respondent in fact sought and received an extension of time to file its response to the fee petition. Viewing Complainant's petition as a request to file the fee petition *instanter*, I find such a motion should be granted in this case.

When considering a fee petition before the Commission, the first task is to establish a reasonable hourly rate. **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1982). Complainant seeks reimbursement for Attorney Elston at the rate of $125 per hour. Respondent accurately notes that there is no supporting affidavit from an attorney to support that this rate is reasonable for Attorney Elston; Attorney Elston simply asserts that $125 per hour is what he charged. While affidavits establishing what a reasonable rate would be for Attorney Elston should have been filed, I note that

Attorney Elston has an extensive legal background, and that he presented his client's case competently at public hearing. Furthermore, the fee request overall is so modest that little support is necessary for the request from Complainant's counsel. See for example, **Green and State of Illinois, Department of Corrections**, ___ Ill. HRC Rep. ___ (1989CN1672, November 17, 1992), *aff'd sub nom*, **Illinois Department of Corrections v. Illinois Human Rights Comm'n**, 699 N.E.2d 143, 232 Ill. Dec. 696 (3rd Dist. 1998). Respondent has not suggested what it would consider a reasonable hourly rate for an attorney with the experience of Attorney Elston, nor has Respondent attached any affidavits stating what a reasonable rate for Attorney Elston should be in this case. [1]

The Commission has awarded higher fees for less experienced counsel. See for example **Dart and Illinois State Board of Elections**, ___ Ill. HRC Rep. ___ (1989SF0094, June 26, 1996), *aff'd sub nom*, **State Board of Elections v. Illinois Human Rights Comm'n**, 291 Ill. App. 3d 185, 683 N.E.2d 1011, 225 Ill. Dec. 508 (4th Dist 1997)($150 per hour for attorney with 15 years experience); **Coleman and Illinois Department of Transportation**, ___ Ill. HRC Rep. ___ (1990CN0110, June 28, 1996)($175 per hour for attorney with nine years experience). Notwithstanding the lack of a supporting affidavit, I find that a fee of $125 per hour is an extremely reasonable fee for a lawyer practicing in the Chicago area with 38 years of legal experience.

***3** Regarding the number of hours spent, Complainant has filed an itemized list of the work performed by her attorney, dates on which the work was performed, and the time devoted to each activity. The overall substance of the fee petition complies with 56 Ill. Admin. Code, ch. XI, Sec. 5300.765(a)(1).

Respondent makes two somewhat related contentions as to why Complainant's counsel's hours should be cut down. Respondent first argues that Attorney Elston's hours should be "reduced" by an amount its own counsel spent on matters such as motions to compel discovery. Second, Respondent argues that Complainant should not be compensated for work performed solely because of Complainant's failure to follow Commission rules. The problem with both of these arguments is that Respondent is inviting me to revisit many motions made in this case and to retroactively impose some sort of sanction against Complainant. As the Commission noted in **Peeples and Raintree Health Care Center, Inc.**, ___ Ill. HRC Rep. ___ (1988CN2190, October 27, 1997), when the respondent noted that the complainant did not win every point raised in the litigation and that some filings were unnecessary, "This is not the standard at this stage of the proceedings. If a complainant is ultimately fully successful with respect to his original complaint, he is normally entitled to all reasonable attorneys fees associated with the litigation, even though he did not succeed with respect to every motion".

Respondent first argues that any fees paid to Complainant's counsel should be subject to a "reduction" based on Complainant's counsel's failure to timely comply with discovery requests. The discovery disputes were the subject of three motions cited by Respondent. [2] Respondent did not seek sanctions in the form of attorney's fees in any of these motions, but now seeks a "reduction" of Complainant's fees "by an amount that represents the time spent by Respondent as a result of Complainant's failure to abide by Commission rules". (Respondent's Objections, pp. 5-6) The imposition of such a "reduction" of Complainant's fees would be exactly the same as the imposition of sanctions against Complainant. Respondent has waived any right to sanctions or a "reduction" by not requesting such a sanction in its earlier motions, which have long since been ruled upon.

In its second argument for reduction of hours, Respondent contends that it would be unfair to compensate Complainant for time spent as a result of her failure to comply with Commission rules. Respondent cites **Kelly and Coca-Cola Bottling of Chicago**, ___ Ill. HRC Rep. ___ (1990CA2284, September 9, 1996). The administrative law judge (ALJ) in that case held that sanctions were appropriate because of the complainant's "egregious abuse of Commission proceedings", giving an example of an answer "which transcends the merely obtuse and sinks to the level of bad faith". In the Recommended Liability Determination in **Kelly**, the ALJ awarded fees *that had been requested and granted in the respondent's earlier motion to compel*. In contrast, this Respondent sought no fees in its various motions, and such fees cannot be awarded

at this time. Additionally, there has been no finding by the ALJ ruling on any of this Respondent's motions that Complainant's conduct was sanctionable.

***4** Respondent points to time spent by Complainant responding to its dismissal motion based on Complainant's failure to respond to discovery. I note that Respondent sought no fees in its dismissal motion, and furthermore, the motion was denied outright on the merits without a response from Complainant. (See Order of November 13, 1997) Again, if Respondent felt it was entitled to some sort of monetary sanction, the request should have been made at the time of filing its motion.

In the same vein, Respondent objects to having to pay Complainant's attorney's fees incurred for seeking a continuance of the May 6, 1998 hearing. The continuance was requested due to witness unavailability. Such delays are unfortunate but are a part of getting a case to hearing. Notably, the May 4, 1998 Order granting the continuance specifically stated "Respondent did not request any sanctions for the late continuance request and none shall be awarded". To reduce Complainant's hours now would be, again, the same as awarding Respondent sanctions in the form of an offset to Complainant's award, and the imposition of such sanctions was specifically rejected in the May 4, 1998 Order.

Complainant's counsel's hours could be reduced if any of the hours were unnecessary. Sorting through Respondent's objections, the only objection which was not the subject of an earlier motion concerned the filing of the prehearing memorandum. Respondent objects for reimbursing Complainant's counsel for spending 2.5 hours revising the prehearing memorandum, as Respondent asserts that all Complainant's counsel had to do was to type in the suggestions from Respondent. Respondent contends both that Complainant's prehearing memorandum filed on April 20, 1998 did not make Respondent's suggested changes (Respondent's Objections, p.5); and that all Complainant did was add Respondent's suggested changes (Respondent's Objections, p. 7). Given that I do not have the various drafts of the prehearing memoranda, and I cannot tell from Respondent's Objections exactly what its grievance is on this issue, I cannot reduce Complainant's hours for time spent on the prehearing memorandum.

Finally, Respondent argues that Complainant's fees must be reduced due to her lack of success on the merits. Respondent cites **Hu and Allstate Ins. Co.**, ___ Ill. HRC Rep. ___ (1992CF0040, June 16, 1995) for the proposition that a party's fees may be reduced because of her lack of success. In **Hu**, the complainant contended that certain actions were taken against him because of his race and national origin, including that he was denied tuition reimbursement, that the respondent allowed him to be harassed by coworkers, and that he was discharged. He succeeded only on the tuition reimbursement claim, and accordingly, his attorney's fees were reduced.

In contrast, this Complainant succeeded on her sole claim presented, that she was treated differently at Respondent's restaurant because of her race. Her request for emotional damages was not rejected, although I recommended that she be awarded a lower amount than she requested. And while Complainant's counsel did ask for some rather unique types of relief which were not granted, no time was spent presenting any evidence to support those requested items at hearing.

***5** The mere fact that a complainant receives a low monetary award does not automatically mean that the complainant should not be compensated for all attorney time reasonably spent proving the civil rights violation. See **Brewington v. Dept. of Corrections**, 161 Ill. App. 3d 54, 513 N.E.2d 1056, 112 Ill. Dec. 447 (1st Dist. 1987); **Rackow v. Illinois Human Rights Comm'n**, 152 Ill. App. 3d 1046, 504 N.E.2d 1344, 105 Ill. Dec. 826 (2nd Dist. 1987). Circumstances here do not allow for a reduction of fees, as Complainant was successful on all material issues and prevailed on the one claim presented. Complainant's attorney's fees should not be reduced based on her limited amount of financial recovery.

The Act authorizes recovery of expenses or costs as well as fees. 775 ILCS 5/8A-104(G). Complainant seeks no costs except the cost of airline travel to the hearing, in the amount of $461.00. Respondent suggested that Complainant's counsel should have driven to the public hearing, as Respondent's counsel did. Absent extremely unreason able costs for transportation, an attorney is allowed to travel as he or she wishes. I note that Complainant's counsel only billed

for nine hours of time on the date of the public hearing. The public hearing lasted approximately six and a half hours (including a lunch hour). Had counsel driven from Chicago, approximately seven hours would have to be added to the hours spent and four hundred miles charged to the client. Given that at least twelve or thirteen hours would have been spent instead of nine on the day of hearing if counsel had driven, it was not inherently unreasonable for him to choose airline service to attend the hearing, even though the price of the airline ticket is rather high. The requested costs are reasonable and should be allowed.

Recommendation

In addition to the relief recommended in the RLD, I recommend the following relief:

1. Respondent be ordered to pay Complainant the sum of $6,612.50 as attorney's fees, and

2. Respondent be ordered to pay Complainant $461.00 as reasonable costs.

BY:

Denise L. Church
Administrative Law Judge
Administrative Law Section

Entered this 21st Day of January, 1999.

RECOMMENDED LIABILITY DETERMINATION

This matter is before me on the Complainant's Complaint after public hearing. Both parties appeared and were represented by counsel at the public hearing. The parties have filed their post-hearing briefs. The matter is ready for decision.

Contentions of the Parties

Velma Henderson ("Complainant") alleges that Steak n Shake, Inc. ("Respondent") discriminated against her because of her race (African-American) when she was not served at Respondent's Effingham, Illinois restaurant. Respondent contends that Complainant may have received slow service, but that she was not discriminated against because she was not refused service altogether. Respondent also contends that it is not liable for discrimination since it took remedial action by investigating Complainant's protest of the alleged discriminatory service.

Findings of Fact

***6** 1. On June 3, 1996, Complainant filed Charge No. 1996CP2939 with the Department of Human Rights alleging that she was discriminated against in Respondent's Effingham, Illinois, restaurant, a place of public accommodation, because of her race (African-American).

