City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Maria Flores
Complainant,
v.
A Taste of Heaven and Dan McCauley
Respondents.

Case No.: 06-E-32

Date of Ruling: August 18, 2010
Date Mailed: September 10, 2010

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FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on August 18, 2010, the Chicago Commission on Human Relations issued a ruling in favor of Complainant in the above-captioned matter, finding that Respondent violated the Chicago Human Rights Ordinance. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, the Commission orders Respondents:

(a) To pay damages to Complainant in the total amount of $51,750, plus interest on that amount from October 21, 2005, in accordance with CCHR Reg. 240.700. Such damages are assessed against Respondents jointly and severally, itemized as follows: (1) lost wages at $6,750, (2) emotional distress at $20,000, punitive damages at $25,000.

(b) To pay fines to the City of Chicago in the amount of $250 per Respondent, for a total of $500 in fines.[1]

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[1] **COMPLIANCE INFORMATION:** Parties must comply with a final order after administrative hearing no later than 28 days from the date of mailing of the later of a Board of Commissioners' final order on liability or any final order on attorney fees and costs, unless another date is specified. See Reg. 250.210. Enforcement procedures for failure to comply are stated in Reg. 250.220.

Payments of damages and interest are to be made directly to Complainant. **Payments of fines** are to be made by check or money order payable to City of Chicago, delivered to the Commission at the above address, to the attention of the Deputy Commissioner for Adjudication and including a reference to this case name and number.

Interest on damages is calculated pursuant to Reg. 240.700, at the bank prime loan rate, as published by the Board of Governors of the Federal Reserve System in its publication entitled "Federal Reserve Statistical Release H.15 (519) Selected Interest Rates." The interest rate used shall be adjusted quarterly from the date of violation based on the rates in the Federal Reserve Statistical Release. Interest shall be calculated on a daily basis starting from the date of the violation and shall be compounded annually.

(c) To pay Complainant's reasonable attorney fees and associated costs, assessed jointly and severally, as determined pursuant to the procedure described below.

Pursuant to Commission Regulations 100(15) and 250.150, a party may obtain review of this order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law. However, because attorney fee proceedings are now pending, such a petition cannot be filed until after issuance of the Final Order concerning those fees.

Attorney Fee Procedure

Pursuant to Reg. 240.630, Complainant may now file with the Commission and serve on all other parties and the hearing officer a petition for attorney fees and/or costs as specified in Reg. 240.630(a). Any petition must be served and filed on or before **October 8, 2010**. Any response to such petition must be filed and served on or before **October 22, 2010**. Replies will be permitted only on leave of the hearing officer. A party may move for an extension of time to file and serve any of the above items pursuant to the provisions of Reg. 210.320. The Commission will rule according to the procedure in Reg. 240.630 (b) and (c).

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

City of Chicago
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IN THE MATTER OF:	
Maria Flores **Complainant,** **v.**	**Case No.:** 06-E-32 **Date of Ruling:** August 18, 2010
A Taste of Heaven and Dan McCauley **Respondents.**	

FINAL RULING ON LIABILITY AND RELIEF

I. INTRODUCTION AND PROCEDURAL HISTORY

On April 14, 2006, Complainant Maria Flores filed a Complaint with the City of Chicago Commission on Human Relations against A Taste of Heaven, alleging that its owner, Dan McCauley, harassed and terminated her because her age, nationality (Mexican), and sex in violation of Chapter 2-160 of the Chicago Municipal Code. On May 30, 2006, A Taste of Heaven filed a Response denying all of Flores' allegations. On May 22, 2008, Flores filed an Amended Complaint adding Dan McCauley as an individual Respondent. Respondents filed a Verified Answer to the Amended Complaint on June 25, 2008.

On September 9, 2008, the Commission entered and mailed to all parties an Order Finding Substantial Evidence and set a settlement conference for December 4, 2008. On the day before the settlement conference, Respondents filed an Emergency Motion to Continue Settlement Conference. Although Respondents' counsel appeared at the settlement conference, no representative with authority to settle appeared. Complainant did not appear because she had been incorrectly advised by Respondents' counsel that the settlement conference had been continued. Based on these and other facts, on January 29, 2009, the Commission entered an Order Imposing Sanctions against Respondents' counsel.

On March 19, 2009, the Commission issued an Order Appointing Hearing Officer and Commencing Hearing Process and, in that Order, set a Pre-Hearing Conference date of May 7, 2009. The Order stated that "[f]ailure to comply with orders and regulations can result in substantial penalties pursuant to Subpart 235 of the Commission's regulations, including dismissal of the complaint, an order of default against a respondent, fines, and costs including attorney fees."

After Respondents failed to appear for the Pre-Hearing Conference, on May 13, 2009, the Hearing Officer entered an Order of Default. The Order stated: "This Order of Default means that each defaulted Respondent is deemed to have admitted the allegations of the Complaint and to have waived any defenses to the allegations, including defenses concerning the Complaint's sufficiency. As set forth in Reg. 215.240, an Administrative Hearing shall be held only for the purpose of allowing the Complainant to establish a *prima facie* case in order to demonstrate that entitlement to appropriate relief."

On May 20, 2009, Respondents moved to vacate the Order of Default, arguing only that Respondents' counsel had failed to docket the date on his calendar. The Hearing Officer denied the Motion to Vacate on July 1, 2009. On September 18, 2009, Respondents filed a motion to disqualify the hearing officer for bias. When that Motion was denied by the hearing officer, Respondents filed a Request for Review of that decision. On October 21, 2009, the Board of Commissioners denied the Request for Review and upheld the decision not to disqualify the hearing officer.

An administrative hearing was conducted on March 3, 2010. Both Complainant and Respondents submitted post-hearing briefs. On June 30, 2010, the hearing officer issued his recommended decision in favor of Complainant and on June 6, 2010, issued a follow-up order clarifying that it was a recommended ruling to which the parties had the opportunity to file objections. Complainant did not file objections. On July 29, 2010, Respondents filed their "Request for Review of Interlocutory Order," which the Commission has also treated as objections to the hearing officer's recommended ruling. On August 5, 2010, Complainant filed a motion seeking leave to respond to Respondents' submission, which the hearing officer granted on August 16, 2010.

II. FINDINGS OF FACT[1]

1. Maria Flores is female. Complaint, par. 3. Flores was born in 1954. At the time of the harassment she was 50-51 years old. Tr. 25. Flores is of Mexican nationality. Tr. 25. Flores does not speak or read English. Tr. 26.

2. Dan McCauley is the owner of A Taste of Heaven, a bakery and cafeteria located on Clark Street in Chicago. Tr. 26, 29. At the time of Flores' termination, A Taste of Heaven employed 14 to 17 employees. Tr.26.

3. In 2005, Flores's hourly rate was $11.25 per hour. Tr. 28.

4. A Taste of Heaven employed other Hispanic workers. Tr. 60.

5. Flores began working at A Taste of Heaven in 1997 as a dishwasher. Tr. 26-27. She later began working in the bakery and cooking as well as washing dishes and cleaning. Tr. 27. Flores was one of the two most senior employees at A Taste of Heaven, considered herself a "good employee," and received several wage increases. Tr. 27-28. In June 2005, McCauley, in a To Whom It May Concern notice, "certified and confirmed" that Flores was "an indispensable part of my company for over 8 years, an exemplary employee and an excellent instructor to other staff members...her work at A Taste of Heaven cannot be over-estimated or praised too high. We think the world of her and truly wish all our employees were as hard working and as loyal as she." Rp Ex 1. Respondents have admitted that Flores was "reliable, rarely missed days, rarely late, hard-working, good work ethic" and that her performance was as good as younger or male similarly situated workers. Cp Exs 1 and 2.

6. When A Taste of Heaven's business expanded, McCauley hired new employees,

[1] The following abbreviations will be used: Tr. means the transcript of the administrative hearing. Cp. Ex means Complainant's Exhibit. Rp Ex means Respondent's Exhibit. Par. means paragraph. Sec. means section. The Commission has made certain typographical and editorial corrections to the Findings of Fact which are not intended to change the substance of the hearing officer's findings.

including a Caucasian woman, Erika, approximately 22 years old, to whom McCauley assigned many of Flores' responsibilities. Tr. 31.

7. After McCauley hired Erika, in late 2004 McCauley began harassing Flores by subjecting her to slurs and other verbal misconduct which included calling her a "stupid Mexican" continuously, a "fucking bitch" many times, and saying that she was "an old lady,...too old." Tr. 35, 36. McCauley intimidated Flores and she was "afraid to come to work." Tr. 36.