2. On May 26, 1996, Complainant was driving to Mississippi with three companions: Lorraine Garnett, Mrs. Garnett's husband Y.D. Garnett, and Ms. Lussborg. Complainant and Mrs. Garnett are African-American; the races of Mr. Garnett and Ms. Lussborg were not identified. [1]

3. Complainant and her companions stopped at Respondent's restaurant in Effingham, Illinois, and entered the restaurant at approximately 1:00 a.m. The dozen or so customers (all white) in the restaurant stopped eating and talking,

and looked at the Complainant and her group. The waitress Leann and the assistant manager Mike McNeely (both white), looked at Complainant but did not say anything to her or her party. Complainant did not notice a sign instructing customers to wait to be seated, so she and her companions seated themselves at a table. The two employees continued talking to each other but did not approach Complainant's table.

4. Jason Knieriem (white) was scheduled to work on the grill, but was assisting in the dining room because there had been a small rush of customers and the waitress was getting behind.[2] McNeeley was working as the cook and serving customers at the drive-through window.

5. Complainant and her companions waited at their table for 10 - 15 minutes. No waiter or waitress formally acknowledged their arrival or took their order. The waitress stared at Complainant's table off and on for about 15 minutes.[3]

6. A group of five white men entered the restaurant and seated themselves near Complainant's table. The waitress immediately brought the men water and silverware and took their order.

7. Thereafter, the waitress and manager passed by Complainant's table. The waitress said “Oh I didn't see you folks”. Complainant took the comment to be a sarcastic remark because she had made eye contact with the waitress when they had entered the restaurant.

8. The waitress asked Complainant and her group if they wanted water and placed three glasses of water on the table. A glass of water was already on the table, presumably left over from a previous customer. The waitress did not take their orders. None of the three staff present spoke to Complainant and her group the rest of the time they were at the restaurant.

9. Mr. Garnett suggested that they wait and see if the waitress would take their order. Complainant wanted to leave because she felt uncomfortable. She saw a card marked “How was our service” and took it with her. The group left the restaurant at 1:29 a.m. and resumed their journey to Mississippi.

10. Mrs. Garnett's testimony was substantially the same as Complainant's testimony regarding what happened in the restaurant. In addition, the parties stipulated that the testimony of Ms. Lussborg (one of the four persons in Complainant's party) would be the same as the testimony of Complainant and Mrs. Garnett regarding what occurred in the restaurant. (Tr. 86)

***7** 11. On the Tuesday following that Memorial Day weekend, when Complainant was back home in Chicago, she called the corporate office of Respondent to complain about the service.

12. Vern Weidler, Respondent's Division Training and Recruitment Manager at the time, called Complainant within a few days and apologized for the incident, and told her he would investigate what happened and get back to her. Weidler attempted to contact Complainant several times thereafter that but Complainant did not return his calls because she did not want to talk to him.

13. Respondent performed a very thorough investigation of the incident, including making several trips to the restaurant to interview the employees who were in the restaurant on the evening in question.

14. Weidler mailed Complainant a book of discount coupons which could be used at Respondent's restaurants. Complainant returned the coupons at the fact-finding conference held by the Department.

15. Respondent's employee handbook states in relevant part that:

"You [employee] should be sensitive to the types of conduct that are personally offensive to others. Abusing the dignity of anyone through ethnic, sexist or racial slurs or other derogatory or objectionable conduct or any physical attack on anyone will be cause for disciplinary action up to an including immediate termination". [4]

16. In June 1997, a waiter in Respondent's Mt. Vernon restaurant refused to wait on an African-American customer and was fired.

17. Numerous minority customers (roughly 25% - 30% of its customers at the restaurant were minorities) were served at Respondent's Effingham restaurant. At one point, the manager convinced Greyhound passenger bus drivers to stop at the restaurant, and up to 90% of those passengers were minorities.

18. Respondent's staff did not wait on Complainant and her friends for one-half hour because of Complainant's race.

19. Complainant was upset at the treatment she received and felt intimidated at the restaurant. The incident reminded her of segregation.

Conclusions of Law

1. Complainant is an individual claiming to have been aggrieved by denial of the full and equal enjoyment of the facility and services of a public accommodation on the basis of race discrimination prohibited by the Human Rights Act ("Act"). 775 ILCS 5/5-102(A).

2. Respondent is a place of public accommodation, as that term is defined under the Act. 775 ILCS 5/5-101(A)(1).

3. The Human Rights Commission ("Commission") has jurisdiction over the parties hereto and the subject matter herein.

4. Complainant established a *prima facie* case of unlawful discrimination regarding Respondent's denial to Complainant of full and equal enjoyment of a public accommodation.

5. Respondent articulated a legitimate, non-discriminatory reason for its decision to provide Complainant full enjoyment of a public accommodation.

6. Complainant established by a preponderance of the evidence that said articulation was a pretext for race discrimination.

Determination

***8** Complainant proved by a preponderance of the evidence that she was discriminated against when Respondent did not provide her service at its restaurant.

Discussion

Preliminary Matter

Respondent moved to strike Complainant's post hearing brief because her counsel did not send it to Respondent's counsel until nine days after its due date, and only after prompting by Respondent's counsel. While Complainant's counsel failure to serve the brief on Respondent's counsel should not be condoned, Respondent has not shown that it has been harmed by the delay, and has in fact filed its reply brief in a timely manner. Respondent's motion to strike cannot be allowed.

Liability

The issue in this case is whether Respondent violated the Act when its staff did not serve Complainant and her companions at its Effingham, Illinois restaurant. The Act provides that it is a civil rights violation for an individual to be denied the full and equal enjoyment of the facilities and services of a public accommodation on the basis of unlawful discrimination. 775 ILCS 5/5-102(A). Unlawful discrimination under the Act includes discrimination on the basis of race. 775 ILCS 5/1-103(Q).

Here, perhaps due to the fact that the waitress on the evening in question was not available as a witness, [5] the facts are relatively uncontested. Complainant, an African-American woman, and her three companions entered Respondent's restaurant in Effingham, Illinois at 1:00 a.m. while en route from Chicago to Mississippi. As they entered the restaurant, their arrival momentarily silenced the other patrons in the restaurant, which were exclusively white at that particular time. Complainant and her friends' arrival was visually noted by two of Respondent's staff: a waitress and the assistant manager (McNeely). The waitress made eye contact with Complainant. Complainant and her party seated themselves. Neither the waitress nor the cook (Knieriem) who was assisting the waitress approached Complainant's table. After 15 minutes or so, a group of white men came in and were seated. The waitress promptly brought water to the white customers and took their order. She then said to Complainant and her companions that she did not see “you folks” arrive, and left three glasses of water with them. (A glass of water from a previous customer had been left on the table.) The waitress did not take Complainant's or her friends' order. After another 10-15 minutes, Complainant and her companions left. They did not ask to speak to the manager prior to leaving.

A few days later, Complainant registered a complaint with Respondent's corporate office, and her complaint was promptly and thoroughly investigated. Respondent through one of its corporate staff apologized to Complainant and offered to provide her a meal at one of its restaurants.

Complainant does not allege any direct evidence of discrimination, such as a racial slur or comment in connection with the refusal of service. Therefore she was required to prove her case through indirect means, as outlined in **McDonnell Douglas v. Green**, 411 U.S. 793 (1973), and **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248 (1981) and adopted by the Illinois Supreme Court in **Zaderaka v. Illinois Human Rights Commission**, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). The Commission applies this burden-shifting method of providing discrimination in public accommodation cases as well as in employment cases. **Davis and Ben Schwartz Food Mart**, 23 Ill. HRC Rep. 2 (1986).

***9** Pursuant to the **McDonnell Douglas** mode of proof, a complainant may create an inference of unlawful discrimination by establishing a *prima facie* case of discrimination by a preponderance of the evidence. The respondent must articulate a clear, legitimate, and reasonably specific non-discriminatory reason for the action taken against the complainant. To succeed in his or her claim, a complainant must then show the articulated reason to be a pretext for discrimination. **St. Mary's Honor Center v. Hicks**, 509 U.S. 502 (1993).

A *prima facie* case of discrimination concerning a public accommodation may be proven by showing that 1) a complainant is within a protected category; 2) he or she was denied full enjoyment of the respondent's facilities; and 3) that others not within his or her protected class were given full enjoyment of those facilities. **Davis**; **Yates and Salvation Army Adult Rehabilitation Center and Lila Delong**, ___ Ill. HRC Rep. ___ (1988SPO182-83, August 27, 1993).

Complainant established a *prima facie* case. She proved that she was denied food service by Respondent, and that white patrons entering the restaurant after her were promptly served. Respondent articulated that if Complainant received slow service, it was due to the waitress being overwhelmed and not due to Complainant's race. Respondent met its burden of articulation.

Complainant was then required to prove by a preponderance of the evidence that Respondent's articulation or reason was not the true reason underlying its decision to refuse food service to Complainant, and was instead merely a pretext for race discrimination. Complainant uses both the waitress's sarcastic remark about not seeing Complainant and the service of the white patrons who arrived after her to show that Respondent's articulation was unworthy of belief. [6] Respondent does not expressly agree or disagree that the white patrons were served first. If the waitress was simply providing poor service, Respondent still has not explained why only the African-American customers received poor service, but not the white customers. If the "bad waitress" defense is to be used successfully, both black and white patrons should have received bad service. See for example **Hayes and Illinois Department of Human Rights (Bravo's Restaurant d/b/a Edwardo's Restaurant)**, ___ Ill. HRC Rep. ___ (1995CP1523, September 29, 1997)(Order on Request For Review), discussed further below.

In **Simpson, Thomas and Dewey's Restaurant, Anastasio Garantziotis**, 40 Ill. HRC Rep. 35 (1988), black complainants entered the respondent restaurant and were not served at the counter, although Respondent Garantziotis looked right at the complainants. White customers arriving after the complainants were promptly served. When Respondent Garantziotis asked the complainants in what they perceived as a threatening manner if anything was wrong, they left. The respondents were found to have violated the Act.

***10** In **Johnson and Ranch Steak House**, 31 Ill. HRC Rep. 2 (1987), the complainant, a blind elderly woman, was initially refused service at a restaurant because of her guide dog. Although the restaurant begrudgingly provided her service, the complainant was seated away from other customers and treated rudely by the waitress. The respondent was found liable under Sec. 5-102(A) of the Act.