8. McCauley also told Flores that she was "good for nothing" and everything she did bothered him. Tr. 32. Approximately a couple of months before Flores was terminated, a customer returned a sandwich she had made and McCauley told another employee to do it and told Flores to "get off from here, you stupid Mexican." Tr. 32-33.

9. On October 21, 2005, Flores went to work in the morning and was in the kitchen doing dishes. McCauley came into the kitchen and threw the phone against the table, and it broke. McCauley started to "scream a lot of things" in English and, since Flores did not understand English, McCauley told Roberto Lopez, a Spanish-speaking cook, to "tell this fucking lady [Flores] to get out of my business. This stupid fucking lady." Tr. 37. McCauley then wrote a check and put it on the table and said to "tell her to get her check and come next Monday." Tr. 37.

10. On October 24, 2005, Flores returned to A Taste of Heaven with her husband and son to meet with McCauley. Tr. 37. When they arrived, Flores, through her son, asked McCauley if she was going to start work. McCauley said no and to go to the front of the bakery and sit down. When McCauley later came to the front, he told Flores's son that "your mom is good for nothing. And she throw away all the food. When I was doing the dishes I used to make a lot of noise with...the dishes. A lot of people used to visit here. Used to go there before. They are no longer going there because of my attitude or something like that." Tr. 38.

11. Flores then asked him why he treated her like that and he said, "[S]hut up, you fucking bitch. Shut up, fucking bitch." Flores had her hands on the table and he said, "[R]emove your hands from there. Your hands are dirty." Tr. 39.

12. Flores then had her son ask McCauley if she was going to continue working and he said, "Tell her that I don't need her. I don't need her work. I don't need her work because she's already old. And I don't like Mexicans. I don't like Mexicans in my business." Tr. 39.

13. McCauley made these statements to Flores in English and her son translated for her. Tr. 40. Flores understood when McCauley called her a "fucking bitch." Tr. 40-41. McCauley called Flores an "old lady" in Spanish. Tr. 44.

14. During the October 24, 2005 meeting, McCauley was angry and yelling. Tr. 44.

15. During the October 24, 2005 meeting, Flores was afraid and she was crying. Tr. 44.

16. About three days later, Flores called McCauley and asked him if he was going to give her a job back. The first time she called she spoke with the lady who answered the phone at the front desk. She called a second time and spoke with Lopez, the cook, who informed her that McCauley was not there. She called a third time and McCauley answered the

phone. McCauley did not understand Flores so he gave the phone to Lopez to translate. Lopez told her he said, "No more working." Tr. 46-47.

17. Flores went back to A Taste of Heaven again on October 31, 2005. On that day, McCauley stayed inside the bakery, but he gave another employee, Liz, a letter and asked Flores to sign it showing her agreement if she wanted her job back. The letter was in English so she asked Lopez to read it to her. Lopez told her that the letter said she threw away food, pastries would disappear, and she didn't get along with the other workers. Tr. 47-48; Rp Ex 2. The letter went on to state:

> My intent with this article is that I hope Mrs. Flores will continue to work at A Taste of Heaven in her capacity as a Kitchen Assistant, that she understands she is not to gossip about or to other employees, she is not to give directives to other employees on my behalf, that she is not to bang dishes or rant when asked to perform her duties, and she is not to dispose of product without my personal consent. We are not at this time asking for an admission on her part, but instead hope she'll choose to continue with us, aware of the above concerns.

18. Flores considered only "parts" of the letter to be true. She testified it was true that one time when she checked the salad and it was old and had "rat poop" in it, she asked Lopez what she should do with it. Lopez spoke with McCauley and he said if it's not good, throw it away, so she threw it in the garbage. She also threw away a cake that had been eaten by a mouse. But she never threw away good food. Tr. 49-50.

19. Flores also admitted that the letter was true to the extent that it said she made a lot of noise while doing dishes because she was washing pots and pans, and that "everyone" makes noise while washing pots and pans. Tr. 50.

20. Flores refused to sign the proffered letter. She did not believe other portions of it to be correct and she was also "pretty sure that I would never have that job" even if she signed the letter. Tr. 51.

21. The harassment by McCauley made Flores feel "very bad." She was not sleeping and she was afraid to come to work. Being called names in front of her husband and son made her feel "very nervous and very bad." Tr. 52.

22. Being terminated from her job made Flores depressed; she gained weight and became diabetic. Tr. 52. In 2006, Flores went to a clinic for treatment because of her distress from losing her job. Tr. 96.

23. Flores looked for another job but stopped in April or May of 2006 because, since no one had called her to work, she started to believe that she was too old to have a job. Tr. 53, 54. Flores did file for and receive unemployment compensation for six months, during which time she registered that she was seeking work. Tr.95-96.

III. CONCLUSIONS OF LAW AND DISCUSSION

A. Flores Has Established a *Prima Facie* Case of Harassment and Termination

Because an Order of Default has been entered against Respondents, Flores need only establish a *prima facie* case of harassment and termination to prevail on her claims. Flores alleges that she was subjected to a hostile work environment and terminated based on her age, sex, and national origin. Flores has established that she is a member of three protected classes: (1) she was over age 40 at the time of the harassment and termination; (2) she is female; and (3) she is of Mexican national origin.

1. Harassment

Section 2-160-030 of the Chicago Human Rights Ordinance ("CHRO") makes it unlawful for any person to "directly or indirectly discriminate against any individual in hiring, classification, grading, discharge, discipline, compensation or other term or condition of employment because of the individual's...sex...age...[or] national origin." Section 345.100 of the Commission's Regulations states that "harassment on the basis of actual or perceived membership in a Protected Class is a violation of the HRO" and that "an employer has an affirmative duty to maintain a working environment free of harassment on the basis of membership in any class protected by the HRO."

Regulation 345.110 defines harassment as "slurs and other verbal or physical conduct relating to an individual's membership in a protected class...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; or (c) otherwise adversely affects an individual's employment opportunities."

When a complaint alleges that verbal conduct created a hostile work environment, "Complainant must demonstrate (1) that she was subjected to unwelcome conduct...and (2) that the conduct was pervasive enough to render her working environment intimidating, hostile or offensive." *Salwierak v. MRI of Chicago, Inc.*, CCHR No. 99-E-107 (July 16, 2003).

Flores has introduced sufficient evidence that she was subjected to extensive unwelcome conduct in the form of slurs and other verbal conduct relating to all three of her protected classes. With respect to her age, Flores testified that McCauley, the owner of A Taste of Heaven, many times called her an "old lady" and told her that she was "too old." With respect to her sex, Flores testified that McCauley called her a "fucking bitch" and a "stupid fucking lady" many times. With respect to her national origin, Flores testified that McCauley repeatedly called her a "stupid Mexican" and also informed her that he "[doesn't] like Mexicans." Additionally, Flores testified to one incident in which McCauley called her a "stupid Mexican" because a customer was not satisfied with the way she prepared a sandwich.

Flores also sufficiently testified that McCauley's conduct was pervasive enough to render her working environment intimidating, hostile, or offensive. Flores testified that McCauley was angry and yelling when he was calling her names and that she was afraid to come to work. She also stated that during the October 24, 2005, meeting with McCauley, she was afraid and crying. Flores's testimony is sufficient to establish a *prima facie* case of harassment based on her age, sex, and national origin.

2. Termination

In any discrimination case which alleges disparate treatment in employment based on a protected class, a complainant may establish his or her case by direct evidence or indirect evidence of the necessary discriminatory intent. *Luckett v. Chicago Dept. of Aviation*, CCHR No. 97-E-115 (Oct. 18, 2000). To prove a discriminatory termination using the direct evidence method, Flores must show that "(1) [her] employer made an unequivocal statement of discriminatory animus as a reason for taking the discriminatory action, or (2) circumstantial evidence, such as making statements or taking actions, together form the basis for concluding that the actions were motivated by discriminatory animus." *Id.*; see also *Griffiths v. DePaul Univ.*, CCHR No. 95-E-224 (Apr. 19, 2000), holding that a complainant may "rely on statements by managers which show that the adverse employment decision was taken because of the complainant's protected group status."

To prove a discriminatory termination using the indirect evidence method, Flores must show that: (1) she is a member of a protected class; (2) she was meeting the employer's legitimate job expectations; (3) she was subject to an adverse employment action; and (4) similarly situated employees outside of her protected class were treated more favorably. *Luckett, supra.* Flores met each of these criteria. See Findings of Fact Nos. 1 and 5.