In **Hayes and Illinois Department of Human Rights (Bravo's Restaurant d/b/a Edwardo's Restaurant)**, the complainant alleged that she and a white companion went to the respondent restaurant at 6:45 p.m. They were given menus 10 minutes later, however, no one served the complainant while white patrons were promptly served. After the complainant asked to see the manager, her order was taken at 7:45 p.m. The complainant alleged that a waitress had to squeeze by her table to serve others and that the staff was staring and laughing at her. The manager offered her a free meal because of the delay. The respondent also articulated that there was a "mix-up" among the wait staff and that was why the complainant was not promptly served.

The Department of Human Rights found a lack of substantial evidence in **Hayes** to support the complainant's charge because of the manager's attempt to resolve the issue and because it determined the complainant was unable to show she was denied equal enjoyment of the restaurant. The Commission disagreed and vacated the lack of substantial evidence finding, noting that the "mix-up" only affected the black complainant and not white patrons, and that the respondent's staff was staring and laughing at the complainant. The Commission noted that the complainant was denied prompt service at the restaurant and that a reasonable person could conclude that the complainant was denied equal enjoyment of the respondent's facilities on the basis of her race.

Perhaps sensing that Commission precedent strongly favors Complainant's right to recovery based on the instant facts, Respondent resorts to citing federal precedent, citing cases involving not only public accommodations, but also cases involving employment law. Because there is sufficient Commission precedent on the topic of public accommodation, I do not find that an examination of federal case law is needed to make a determination in this matter. For purposes of completeness, however, the precedent cited by Respondent will be discussed.

Respondent's defense focused on its undeniably prompt and thorough investigation of Complainant's allegations. To support its remedial action defense, Respondent cites cases regarding racial and sexual harassment in employment brought under Title VII of the federal Civil Rights Act **Williams v. Banning**, 72 F.3d 552, 555 (7th Cir. 1995); **Jeffries v. Metro-Mark, Inc.**, 45 F.3d 258 (8th Cir. 1995); **McKenzie v. Illinois Dept. of Transportation**, 92 F.3d 473, 480 (7th Cir.

1996); **Baskerville v. Culligan Int'l Co.**, 50 F.3d 428, 431 (7th Cir. 1995)). The requirement of allowing an employer to fix a problem in some ongoing employment situations prior to a finding of liability is not directly applicable to public accommodation cases. While Respondent accurately notes that a Commission panel in **Haney and University of Illinois, Bd. of Trustees**, ___ Ill. HRC Rep. ___ (1993SP0431, September 14, 1994)(Order on Request for Review) said that the Commission will look to federal law for guidance in interpreting novel questions under the Act, the Commission in **Haney** was looking to a Title II (public accommodations) case for guidance, not Title VII cases (employment). It would be quite another, larger leap to impose the holdings of Title VII regarding remedial action on public accommodation cases under the Act. [7] Respondent has cited no precedent which would require me to graft a "notification" requirement onto Complainant's burden of proof in a public accommodation case.

***11** Turning to the federal cases on public accommodations cited by Respondent, it is clear the cases are distinguishable from the instant case, even if federal law were applicable. In **Robertson v. Burger King**, 848 F. Supp. 78 (E.D.La. 1994) the plaintiff lost because his order was taken and he was given his food (his claim was based on the fact that white customers arriving after him received their food first). The plaintiff's state law claim was denied because the applicable state law, unlike the Illinois statute, only prohibited denial of access to an establishment. In contrast to the situation in **Robertson**, this Complainant's order was not taken and she received no food. Also, the Illinois Act entitles person to have "full and equal enjoyment" of the facilities, not just access. 775 ILCS 5/5-102(A).

In **Jackson v. Tyler's Dad's Place, Inc.**, 850 F. Supp. 53 (D.D.C. 1994), the plaintiffs were not denied service. Despite arriving at a restaurant without reservations, the plaintiffs did not want to be seated in the bar area of the restaurant. There was no evidence that white patrons without reservations were not similarly seated in the bar section. Furthermore, when the plaintiff made a reservation and returned to the restaurant, she did not ask to be seated.

In **Stearnes v. Baur's Opera House, Inc.**, 788 F. Supp. 375 (C.D. Ill. 1992), *aff'd on another ground*, 3 F.3d 1142 (7th Cir. 1993), the plaintiffs were admitted and were not denied service; they contended the playing of "hard rock" music was done to keep black patrons from the establishment. The trial court held that a bar's music selection cannot be grounds to find it engaged in discriminatory conduct. In **White v. Denney's, Inc.**, 918 F. Supp. 1418 (D. Col. 1996), the black plaintiffs were seated within "a few seconds to a few minutes" of white patrons, and they did not request service because they became involved in an altercation. The plaintiffs did not show that others were offered the services that they were purportedly denied.

Morris v. Office Max Stores, Inc., 89 F.3d 411 (7th Cir. 1996) involved a "right to contract" claim under 42 U.S.C. §1981 and 1982. In that case, African-American customers entered a store shortly before closing time and were approached by police requesting identification and answers to questions. The district court granted summary judgment to the defendant, and noted that both plaintiffs had shopped in the store before, and failed to produce evidence that the store interfered with their right to enter into a retail contract. The Court of Appeals affirmed. No one stopped the plaintiffs from making a purchase in **Morris**. In the instant case, the actions took place in a restaurant; by the very nature of a restaurant, a customer asks to be served simply by entering the establishment. This implicit request was in essence denied by Respondent, when its staff ignored Complainant and her group.

***12** Respondent also cites **Harrison v. Denny's Restaurant, Inc.**, 1997WL227963 (N.D. Cal. 1997), an unreported District Court case. In **Harrison**, the defendant was granted summary judgment where the African-American plaintiff alleged that a Caucasian couple arriving after him was served first. There, the couple has arrived immediately after the plaintiff. More important, the plaintiff was a regular customer of the restaurant for 20 years prior to the incident, frequented the restaurant twice a day for 10-12 years, and had never had a problem with service. The plaintiff in **Harrison**, unlike this Complainant, also received and was satisfied with his meal.

Respondent also asserts that it is not liable here because it trains its employees not to discriminate and has firm policies against discrimination. Even if there was authority for such a theory (none was provided), I doubt that the few cursory references in the manual cited in Finding of Fact # 15 would create an absolute shield against liability based on the discriminatory actions of an establishment's employees.

I do recognize that Respondent has made efforts to prevent discriminatory treatment of its customers, including the discharge of an employee in 1997 who refused to wait on an African-American customer. It is also clear that Respondent served many African-Americans at its Effingham restaurant and that at one point, its assistant manager sought out Greyhound bus passengers, the majority of whom were African-American, as customers in the restaurant. The fact that many patrons in the protected class are served was noted in **Yates and Salvation Army Adult Rehabilitation Center, Lila DeLong** and **Vilardo and Alpha Lanes**, ___ Ill. HRC Rep. ___ (1995CP1438, January 13, 1998). However, the fact that others in the protected class are served is but one element involved in determining if pretext has been shown, it is does not "prove" that no discrimination could ever take place at Respondent's establishment. [8]

Furthermore, I acknowledge Respondent's thorough and prompt efforts made to investigate the matter and its apology and offer of a free meal to Complainant. All of these facts do not change the fact that when Complainant and her companions went to Respondent's restaurant, they were not served while white patrons were. Complainant has successfully established that Respondent denied her equal enjoyment of services based on her race.

Damages

Complainant seeks $15,000 in emotional distress damages. Before addressing an appropriate amount of damages on this case, I should address Complainant's credibility on this issue.

In the liability portion of the case, I credited Complainant's version of what happened at the restaurant, mainly because she testified steadily, certainly and in great detail. Her testimony was unwavering on cross-examination and also was corroborated by two witnesses. While I find that Respondent's witnesses were also truthful as what happened that night, the key witness (the waitress) did not testify and Complainant's version of the facts was not seriously contradicted. [9]

***13** Complainant's testimony on damages, however, was slightly exaggerated. She contended that the incident "caused" her high blood pressure (and added on cross-examination that chronic insomnia was another result of the incident), but provided no medical documentation to support her claim. And although originally she stated on direct examination that she was off five days from work due to the incident the week after the incident occurred, the doctor's note she provided in discovery showed the five day absence occurred two months later. She testified she could not recall ever receiving slow service at a restaurant before this incident.

Finally, on cross-examination, she expanded her feelings about the incident to include that she was "possibly" in danger of her life on the evening in question. I can accept that Complainant felt uncomfortable and nervous, being among the only African-Americans in the establishment, late at night, in what Complainant perceived (correctly or incorrectly) to be a "racist community". I have no doubt that Complainant was understandably angry and upset about her treatment at the restaurant. I also do not mean to minimize Complainant's feelings of having suffered discrimination. Her embellishment during the damages portion of the case, however, makes it difficult to assign a dollar value to her suffering.

A review of previous Commission awards in these types of cases shows that an award of $15,000 would be too high in this case. In the **Simpson, Thomas** case, the complainants were awarded $2,000. In **Johnson**, the complainant was awarded $2,500. In **Blakemore and Glen's Restaurant, Inc.**, 35 Ill. HRC Rep. 154 (1987) the complainant was awarded $5,000; however, that complainant was ejected from the restaurant by threat of violence because of his race and he was arrested in connection with this incident because of a misleading incident report filed by the respondent with the police.

In a more recent case, **Kuhlman and The Korner House**, ___ Ill. HRC Rep. ___ (1996CP2474, November 24, 1997) a complainant who was a quadriplegic confined to a wheelchair, was refused an alcoholic drink (but not other drinks or food) and was awarded $3,500 in emotional distress damages. In that case, the complainant and friends had gone to a restaurant to celebrate the complainant's birthday and the manager told him "If you no walk, you no drink in this bar". Complainant was humiliated and was crying in the parking lot as he and his friends left. His birthday celebration was ruined. As a result of the incident, felt that people were looking at him because he was in a wheelchair. He socialized with his friends less and stopped going out to any new or unfamiliar establishments because he was not sure he would be served.

In this case, there were no direct comments regarding her race, and the case is thus unlike the **Kuhlman** and **Johnson** cases in which a complainant was expressly told that they would not be served due to something relating to their protected status. There were no threats made or impliedly made to this Complainant (although subjectively, Complainant may have felt intimidated). Complainant's damages testimony focused on her poor medical condition and time off from work, which I cannot find were caused by the incident. Given the facts in this case and the range of damages previously awarded in these types of cases (and acknowledging that **Johnson** and **Simpson** were decided a decade ago) I find that $2,500 is an appropriate award of damages in this case.