Flores has also presented sufficient evidence by the direct method to prove that her termination was motivated by her protected classes. At the October 24, 2005, meeting when McCauley effectively terminated Flores, he told her that "I don't need her work because she's already old. And I don't like Mexicans. I don't like Mexicans in my business." McCauley's statement is unequivocal that he was terminating her because of her age and her Mexican national origin. Moreover, there is sufficient circumstantial evidence—for example, that during the termination meeting McCauley called her a "fucking bitch"—to form the basis for establishing that her termination was also a result of her sex.

3. Request for Review and Objections Regarding Liability

Respondents' principal arguments in their Request for Review of Interlocutory Order are directed to the entry and effect of an Order of Default against them.

They argue, first, that the Order of Default was entered without first issuing a Notice of Potential Sanctions for failure to attend a pre-hearing conference. This argument is without merit. Respondents had ample notice that an order of default could be entered against them. The Commission's Order Appointing Hearing Officer and Commencing Hearing Process informed all parties: "Failure to comply with orders and regulations can result in substantial penalties pursuant to Subpart 235 of the Commission's regulations, including dismissal of the complaint, an order of default against a respondent, fines, and costs including attorney fees." It also directed the parties to review an enclosed Standing Order on administrative hearings and pre-hearing procedures which includes the following paragraph:

> **Attendance Requirements and Penalties.** Attendance at the administrative hearing and any pre-hearing conference is essential, and severe penalties can follow if a party fails to attend without good cause. If a complainant fails to attend any part of the administrative hearing without good cause, the hearing officer may dismiss the complaint immediately, without further notice. If a respondent fails to attend any part of the administrative hearing without good cause, the hearing officer may enter an order of default immediately, without further notice. See Reg. 240.398. If an order of default is entered

at the administrative hearing, the hearing officer will allow the complainant to present a *prima facie* case at that time, pursuant to Reg. 235.320, and any defenses the respondent may have will not be considered. In addition, the hearing officer may impose any of the other monetary sanctions described in Section 235.400 of the Commission's regulations and in the information on other procedural sanctions immediately below.

These orders are consistent with CCHR Reg. 235.310, which provides that an order of default may be entered if, without good cause, a respondent "...Fails to attend a scheduled proceeding."

CCHR Reg. 235.120 sets forth the notice requirements before a sanction for a procedural violation can be imposed. Although subsection (a) describes the procedure for a notice of potential sanctions, subsection (b) makes it clear that a notice of potential sanctions is not always required:

(b) When Not Required

The Commission (or hearing officer if applicable) may issue an order imposing a procedural sanction without further notice in the following circumstances, provided that the order includes notice of the opportunity to move to vacate or modify the sanction or to submit a request for review, as applicable:

(1) When the notice or order with which the party failed to comply included a warning that the sanction could be imposed for noncompliance.

(2) When the notice or order with which the party failed to comply is returned to the Commission as undeliverable and the Commission has not been notified of a new address for the party.

In this case, the requirements of CCHR Reg. 235.120(b)(1)[2] were met. The Order Appointing Hearing Officer and Commencing Hearing Process scheduled a Pre-Hearing Conference for May 7, 2009, at 9:30 a.m. It directed the parties to the enclosed Standing Order quoted above and an enclosed full set of the Commission's regulations. It informed the parties that failure to comply with Commission orders or regulations could result in severe penalties including default. Then the Order of Default explicitly notified Respondents of their opportunity to move to vacate or modify it.

Respondents attempted to exercise their opportunity for reconsideration of the Order of Default by filing a Motion to Vacate on May 20, 2009, on behalf of A Taste of Heaven but not Respondent McCauley. The motion did not include a certificate of service on Complainant as required by Reg. 270.210(b) and was not served on the hearing officer pursuant to Regs. 210.310 and 235.150(a). In addition, it did not establish good cause for failing to attend the Pre-Hearing Conference, stating only that Respondent's counsel failed to docket and record the hearing date in his calendar. The hearing officer therefore properly denied the Motion to Vacate.

The Commission has long recognized that default and dismissal are severe penalties not to be imposed punitively. *Aljazi v. Owner*, CCHR No. 99-H-75 (Apr. 27, 2000). Nevertheless, this was not Respondents' first procedural violation. The Order Imposing Sanctions issued on

[2] This provision went into effect on July 1, 2008, as part of a general update of the Commission's procedural regulations. It changed prior versions of the regulations which did call for a notice of potential default or dismissal for most pre-hearing procedural violations.