***14** While a cease and desist order is a type of available relief, it appears that the action taken by the waitress (who is no longer employed at Respondent) was an isolated incident and that Respondent has not had discrimination complaints from other African-American customers. Respondent has demonstrated that it takes discrimination complaints seriously and in fact fired an employee who it found out did not wait on a minority customer. Therefore, I do not recommend that a cease and desist order issue in this case.

IT IS THEREFORE RECOMMENDED that:

1. The instant Complaint be sustained.

2. Respondent pay to Complainant the sum of $2,500 for emotional damages in this case.

3. Complainant be awarded her reasonable attorney's fees and costs.

4. Complainant shall submit her Request For Attorney's Fees And Costs within three weeks of the service of this Recommended Liability Determination. The request must conform with the Commission's rules on attorney's fees requests. 56 Ill. Admin. Code, ch. XI, Sec. 5300.765. The parties should also refer to **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1982).

5. Respondent shall file its response to the request within three weeks of the date of service of the Complainant's request for attorney's fees and costs upon it. Respondent may request a hearing on the factual issues underlying the request for fees and costs. The response must also make proposed findings of fact and proposed conclusions of law.

6. Complainant may file a reply within three weeks of the date of service of Respondent's response to the Complainant's request for attorney's fees and costs upon them.

7. No exceptions shall be filed with the Commission until such time as Recommended Order and Decision ruling on the attorney's fee petition issues. 56 Ill. Admin. Code, ch. XI, Sec. 5300.920.

8. Any request to extend the time for filing of any pleading herein shall be made in accordance with 56 Ill. Admin. Code, ch. XI, Sec. 5300.765(d) and shall be made on or before the due date sought to be extended.

BY:

Denise Church
Administrative Law Judge
Administrative Law Section

Entered the 25th Day of September, 1998.

Footnotes

1 Respondent's counsel, Mark Sifferlen, attached an affidavit in support of his sanctions argument, discussed *infra*. In the affidavit, Attorney Sifferlen, who has been practicing law since 1992, states his own reasonable hourly fee would be $150.

2 Respondent's motions were filed on October 29, 1997, November 21, 1997 and December 31, 1997.

1 The Complaint states that all four persons in Complainant's party were black; Respondent's answer states that it lacks sufficient knowledge to form a belief regarding this paragraph and therefore denied the allegation. While presumably based on the pleadings, all four in the party were black, that fact was not shown at hearing.

2 According to Respondent's Hourly Report, between 12:30 a.m. and 1:00 a.m., two customers had their orders rang in. Between 1:00 a.m. and 1:30 a.m. 10 customers had their orders rang in. (Respondent's Exhibit # 10)

3 Complainant also felt McNeely was staring at her. I noticed at the hearing that McNeely had a way of holding one's glance longer than what might be considered usual; it is possible Complainant mistook this mannerism as staring. I do not find McNeely was staring at Complainant.

4 Other portions of the manual pertain to harassment (pp.3-4), however, that portion of the manual applies to employee relationships.

5 As Respondent adequately explained its unsuccessful efforts to find the waitress Leanne, who was no longer employed by Respondent, I draw no negative inference against Respondent for failing to produce her as a witness. Still, the fact that the waitress did not testify means that the testimony of Complainant, Mrs. Garnett and Ms. Lussborg (stipulated testimony) was unrebutted.

6 Showing disparate treatment is a method of showing pretext often used in employment cases. See for example, **Loyola University of Chicago v. Illinois Human Rights Comm'n**, 149 Ill. App. 3d 8, 500 N.E.2d 639 (1st Dist. 1986) (one method of showing pretext is to demonstrate that employees involved in misconduct of comparable seriousness were retained while the complainant was discharged).

7 Respondent notes that federal courts have applied the **McDonnell Douglas** burden shifting analysis to public accommodation cases (see **Hornick v. Noyes**, 708 F. 2d 321 (7th Cir. 1983)). The Commission applies **McDonnell Douglas** in public accommodation cases as well. See **Davis and Ben Schwartz Food Mart**. That federal courts and the Commission follow **McDonnell Douglas** in public accommodation cases does not mean that any aspect of federal civil rights employment law is necessarily applicable to cases on public accommodation brought pursuant to the Act.

8 For example, the Commission has held that in the context of employment law, although statistics are helpful in deciding cases of alleged discrimination, the fact that an employer has a number of minority employees and treats some of them well does not mean that the employer does not have racial animus. **Parham, et al. and Centreville Township Hospital**, 59 Ill. HRC Rep. 171, 189 (1990); **Cox and Combined Insurance Co. Of America**, ___ Ill. HRC Rep. ___ (1991CF0115, January 20, 1995).

9 Respondent was allowed to enter in evidence the waitress' affidavit and a customer statement regarding the incident only to show Respondent's investigation. The hearsay documents were not considered in determining what actually happened on that evening.

1999 WL 33252627 (Ill.Hum.Rts.Com.)

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Appendix 4

2011 WL 4916305
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Brian JOHNSTON and Nile Charles, Plaintiffs,
v.
APPLE INC. and Omniscient
Investigation Corporation, Defendants.

No. 11 Civ. 3321(JSR).
|
Oct. 14, 2011.

OPINION AND ORDER

JED S. RAKOFF, District Judge.

***1** Plaintiffs Brian Johnston and Nile Charles bring this action asserting federal, state, and city discrimination claims arising from their allegation that defendants removed plaintiffs from an Apple Store in Manhattan on account of their being African–American. Each of the defendants moved to dismiss the Second Amended Complaint in its entirety, and the Court, by Order dated September 15, 2011, granted their motions. This Opinion sets forth the reasons for that ruling and directs the entry of final judgment.

The pertinent facts, drawn from plaintiffs' Second Amended Complaint, are as follows. On December 9, 2010 plaintiffs Brian Johnston and Nile Charles, both African–American males, visited Apple's retail store at 1981 Broadway, New York, N.Y. 10023. Second Amended Complaint ("SAC") ¶¶ 5, 7, 12, 33. After purchasing headphones, plaintiffs were approached by a security guard, referred to in the Second Amended Complaint as "John Doe." *Id.* ¶¶ 39, 41. The complaint alleges John Doe was an employee of Omniscient who worked in the 1981 Broadway store pursuant to Apple's contract with Omniscient. *Id.* ¶¶ 13, 39, 41. The following exchanges then allegedly transpired:

> John Doe told Plaintiffs, "Either you're here to see a Mac Specialist or to purchase something. If you are not doing either you have to leave the store."
>
> Before the Plaintiffs could respond, John Doe responded, "And before you say I'm racially discriminating against you let me stop you. I am discriminating against you. I don't want 'your kind' hanging out in the store."
>
> ...
>
> Plaintiffs used their cell phones to record what transpired when another employee of Defendants' Security Personnel approached Plaintiffs.
>
> The second of Defendants' Security Personnel to approach Plaintiffs identified himself as the Head of Security and told Plaintiffs, "Now you have to go. If you want to know why, it's because I said so. CONSIDER ME GOD. You have to go."
>
> Plaintiffs asked to speak to a manager to file a complaint. Defendants' Head of Security told Plaintiffs that there was no complaint to be made and walked away from the Plaintiffs, deliberately ignoring their request to see a manager. Plaintiffs searched the retail store and found a manager ... Plaintiffs complained about the John Doe's racial profiling .... Defendant [Apple's] manager asked Defendants' Head of Security to call 911.

Id. ¶¶ 43–53 (emphasis removed). The Apple manager required the plaintiffs to leave the premises with defendants' security personnel. *Id.* ¶ 55.

Based on the foregoing allegations, plaintiffs' Second Amended Complaint asserts three causes of action against both defendants: (1) unlawful discrimination in violation of 42 U.S.C. § 1982; (2) unlawful discrimination in violation of New York State Executive Law § 296; and (3) unlawful discrimination in violation of the Administrative Code of the City of New York § 8–107. Each defendant moved to dismiss the Second Amended Complaint, in its entirety, under Rule 12(b)(6) [1] of the Federal Rules of Civil Procedure for failure to state a claim.

***2** The Court first turns to plaintiffs' federal discrimination claim under 42 U.S.C. § 1982. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Section 1982 prohibits "intentional discrimination" based on race. *Sanders v. Grenadier Realty, Inc.*, 367 F. App'x 173, 174 (2d Cir.2010) (citing *Shaare Tefila Congregation*

v. Cobb, 481 U.S. 615, 617, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987)). To state a claim for relief under section 1982, a plaintiff must allege that he was intentionally "deprived of a property right" because of his race. *Grimes v. Fremont Gen. Corp.,* No. 08 Civ. 1024, 2011 WL 1899403, at *16 (S.D.N.Y. Mar. 31, 2011). These allegations must be supported by particularized facts pled in the complaint that make out a plausible claim for relief. *See Sanders,* 367 F. App'x at 175 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)).

The Second Amended Complaint does not plausibly allege that either Apple or Omniscient deprived plaintiffs of a property right. According to the complaint, Johnston and Charles had *already* purchased headphones and had "proceeded upstairs ... [to] the entry level" of the Apple Store when John Doe first approached them. SAC ¶¶ 37–39. When John Doe approached Johnston and Charles, he did not tell them they had to leave the store immediately. Rather, John Doe invited the plaintiffs to exercise their property rights by stating, "Either you're here to see a Mac Specialist or to purchase something. If you are not doing either you have to leave the store." *Id.* ¶ 43. At no point does the Second Amended Complaint allege that plaintiffs said they were going to continue shopping or, as plaintiffs' counsel represented at oral argument, check out a floor model of the headphones they had just purchased. *See* Oral Arg. Tr. at 14:24–25.

After both this first exchange with John Doe and the second exchange with defendants' Head of Security, plaintiffs were not forced to leave the store. The complaint alleges that plaintiffs "searched the retail store and found a manager." SAC ¶ 49. The complaint does not allege that plaintiffs intended to see a Mac Specialist or continue shopping, or exercise any of their other property rights such as returning a product or asking for a repair under an Apple warranty.

Even after amending their complaint twice, plaintiffs' Second Amended Complaint does not show that defendants deprived plaintiffs of any of their property rights. Their purchase was complete; they were invited to continue exercising their property rights by seeing a Mac Specialist or buying something else, and when they failed to do so they were removed from the store. *See Bishop v. Best Buy, Co.,* No. 08 Civ. 8427, 2010 WL 4159566, at *5 (S.D.N.Y. Oct.13, 2010) (holding no cognizable § 1982 claim where plaintiff's contractual relationship with Best Buy had already ended when he was stopped to verify his receipt). Plaintiffs' contractual relationship with the Apple Store had ended.

***3** The factual allegations in the Second Amended Complaint, if true, are despicable. Johnston and Charles were discriminated against by a security guard who made no effort to hide his prejudice for them and their "kind." *See* SAC ¶ 44. But although the Second Amended Complaint supports a more than plausible allegation of racial animus, the complaint does not allege that plaintiffs were deprived of their property rights. Accordingly, plaintiffs' claim under section 1982 fails and must be dismissed.

The Court next turns to plaintiffs' state discrimination claim under New York Executive Law § 296. Section 296 makes it an unlawful discriminatory practice for any person associated with a place of public accommodation to "deny to such person any of the accommodations, advantages, facilities or privileges" of that accommodation. N.Y. Exec. Law § 296(2)(a).

This statute does not embrace a theory of respondeat superior or strict liability. The New York Court of Appeals has made clear that section 296 unambiguously separates the liability of an employee who discriminates from the liability of his employer; an employer "cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it." *Totem Taxi v. N.Y. State Human Rights Appeal Bd.,* 65 N.Y.2d 300, 304–305, 491 N.Y.S.2d 293, 480 N.E.2d 1075 (1985).

Plaintiffs argue that when the Apple Manager removed them from the store he subjected Apple to liability by condoning or approving the conduct of John Doe, the security guard. *See* Pl. Br. at 13. Though not briefed, plaintiffs' counsel also argued before this Court that the actions of Omniscient's Head of Security likewise subjects Omniscient to liability. Oral Arg. Tr. at 17:10–19:6. The term "employer" is not defined in the New York State Human Rights Law. But this Court's review of the case law and independent analysis of the text of the statute convinces the Court that the alleged actions of the Apple Manager and Omniscient Head of Security are insufficient, as pled, to subject Apple or Omniscient to liability under section 296.

In *Totem Taxi,* one of the defendant's taxi drivers discriminated against and harassed African–American passengers. 65 N.Y.2d at 302–03, 491 N.Y.S.2d 293, 480 N.E.2d 1075. The passengers filed complaints against Totem Taxi with the State Division of Human Rights. The Division held the company liable for violating its "duty of hiring drivers who would not discriminate." *Id.* at 303, 491 N.Y.S.2d 293, 480 N.E.2d 1075 (internal quotation marks omitted). On appeal, the New York Court of Appeals reversed. The court noted that section 296 distinguishes between discriminatory acts committed by an employee and those committed by an owner or proprietor, and "expressly imposes liability only on the person who actually commits the discriminatory act." *Id.* at 305, 491 N.Y.S.2d 293, 480 N.E.2d 1075. Thus, the taxi company could be liable for its driver's actions only if it had encouraged, condoned, or approved of the discriminating act. *Id.*

***4** Plaintiffs argue that when Apple's *manager* condoned the security guard's actions, Apple the *entity* became a party to those actions. Likewise, plaintiffs argue, when Omniscient's Head of Security for the Apple store condoned the security guard's actions, Omniscient became a party to those actions. But section 296 not only distinguishes between discrimination by the employee as compared to discrimination by the employer, it also distinguishes between an owner and a manager. By its terms, the section applies to "any person, being the owner, lessee, proprietor, *manager,* superintendent, agent or employee of any place of public accommodation." § 296(2) (emphasis added). Thus, while the Apple manager or the Omniscient Head of Security could be liable for their own discriminatory actions, those actions are not imputed to Apple or Omniscient, their employers.

Plaintiffs rely on two cases where courts allowed section 296 claims to proceed against an employer based on the discriminatory acts of its manager. Both are distinguishable from this case. In the first, *Wal–Mart Stores East, L.P. v. N.Y. State Div. of Human Rights,* 71 A.D.3d 1452, 897 N.Y.S.2d 348 (4th Dep't 2010), the New York Appellate Division held that because there was "substantial evidence in the record establishing that [the employer] condoned its employee's actions by failing to discipline the employee," the employer could be held liable. *Id.* at 1453, 897 N.Y.S.2d 348. Here, the Second Amended Complaint does not allege facts plausibly suggesting that either Apple or Omniscient was aware of discrimination by its employees and failed to take appropriate remedial actions.

In the second, *Burgin v. Toys–R–Us–Nytex, Inc.,* No. 97 Civ. 0998E(H), 1999 WL 454302 (W.D.N.Y. June 30, 1999), the court refused to dismiss plaintiffs' section 296 claim where it was unclear whether the discriminating manager "acted out of personal animosity against African–Americans or pursuant to a discriminatory company-wide policy or practice." *Id.* at *4. Again, plaintiffs' Second Amended Complaint does not allege facts plausibly suggesting their treatment was due to a "discriminatory company-wide policy or practice" of either Apple or Omniscient.

Both of the cases plaintiffs cite rely on circumstantial evidence of knowledge or condonation by the employer in order to allow a claim to proceed against the employer for primary liability. Without any allegations of knowledge or condonation by Apple or Omniscient, the Second Amended Complaint does not demonstrate a plausible claim that either corporation is liable for discrimination. This Court hews to *Totem Taxi*' s instruction that section 296 is not a strict liability statute for employers and likewise dismisses plaintiffs' section 296 claims against both Apple and Omniscient with prejudice.

Turning to plaintiffs' third and final claim, the Court finds the Second Amended Complaint does plausibly allege that defendants violated section 8–107 of the Administrative Code of the City of New York. The Court, however, declines to exercise supplemental jurisdiction over this remaining city law claim.

***5** Section 8–107 lists a variety of discriminatory practices that can subject an individual to liability for discriminatory conduct. In this case, plaintiffs have alleged a violation of § 8–107[4], which makes it an unlawful discriminatory practice "to refuse, withhold from or deny to [a member of a protected class] any of the accommodations, advantages, facilities or privileges" of a public accommodation. [2] N.Y.C. Admin. Code § 8–107. Defendants argue that since plaintiffs have failed to state a claim under Executive Law § 296, their claim also fails under § 8–107, as "the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards," namely, *Totem Taxi.* Apple Br. at 9 (quoting *Forrest v. Jewish*

Guild for the Blind, 3 N.Y.3d 295, 305 n. 3, 786 N.Y.S.2d 382, 819 N.E.2d 998 (2004)). Defendants' argument is mistaken; *Totem Taxi* is not the standard for employer liability under section 8–107[13].

Subdivision 13 of Section 8–107 defines the scope of employer liability for the discriminatory acts of employees, agents, and independent contractors. The standard of liability for an employer differs for a case alleging discrimination by an employee as compared to discrimination by an independent contractor. For discrimination by an employee in a place of public accommodation, the statute provides: "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one [employment discrimination] and two [apprentice training programs]." § 8–107[13](a). On its face, the statute makes an employer liable for the discriminatory conduct of its employee without regard to the knowledge or conduct of the employer. This, unlike New York State Executive Law § 296, is a strict liability statute.

This Court's reading of 8–107[13](a) is confirmed by comparison to 8–107[13]'s other provisions, by the legislative history of 8–107[13], and by the New York Court of Appeals's interpretation of 8–107[13](b) in *Zakrzewska v. New School,* 14 N.Y.3d 469, 902 N.Y.S.2d 838, 928 N.E.2d 1035 (2010). Subsection (b) of 8–107[13] defines an employer's liability for the discriminatory actions of its employee or agent in an employment context or apprentice training context. It specifies three conditions for liability which do not appear in subsection (a), at least one of which must be satisfied in order to impose liability on the employer: (1) the employee who engaged in the discriminatory conduct "exercised managerial or supervisory responsibility"; (2) the employer *"knew* of the ... discriminatory conduct, and *acquiesced* in such conduct"; or (3) the employer *"should have known* of the ... discriminatory conduct." § 8–107[13] (b)(1)-(3) (emphasis added). These conditions require showing some level of knowledge on the part of the employer (implicitly when the employee is a manager) that 8–107[13](a) does not require.

***6** Subsection (c) of 8–107[13] defines an employer's liability for the discriminatory actions of its independent contractor. It specifies that an employer is liable for the discriminatory act of its independent contractor "only where ... the employer had *actual knowledge of and acquiesced in* such conduct." § 8–107[13](c) (emphasis added). Again, this subsection requires a showing of knowledge on the part of the employer not required for liability under 8–107[13](a).

Legislative history further confirms 8–107[13](a) imposes strict liability on employers. Section 8–107[13] was added to the New York City Human Rights Law by an amendment passed in 1991. *See* Report of the New York City Council Committee on General Welfare on Proposed Int. No 465–A and No. 536–A, Section–by–Section Analysis, at 18 (describing subdivision 13 as "new"). The Committee on General Welfare's report states that "with respect to all types of discrimination other than employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent." *Id.* at 19, 902 N.Y.S.2d 838, 928 N.E.2d 1035. For independent contractors, on the other hand, "an employer would be held liable for the conduct of certain persons employed as independent contractors only where the employer had actual knowledge of and acquiesced in the conduct." *Id.* Likewise, in a side-by-side comparison of the pre-amendment Human Rights Law to the amended Human Rights Law published in the Legislative Annual for New York City, the report states that section 8–107[13] creates "strict liability in housing and public accommodations." [3] 1991 N.Y. City Legis. Ann., at 187.

The New York State Court of Appeals recently clarified the differences between section 8–107[13] and section 296 in an opinion on a certified question from the Second Circuit. *Zakrzewska,* 14 N.Y.3d 469, 902 N.Y.S.2d 838, 928 N.E.2d 1035. In that case, the plaintiff brought an employment discrimination claim against her employer under 8–107[13](b). The court rejected the defendants' attempt to tie the plaintiff to the *Totem Taxi* standard as the "knowing or condoning" standard was expressly inconsistent with the text of and legislative intent behind § 8–107[13](b). *Id.* at 480–81, 902 N.Y.S.2d 838, 928 N.E.2d 1035 (distinguishing the "general statement in a footnote" in *Forrest,* 3 N.Y.3d at 305 n. 3, 786 N.Y.S.2d 382, 819 N.E.2d 998, that the New York City Human Rights Law mirrors the state law from analyzing the specific issue of employer liability under § 8–107[13](b)).