February 10, 2009, the Commission (not the hearing officer, as he had not yet been appointed) imposed a fine of $250 against Respondents' counsel for misrepresenting the reasons for a last-minute motion to continue a scheduled settlement conference. After first representing to the Commission that owner McCauley was unavailable due to an "unexpected work conflict," Counsel later admitted that he had failed to inform owner McCauley of this rescheduled proceeding until two days before it was to occur. In addition, Respondent's counsel misrepresented to Complainant's counsel that he had obtained a continuance of the settlement conference. Such misrepresentations are themselves serious procedural violations; see CCHR Regs. 220.410 and 220.420.

As a result of the misrepresentation to Complainant's counsel, neither Complainant nor her counsel attended the settlement conference. Respondent's counsel but not McCauley or any other representative of A Taste of Heaven attended, leaving Respondents with no one with authority to settle, in violation of CCHR Reg. 230.110 and the Order Setting Settlement Conference.

In light of this previous failed proceeding and the misrepresentations associated with it, the decisions of the hearing officer to enter and Order of Default after a second failure of attendance due to the negligence of counsel, and then to deny the subsequent, inadequately-served Motion to Vacate, are not unreasonable.

Respondents' arguments that they had meritorious defenses and desired to present them are insufficient to avoid an order of default. At the Commission on Human Relations, this has never been the standard. See, e.g., *Janas v. Zuniga*, CCHR No. 96-H-74 (Apr. 9, 1997), a decision denying a motion to vacate which explains that this Commission applies its own default regulations, not the Federal Rules of Civil Procedure, so assertions about a meritorious defense and lack of prejudice to the complainant were not relevant.

Generalized references to the concept of due process and declarations of unfairness and "no concern for the truth" are also unavailing, as applicable due process standards have been met. The Commission has adopted as guidance in this area the principles set forth in *Metz v. Ill. State Labor Relations Bd.*, 231 Ill. App.3d 1079 (Ill.App.Ct. 1992), which held that an entry of default by an administrative agency for failure to comply with its reasonable procedural rules does not violate due process. In *Metz*, the Appellate Court upheld a default against a respondent that filed an answer to a complaint two days after the 15-day limit had expired, pointing out that the respondent had been notified that failure to file a timely answer would be deemed an admission of all material facts and waiver of a hearing. The court explained that "there is no due process violation in an administrative agency proceeding where the negligence or intentional conduct of a party results in the dismissal of its claims or the entry of a default judgment against the party." *Id.*, 231 Ill.App.3d at 1093, quoted and discussed in *Kemnitz v. Crisan and Maejla*, CCHR No. 96-H-88 (Feb. 11, 1997). Here, Respondents had ample notice of the applicable procedural rules and the possibility of an order of default for failure to comply with them. Respondents also had an opportunity to be heard regarding the propriety of the Order of Default through the procedure of a motion to vacate. This satisfies due process standards.

Applying these principles, in *Howery v. Labor Ready et al.*, CCHR No. 99-E-131 (Mar. 10, 2000), the Commission refused to vacate a default, holding that attorney neglect of a deadline is not "good cause" and the respondent's own lack of oversight and organization caused the failure to respond; this decision also reaffirmed that it is not a due process violation to enter a default due to a party's negligence; see also *Aljazi v. Owner, supra*, and *Sellers v. Outland*, CCHR No. 02-H-37 (Oct. 15, 2003), aff'd in part & vacated in part (as to certain relief), Cir. Ct.

Cook Co. No. 04 106429 (Sept. 22, 2004), aff'd in part and vacated in part (as to certain relief), Ill.App.Ct. No. 1-04-3599 (Sept. 15, 2008). Further, in *Barren-Johnson v. Mahmood*, CCHR No. 03-P-9 (May 18, 2006), the Commission held that an attorney's neglect in failing to notify a client of a scheduled proceeding must be imputed to the client; see also *Garcia v. Varela*, CCHR No. 03-H-32 (June 29, 2006).