Although the court of appeals addressed only subsection (b) in its holding, its reasoning applies in full force to

subsection (a). Defendants' argument that *Totem Taxi* should apply to subsection (a) is contradicted by the text of the statute, by the legislative history of the New York City Human Rights Law, and by the court of appeals's logic in *Zakrzewska.* If an employee discriminates in a place of public accommodation, the employer is liable, period. Accordingly, all that remains to be analyzed is if plaintiffs have alleged a plausible violation of § 8–107 by defendants. [4]

***7** Johnston and Charles have alleged such a violation. With respect to defendant Apple, the Second Amended Complaint alleges that the Apple Store manager discriminated against them when he instructed Omniscient's Head of Security to call the police and remove plaintiffs from the premises. While the complaint does not identify this manager by name, it is plausible on the face of the complaint to infer that the manager was in fact an employee of defendant Apple. The complaint alleges that plaintiffs were discriminated against first by John Doe the security guard, and when they sought out the Apple manager to explain what had happened, the Apple manager furthered that discrimination by ignoring their complaints and ordering them removed from the store they had chosen to patron. Unlike 28 U.S.C. § 1982, the New York City Human Rights Law does not require plaintiffs to plead interference with a property interest. Rather, they must show defendants refused, withheld, or denied them any of the "accommodations, advantages, facilities or privileges" of a public accommodation. Here, the Second Amended Complaint at least plausibly alleges plaintiffs were denied the "facilities" of Apple's retail store, as they were removed from the premises on what they allege is account of their race.

With respect to defendant Omniscient, plaintiffs have plausibly alleged that an employee of Omniscient, security guard John Doe, denied them access to the facilities of a public accommodation. John Doe told the plaintiffs they had to "buy something, see a Mac specialist" or leave, and he explicitly told them he confronted them on account of their race. As section 8–107[13](a) creates strict liability for the employer of an employee who violates section 8–107, the complaint also plausibly alleges a claim against defendant Omniscient. Defendants' motions to dismiss plaintiffs third claim is denied.

The Court in its discretion, however, declines to exercise supplemental jurisdiction over plaintiffs' remaining claim. *See* 28 U.S.C. § 1367. This case was originally removed to federal court by defendant Apple on a theory of diversity jurisdiction, *see* Notice of Removal, May 16, 2011, but diversity was destroyed when plaintiffs, citizens of New York, joined defendant Omniscient, a New York corporation, in their First Amended Complaint. *See* SAC ¶¶ 4, 6, 10. After Omniscient was joined, this Court continued to exercise federal question jurisdiction over plaintiffs' section 1982 claim and supplemental jurisdiction over plaintiffs' state and city law claims. But since only the city law claim remains at issue in this case, and since the facts remain very much in dispute and awaiting discovery and further motion practice, let alone trial, it makes sense at this early stage in litigation for the Court to dismiss plaintiffs' city law claim, without prejudice, in favor of the state forum from which it came.

For the foregoing reasons, the Court hereby reaffirms its Order of September 14, 2011 dismissing, with prejudice, claims one and two of the Second Amended Complaint, brought under 42 U.S.C. § 1982 and New York State Executive Law § 296, and dismissing, without prejudice to re-filing in state court, claim three of the complaint, brought under the Administrative Code of the City of New York § 8–107. The Clerk of the Court is directed to enter final judgment and to close the case.

***8** SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 4916305

Footnotes

1 Defendant Apple also moved under Rule 12(d) to convert the motion to a motion for summary judgment. *See* Apple Br. at 1. The Court, however, relied only on the pleadings in rendering this Opinion and its prior Order, and declined the requested conversion.

2 A public accommodation is defined as: "providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods,

services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold or otherwise made available." N.Y.C. Admin. Code § 8–102[9].

3 The New York Court of Appeals has relied on this document as persuasive authority in interpreting § 8–107[13]. *See Zakrzewska,* 14 N.Y.3d at 480, 902 N.Y.S.2d 838, 928 N.E.2d 1035.

4 While plaintiffs' Second Amended Complaint quotes in whole only the subsection addressing liability for the acts of independent contractors, the Second Amended Complaint alleges a general violation of section 8–107, without distinguishing between employees and independent contractors. *Compare* SAC ¶ 72 (quoting § 8–107[4]; [13](c)), *with* SAC at 10 (citing § 8–107 as plaintiffs' third cause of action). Likewise, the Seconded Amended Complaint appears to make employee and independent contractor arguments in the alternative. *See* SAC ¶¶ 73–74. Although the Second Amended Complaint is far from a paragon of clarity, the Court, construing the complaint liberally and drawing all inferences of favor of plaintiffs, reads the Second Amended Complaint as alleging violations of § 8–107[4] and [13] without limiting plaintiffs' claim to either an independent contractor theory or an employee theory of liability.

Appendix 5

73 Mass.App.Ct. 1127
Unpublished Disposition

Appeals Court of Massachusetts.

La Reine BOUTIQUE & another [1]
v.
MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another. [2]

No. 08–P–621.
|
March 16, 2009.

By the Court (GRASSO, TRAINOR & MEADE, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** Mireille Stanbro and La Reine Boutique (collectively, La Reine) appeal from a judgment of the Superior Court that affirmed a decision of the Massachusetts Commission Against Discrimination (MCAD) in favor of Immacula Saint Louis on a claim of a violation of G.L. c. 272, § 98, the public accommodation statute. La Reine asserts that the judgment should be reversed because the MCAD decision is not supported by substantial evidence. We disagree.

Appellate review of a final agency decision is deferential and circumscribed. See *Vaspourakan, Ltd. v. Alcoholic Bevs. Control Commn.,* 401 Mass. 347, 351–352 (1987). Unless it is unsupported by substantial evidence or based upon an error of law, an agency decision must stand. See *Boston Pub. Health Commn. v. Massachusetts Commn. Against Discrimination,* 67 Mass.App.Ct. 404, 408 (2006). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Vaspourakan, Ltd., supra* at 351, quoting from G.L. c. 30A, § 1(6). Findings of fact and credibility determinations are solely the province of the agency. *Vaspourakan, Ltd., supra* at 351–352. Although appellate courts "consider the entire record and take into account whatever detracts from the weight of the evidence," they are not permitted to draw different inferences from those drawn by the agency. *Id.* at 351. Applying these well-known standards, we conclude that the decision was based upon substantial evidence and free from error of law. Indeed, the problem with La Reine's appellate arguments is that they turn on credibility assessments and inferences that the hearing officer expressly rejected.

Substantial evidence underpins the finding that Saint Louis established a prima facie case of racial discrimination in a place of public accommodation. [3] The hearing officer, who observed the witnesses and assessed their credibility, was warranted in concluding that Saint Louis and her sister, Sabrina Fraser, were forced to wait unreasonably long periods of time, denied services, and subjected to racially derogatory statements that reflected the discriminatory animus of Stanbro, the owner of the boutique. The hearing officer could have drawn different inferences about the reasons for the wait and Stanbro's statements, but she was not required to do so. In our limited review, we are not permitted to displace the hearing officer's determinations. See *Gnerre v. Massachusetts Commn. Against Discrimination,* 402 Mass. 502, 509 (1988).

The hearing officer also could have accepted the defense that Saint Louis was not denied access to services at the boutique. See *Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination,* 431 Mass. 655, 665–666 (2000) (once plaintiff meets initial burden of establishing prima facie case, "burden of production shifts to the [defendant] to 'articulat[e] a legitimate, nondiscriminatory reason' for the adverse ... action"). Although Saint Louis had no plans to be fitted that day, she did not inform Stanbro of her plans. (App.209) The hearing officer's conclusion that Saint Louis was denied access to services is supported, however, by evidence that Stanbro refused to do business with both sisters even after they had offered to pay the fitting fee [4] and then restricted their access to her boutique.

***2** Substantial evidence also supports the finding that Stanbro's reasons for refusing to measure the sisters and for ejecting them from the premises were a pretext for racial discrimination. See *id.* at 666. The issue of pretext also turned on credibility assessments. The hearing officer was entitled to discredit Stanbro's testimony that the sisters refused to pay the ten dollar fitting fee. Likewise,

the hearing officer could, and did, reject Stanbro's claim that the sisters became "belligerent," justifying their expulsion. Instead, the hearing officer concluded that while Fraser's loud voice and threatening comments likely exacerbated the parties' dispute, nothing Fraser said warranted either Stanbro's refusal to provide services or her racial insults, and that the sisters' "assertive" behavior was a response to Stanbro's mistreatment rather than a precipitating factor.

The judgment of the Superior Court affirming the decision of MCAD is affirmed.

So ordered.

All Citations

73 Mass.App.Ct. 1127, 902 N.E.2d 433 (Table), 2009 WL 648888

Footnotes

1 Mireille Stanbro.

2 Immacula Saint Louis.

3 As relevant here, G.L. c. 272, § 98, as appearing in St.1989, c. 516, § 16, prohibits "any distinction, discrimination or restriction on account of race ... relative to the admission of any person to, or his treatment in any place of public accommodation ." See *Gutierrez v. Massachusetts Bay Transp. Authy.,* 437 Mass. 396, 410 (2002). It is undisputed that the boutique is a "place of public accommodation" within the meaning of G.L. c. 272, § 92A, as appearing in St.1989, c. 516, § 15.

4 This finding is supported not only by Fraser's "whatever" comment, but also by the testimony of both Saint Louis and Fraser about their offer to pay the fee.

Appendix 6

1998 WL 307868 (Chi.Com.Hum.Rel.)

Commission on Human Relations Relations

City of Chicago

IN THE MATTER OF KARL D. MILLER, COMPLAINANT
AND
DRAIN EXPERTS AND EARL DERKITS, RESPONDENTS

Case No. 97-PA-29
April 15, 1998

FINAL RULING REGARDING LIABILITY AND DAMAGES

I. INTRODUCTION

***1** Complainant, Karl D. Miller, alleges that Respondents, Earl Derkits and Drain Experts, discriminated against him on the basis of race in the provision of plumbing repair services. Complainant further alleges that Respondent Derkits repeatedly used racial epithets and vulgar language toward him. As a result of these actions by Respondents, Complainant alleges that he was emotionally and financially harmed. At an Administrative Hearing held after Respondents were defaulted, Respondents argued that Complainant was not harmed by their actions.

II. PROCEDURAL HISTORY

Complainant filed his complaint on April 15, 1997, alleging discrimination on the basis of race in a public accommodation, the Respondents' plumbing service company. Respondents were served with the Complaint, but did not respond. On May 23, 1997, the Chicago Commission on Human Relations (the "Commission") mailed a Notice of Potential Default to Respondents for their failure to file a Verified Response and for failure to respond to the Commission's Request for Documents and Information. Respondents did not respond to this Notice. On July 10, 1997, the Commission mailed a second Notice of Potential Default. Respondents were given until July 24, 1997, to file the documents requested and cure the default. Again Respondents failed to respond.

On August 15, 1997, the Commission issued an Order of Default against Respondents and noted that Commission Reg. 215.250 describes the procedures by which Respondents might file a motion to vacate the default. Respondents did not file any motion to vacate. On August 15, 1997, the Commission also sent an order to the parties setting dates for both a Pre-Hearing Conference and the Administrative Hearing with a copy of the Commission's Standing Order regarding pre-hearing procedures and memoranda.

A Pre-Hearing Conference was conducted on November 13, 1997 at the Commission's offices. Both parties appeared without counsel; Respondent Derkits indicated that he wished to have additional time to secure representation. An order was issued that day which obligated the parties to file any documents, witness lists and motions by November 20, 1997 and which set a hearing date for December 16, 1997. On November 20, 1997, Complainant filed his Pre-Hearing Memorandum and witness list; Respondents filed nothing in response to the November 13, 1997 order. On November 21, 1997, the Hearing Officer issued an order which found that, due to Respondents' continuing failure to comply with the Commission's Regulations and orders, Respondents had waived any right to challenge the Order of Default. Reg. 215.250. On November 25, 1997, a rescheduled Pre-Hearing Conference was conducted by phone, during which the parties were reminded that the Hearing was set for December 16, 1997. On December 15, 1997, James J. Ryan filed an appearance of attorney on behalf of Respondents.

***2** The Administrative Hearing was held in this case on December 16, 1997, at 10:00 a.m. Complainant Miller appeared without counsel; Respondents Derkits and Drain Experts were represented by attorney James J. Ryan. The Hearing was held only for the purpose of allowing Complainant to establish appropriate relief. Reg. 215.240. The only witness to appear other than the parties was Ms. Marcella Lyles, for Complainant.

On February 11, 1998, the Hearing Officer issued her First Recommended Decision Regarding Liability and Damages with instructions to the parties for filing Objections to the First Recommended Decision. The first date for filing simultaneous Objections was March 13, 1998; neither party filed any Objections. The Hearing Officer then issued her Final Recommended Decision Regarding Liability on March 24, 1998.

III. FINDINGS OF FACT [1]

1. Complainant Karl D. Miller is African-American. C #1, Tr. 5.

2. Complainant lives at 12035 South Justine, Chicago, Illinois. C, Tr. 20.

3. On February 10, 1997, Complainant had a plumbing problem in his home. C #3, Tr.5.

4. On February 10, 1997, Complainant called Respondent Drain Experts, located at 7143 W. 73rd Place, Chicago, Illinois, to fix the plumbing problem. C, C#3, Tr. 5. Drain Experts is owned by Respondent Earl Derkits, whose address is the same as the address for Drain Experts. C, Tr. 27.

5. An employee of Respondent Drain Experts gave Complainant an initial written estimate of $1,700 to fix the plumbing problem. Tr. 5, Exh. B. Based on that estimate, Complainant accepted Respondents' proposal to complete the work and gave Respondents' employee a check for a deposit in the amount of $700. Tr. 6, Exh. A and B.

6. The next day, Drain Experts began working on the Complainant's plumbing, which required Respondents' employees to dig a hole in the north side of Complainant's yard. Tr. 6. Complainant was not at his home at that time and had asked a friend to stay at his house while the work was being done. Tr. 6. After Respondents' employees began digging the hole on Complainant's property, they told Complainant's friend that their equipment indicated that the problem was much more serious than originally thought. Tr. 6. Respondents wrote a new proposal which gave $4,875 as the new estimate to fix the problem. Tr. 6, Exh. C.

7. In view of the new and much larger estimate, Complainant allowed Respondents to continue working on the plumbing problem, but contacted his insurance company, “seeking relief.” Tr. 6. An insurance adjuster came out the following day, February 11, 1997, and then told Complainant to inform Drain Experts to discontinue working at his house until Complainant had obtained a second plumbing estimate and had a video taken of his plumbing system. Tr. 6.

8. Complainant called the Drain Experts office and talked with Respondent Derkits. Mr. Derkits had never been to Complainant's house. Mr. Derkits became upset when Complainant told him his insurance adjustor's instructions. Tr. 7.

***3** 9. During the first phone conversation, Mr. Derkits called Complainant a “nigger” and hung up the telephone. Tr. 6-7. During a second phone conversation which shortly followed the first, Mr. Derkits told Complainant “What I said nigger, you're a mother fucking cock sucking nigger.” Tr. 7. Complainant thought these comments were “very obscene, vulgar and offensive.” Tr. 7.

10. Ms. Lyles witnessed Complainant receiving these calls and noticed that Complainant appeared disturbed and distraught. Tr. 23. She asked him what was wrong and he told her the content of the conversation. She said he appeared upset and angered by the phone calls. Tr. 23

11. After the second phone call, Complainant did not answer the phone. Tr. 7. Respondent Derkits continued to call, a fact known to Complainant and Ms. Lyles because Complainant has "Caller ID" on his telephone. Tr. 22. Ms. Lyles took one call in which she told Respondent Derkits that he should not call anyone a "nigger" or use the other vulgar words. Tr. 25. She did not say that Respondent Derkits admitted that he had called Complainant a "nigger." Respondent Derkits said he was angry that Complainant would not sign a document releasing him from liability if someone should fall in the hole Respondents had dug on Complainant's property. Tr. 25. He also said that he was not prejudiced and that he had black people working for him. Tr. 25.

12. Complainant subsequently had another company fix his plumbing problem at a cost of $1,100. Tr. 8, Exh. D. Part of that charge was for additional digging which had to be done to complete the job. Tr. 15, Exh. D.

13. Complainant was without a functional plumbing system for 26 days while the system was being fixed. [2] Tr. 9. Some of that delay (five days) was caused by waiting for a plumber to come out, and some unspecified number of days by inclement weather which prevented the plumber from completing the job. Tr. 13-14.

14. Respondent Derkits testified that he would not have needed to get a video of the sewer because he had electronically located where the pipe was and he knew the problem was caused by tree roots. Tr. 30-31.

IV. CONCLUSIONS OF LAW

1. Respondents discriminated against Complainant Karl Miller in the provision of services to him. Respondent Drain Experts, owned by Respondent Earl Derkits, is a public accommodation within the meaning of Section 2-160-020(i) of the Chicago Human Rights Ordinance ("CHRO"). Respondents racially discriminated against Complainant while providing plumbing service and by using racial epithets which are offensive to African-Americans in violation of CHRO, section 2-160-070.

2. Respondents repeatedly failed to file a Verified Reply to the Complaint and otherwise refused to participate in the procedures of the Commission. As a result of their failure and after numerous notices of the consequences of that failure, a default order was entered against Respondents on August 6, 1997. Consequently, Respondents are deemed to have admitted all of the factual allegations of Complainant's complaint.

V. DISCUSSION

***4** Complainant has the burden of establishing the elements of his case of discrimination and of supporting his requests for damages. Because Respondents have refused to respond to repeated Commission orders, an Order of Default was entered and the Commission is bound to find that Respondents have admitted all of the facts alleged in Complainant's complaint. See, e.g., Soria v. Kern, CCHR No. 95-H-113 (July 18, 1996); Starrett v. Duda, CCHR No. 93-H-6 (April 20, 1996); and Rottman v. Spanola, CCHR No. 93-H-21 (March 8, 1996). By virtue of the Order of Default entered against Respondents, Respondents are not entitled to object to the sufficiency of Complainant's allegations. Reg. 215.240 ("A Respondent against whom an Order of Default has been issued shall be deemed to have admitted the allegations of the Complaint and to have waived its defense(s) to the allegations, including defenses concerning the Complaint's sufficiency.") The only issue to be addressed in the Hearing and in this order is appropriate relief. Reg. 215.240

It is Complainant's burden to support his request for damages. The Hearing Officer determines the admissibility of any testimonial evidence and exhibits and "shall not be bound by the strict rules of evidence applicable in courts of law or

equity." Reg. 240.314 The Hearing Officer and the Commission determine the weight and probity of evidence. McGee v. Sims, CCHR No. 94-H-131 (May 23, 1995). However, the fact that the Commission is not bound by the rules of evidence does not mean that it can accept unsupported evidence. Richardson v. Chicago Area Council of Boy Scouts of America & Carter, CCHR No. 92-E-80 (April 20, 1993).

Generally, Complainant's support for damages was lacking in some details, possibly due to his lack of knowledge of the Commission's rules. Where Complainant did not supply a basis for his requests for certain damages, those requests must be denied. Where Complainant's presentation was inartful, but allowed the Commission to conclude that damages were warranted, damages have been awarded. A more detailed discussion follows in Section VI below.

VI. REMEDIES

The Commission has broad powers to order relief to compensate complainants and to make them whole. CHRO, §2-120-510(l). Further, the Commission has the power to discourage Respondents from engaging in similar discriminatory conduct in the future. CHRO, §2-120-510(l). To accomplish those dual goals, remedies in this case are ordered as follows:

A. **Out-of-Pocket Expenses**

Plumbing Deposit. Complainant shall receive $400 as a partial return of the $700 deposit paid to Respondents. Digging out the sewer pipes was necessary regardless of which company eventually fixed the plumbing problem, so Complainant received some value for the deposit he paid to Respondents. Complainant stated that he had to pay for additional digging once Respondents' employees left, after he told Respondents to stop digging. Tr. 15. It is unclear from the record how much additional digging needed to be done or what the expense for the additional digging was. Respondents claimed that the entire $700 deposit merely covered the digging costs for that day, but nowhere is there any testimony that the digging was complete. Neither party had adequate proof to support their claims fully, but Complainant showed that the amount that he paid ($700) did not cover all the digging expense in that the next company did additional digging work. Therefore, the Commission finds that returning $400 compensates Complainant for the additional digging expense.

***5 Cost of Other Company.** Complainant requested $1,100, the charge of the other plumbing company to fix the plumbing problem. However, he did not provide any documentation showing that he would not have had to spend the money but for the discriminatory actions of Respondents. Indeed, Complainant had a plumbing problem which needed to be fixed. The additional cost, $1,100, was less than Respondents' original estimate; Complainant was going to have to pay more money regardless of who eventually completed the repair. Therefore, this amount cannot be included in damages.

Videotape Cost. Complainant testified that he was charged $125 for a videotape of his pipes and supplied documentation of the expense. Tr. 8, Exh. E. The Hearing Officer recommended that the Commission award Complainant that $125. However, the Commission finds that recommendation is against the manifest weight of the evidence. The Hearing Officer recommended that Respondents pay Complainant the $125 stating that, had Derkits not called him the outrageous and offensive names, Complainant would not have called his insurance agency which would not have told him to obtain a video tape. However, as set forth in Findings of Fact 7-9, *supra*, Complainant's insurance company instructed him to have his plumbing videotaped **before** Derkits called Complainant "nigger." Therefore, Complainant would have had to purchase the videotape even if Derkits had been professional and polite. Further, there is no evidence that, had Complainant hired Respondents for the videotaping, it would have cost less than $125, so there is no basis to award Complainant even a portion of the $125. Accordingly, this request for damages is denied.

Lost Wages. Complainant also testified that he lost a week's wages while he pursued his rights and located additional plumbers. He supported the amount lost -- $1,275 -- with no evidence other than this conclusory statement. He did not

testify to his occupation, his average daily wages, his employer's identity, or any other identifying details. He did not supply any documentation of this alleged loss. Although his testimony alone might have supported a lost wage claim, this conclusory testimony of amount lost is not sufficient. See Macklin v. R & R Concrete, Affordable Concrete & Fentress, CCHR No. 95-PA-35 (November 20, 1997) (where a complainant who testified as to his daily salary was awarded lost pay). Therefore, this request is denied.

B. **Emotional Distress Damages**

Chicago Human Rights Ordinance §2-120-510(l) provides that the Commission may order actual damages. Such damages may include damages for emotional distress. E.g., Steward v. Campbell and Campbell's Cleaning Service, CCHR No. 96-E-17 (June 18, 1997) and Efstathiou v. Cafe Kallisto, CCHR No. 95-PA-1 (May 21, 1997); see, e.g., Sloan v. Jasper Cty. Comm. School Dist., 167 Ill. App. 3d 867, 522 N.E.2d 334 (5th Dist. 1988) citing Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307, 106 S.Ct. 2537 (1986).

***6** Emotional distress damages have been given where racial epithets have been used without resulting physical or permanent emotional damages. See Jenkins v. Artists' Restaurant, 90-PA-14 (August 14, 1991) ($1,000 awarded to complainant who put on "slim" evidence of harm caused by single use of racial epithet); Pryor/Boney v. Echevarria, 92-PA-62/63 (October 19, 1994) ($500 and $1,000 awards for complainants who had been called "niggers" by store owner); Efstathiou, *supra* ($1,000 to complainant who became upset and stopped frequenting restaurant when he was denied entry because his companions were black).

Complainant is awarded emotional distress damages in the total amount of $2,750. Of that amount, $1,250 is to compensate Complainant for the emotional distress caused by the racially offensive language repeatedly used by Respondent Derkits. While the language was particularly repulsive and was repeated, Complainant merely testified that the statements were made and that he was requesting damages to compensate him for the "[m]ental anguish and anxiety created from a racist vulgar statement." Tr. 8-9. His witness, Ms. Lyles, noted that he was "disturbed and distraught" and "angered" by the statements, which does not add significantly to Complainant's testimony. Tr. 23. This constitutes "slim" evidence of any emotional distress and warrants a small award of emotional distress damages.

Complainant is also awarded another $1,500 for loss of the plumbing system caused by Respondents' admitted discrimination in providing service. See Complaint. Complainant had asked for $2,600 ($100 per day for the entire period he was without plumbing service). Tr. 9. However, his own testimony is that some of the delay in restoring service was the inability of the plumbing service he "wanted" to respond quickly, and the further delay occasioned by bad weather encountered due in part to this delay. Tr. 18. Some of the consequences of those choices made by Complainant in this matter must be borne by Complainant. Although it is unclear what amount would compensate a party for the loss of plumbing service (and Complainant did not provide details of the individual inconvenience and harm he suffered), the $1,500 provides reasonable compensation for this loss for at least some of the time Complainant was without plumbing service in his house.

C. **Punitive Damages**.

The Hearing Officer did not make any recommendation for or against the award of punitive damages. For the reasons set forth below, the Board of Commissioners, pursuant to its power to "modify" recommendations (Chic. Muni. Code, §2-120-510(l)), finds that it is appropriate to award Complainant punitive damages of $2,500.

The Commission has repeatedly held that punitive damages may be awarded when a respondent's actions were wilful, wanton or taken in reckless disregard of the complainant's rights. E.g., Steward v. Campbell's Cleaning Scvs. & Campbell, CCHR No. 96-E-170 (June 18, 1997); Buckner v. Verbon, CCHR No. 94-H-82 (May 21, 1997); and Wright v. Mims, CCHR No. 95-H-12 (Mar. 19, 1997). The Commission also looks to a respondent's history of discrimination,

any attempts to cover up and respondent's attitude towards the judicial process (including whether the respondent disregarded the Commission's processes). E.g., Soria v. Kern, CCHR No. 95-H-13 (Oct. 16, 1996) and Matias v. Zachariah, CCHR No. 95-H-110 (Sep. 18, 1996).

***7** Further, the Commission has regularly held that the purpose of punitive damages is to punish the violator and to deter him or her from taking similar, discriminatory actions in the future. E.g., Buckner, *supra*. In public accommodation cases, where actual damages are often not high, punitive damages may be particularly necessary to ensure a meaningful deterrent. See Buckner, *supra*.

All of these factors compel the Commission's Board of Commissioners to award punitive damages in this case. Most importantly, Respondents' behavior is easily characterized as wilful, wanton and in reckless disregard of Complainant's rights. Derkits repeatedly used racial epithets to Complainant as part of providing services to him. The Commission has previously awarded substantial punitive damages when direct, racist comments were made. E.g., Buckner, *supra*, awarding $10,000 in punitive damages where the landlord and her companion made racial comments to a neutral apartment broker and a tester and refused to rent to complainant once she learned he was Black; and Soria, *supra*, awarding $10,000 in punitive damages against defaulted respondent who refused to rent to complainant due to her race, made racist comments to her and to a tester and disregarded Commission procedures. Also, Respondents here disregarded virtually all of the Commission procedures; that also supports this decision. In addition, compensatory damages in this case are small, just over $3,000. Under these circumstances, punitive damages are necessary to deter Respondents from continuing to violate the Chicago Human Rights Ordinance.

As to the amount of punitive damages, there is no evidence of Respondents' income and assets. However, the burden of producing that evidence normally rests with the respondent. E.g., Steward v. Campbell's Cleaning & Campbell, CCHR No. 96-E-170 (June 18, 1997). As discussed, Respondents did not cooperate with the Commission's investigation and did not present any financial information during the hearing. Under these circumstances, the Commission may award punitive damages without considering Respondents' financial circumstances. E.g., Wright, and Cruz v. Fonseca, CCHR No. 94-H-141 (Oct. 16, 1996).

In Buckner and Soria, two cases involving racist comments (among other things), the Commission ordered the respondent to pay $10,000 in punitive damages. Such an amount could also be found appropriate here, given the outrageousness and viciousness of Derkits' comments and the need for a deterrent. However, the Commission recognizes that the hearing officer's recommendation did not include punitive damages and so Respondents did not have the opportunity to respond to such an award. Therefore, the Commission orders Respondents to pay Complainant punitive damages in the amount of $2,500.

D. Fines. Respondents are assessed a fine payable to the Commission in the amount of $500 for violating the CHRO and for repeatedly failing to respond to Commission orders.

***8** E. Interest. In order to make complainants whole, the Chicago Human Rights Ordinance provides for the payment of actual for certain damages. CHRO § 2-120-510(l); Reg. 240.700. Interest shall be calculated at the "prime rate." [3] Interest shall be awarded from the date of the violation for the $2,750 [4] awarded as emotional distress damages. Interest shall be awarded from the date of judgment for all other damages.

VII. CONCLUSION

For the reasons stated in this Order, the Commission awards Complainant $5,650 in damages against Respondents Drain Experts and Earl Derkits, jointly and severally; damages shall earn interest as set forth above. The Commission orders Respondents Drain Experts and Earl Derkits to pay the City of Chicago a fine in the amount of $500, jointly and severally. Because Complainant proceeded *pro se*, no attorney's fees are assessed against Respondents.

by:

Clarence N. Wood
Chair

Footnotes

1 Findings of Fact which originate from the allegations of the Complaint admitted by Respondents due to their default will be labeled "C" to denote Complaint; a paragraph number will be included where available. Findings of Fact which originate from the testimony at the Hearing will be labeled "Tr. [page number]" to denote the transcript of the Hearing held on December 16, 1997, and the page number. Findings of Fact which originate from Exhibits introduced at that Hearing will be labeled "Exh. [letter]." All exhibits introduced at the Hearing were introduced by Complainant.

2 There is some discrepancy in the transcript about the exact date on which the second plumbing company completed the repair. Complainant consistently states that he was without plumbing service for 26 days. Tr. 9, 12. However, on cross-examination, the transcript indicates that Mr. Miller stated that the job was finished on March 2. Tr. 14. However, in the subsequent question, Respondents' attorney asks, "So, you're talking February 19 to March 7?" and Complainant answers, "Yes." Tr. 14. Therefore, the March 7, 1998 date will be accepted as the date the plumbing system was finally fixed.

3 The term "prime rate" means a variable rate of interest per annum equal to the rate of interest from time to time published by the Board of Governors of the Federal Reserve System as the "Bank Prime Loan" rate in the Federal Reserve statistical release H.15 (519) entitled "Selected Interest Rate" or any successor publication to the Federal Reserve system reporting the Bank Prime Loan rate or its equivalent. The Statistical release generally sets forth a Bank Prime Loan rate for each business day. The applicable Prime Loan rate for any date not set forth shall be the rate set forth for the last proceeding date on which a rate was set forth. In the event the Board of Governors of the Federal Reserve System ceases to publish a Bank Prime Loan rate or equivalent, the term "prime rate," "base rate" or other similar rate announced from time to time by any of the Banker's Trust Company, Chase Manhattan Bank, N.A. or Chemical Bank (with the understanding that any such rate may merely be a reference rate and may not necessarily represent the lowest or best rate actually charged to any customer by such bank) shall be substituted.

4 The Hearing Officer's final recommendation included an error about the amount of emotional distress damages on which pre-judgment interest is to be paid. Her recommendation listed it as $1,250, but that was just a portion of the total award of emotional distress. This Final Ruling lists the correct total amount -- $2,750.

1998 WL 307868 (Chi.Com.Hum.Rel.)

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