What Respondents characterize as unfair evidentiary and procedural rulings are the predictable effect of the Order of Default, as spelled out by CCHR Reg. 235.320:

> A defaulted respondent is deemed to have admitted the allegations of the complaint and to have waived any defenses to the allegations including defenses concerning the complaint's sufficiency. An administrative hearing after an order of default shall be held only to allow the complainant to establish a *prima facie* case and to establish the nature and amount of the relief to be awarded. A complainant may present a *prima facie* case through the complaint alone or may present additional evidence. Although the defaulted respondent may not contest the sufficiency of the complaint or present any evidence in defense, the Commission itself must determine whether there was an ordinance violation and so must determine whether the complainant has established a *prima facie* case and whether it has jurisdiction. A defaulted respondent may present evidence as to relief to be awarded.

Based on Reg. 235.320, the hearing officer did not allow the defaulted Respondents to cross-examine Complainant for the purpose of adducing evidence to defend against the allegations of the complaint and Complainant's *prima facie* case. However, the hearing officer allowed cross-examination on issues related to relief. This was a correct statement and application of the law. Tr. 57-58. The hearing officer even allowed some cross-examination of Complainant related to her credibility. Tr. 59, 61.

Respondents' ongoing complaints and accusations against the hearing officer likewise are misplaced. The hearing officer did not commit error or exceed his authority in entering the Order of Default, denying the Motion to Vacate, and disallowing cross-examination of Complainant on issues related to liability. As the Board of Commissioners has already ruled on Respondents' interlocutory Request for Review, there has been no showing that the hearing officer should be disqualified for personal bias or prejudice against Respondents or their counsel, or on any other basis which warrants disqualification.

Finally, there is no merit to Respondents' argument that Complainant has not established a *prima facie* case because her testimony is uncorroborated, and indeed Respondents cite no legal authority supporting such a standard.[3] Default does not mean a complainant is automatically entitled to a liability finding; in evaluating the evidence submitted by a complainant to prove a *prima facie* case after a default, the Commission has always recognized that it has an independent obligation to find liability and order relief only when the record demonstrates that an ordinance violation occurred. See, e.g., *Lawrence v. Multicorp Co.*, CCHR No. 97-PA-65 (July 22, 1998); *Wiles v. The Woodlawn Organization et al.*, CCHR No. 96-H-1 (Mar. 17, 1999); *Horn v. A-Aero 24 Hour Locksmith et al.*, CCHR No. 99-PA-32 (July 19,

[3] To the extent that Respondents may be attempting to rely on a missing evidence presumption by citation of *Nakis v. Amabile*, 103 Ill.App.3d 840 (1st Dist. 1981), such a presumption is not applicable to this default situation where Complainant herself presented testimony sufficient to prove the necessary elements of her claims and corroboration was not required. As noted in *Nakis*, the missing evidence presumption is typically applied in favor of a plaintiff and against a defendant who produces no evidence on an issue after a plaintiff establishes a *prima facie* case. Compare *Blakemore v. Dominick's Finer Foods*, CCHR No. 01-P-51 (Oct. 18, 2006).

2000); *Puryear v. Hank*, CCHR No. 98-H-139 (Sept. 15, 1999). However, the Commission has often found a *prima facie* case to be established based only on the testimony of the complainant. See, e.g. *Lawrence*, *Horn*, and *Puryear*, *supra.* As noted above, the hearing officer heard and assessed Complainant's testimony, finding that it established a *prima facie* case. The Commission has reviewed the hearing record and also finds that Complainant has established her *prima facie* case and entitlement to relief. Any testimony of additional witnesses would have been merely cumulative.

B. Damages

Under Section 2-120-510(l) of the Chicago Municipal Code, the Commission may award a prevailing complainant the following forms of relief:

> [A]n order: ...to pay actual damages, as reasonably determined by the Commission, for injury or loss suffered by the complainant; ...to pay to the complainant all or a portion of the costs, including reasonable attorney fees, expert witness fees, witness fees and duplicating costs, incurred in pursuing the complaint before the Commission...; [and] to take such action as may be necessary to make the individual complainant whole, including, but not limited to, awards of interest on the complainant's actual damages.... These remedies shall be cumulative, and in addition to any fines imposed for violations of provisions of Chapter 2-160 and Chapter 5-8.

1. Lost Wages (Back Pay)

Flores has sufficiently established that she is entitled to damages for lost wages, also known as back pay, covering the period when she was looking for work. Flores established that she was terminated from her employment when McCauley said on October 21, 2005, to "tell this fucking lady to get out of my business" and then on October 24, 2005, that "I don't need her work because she's already old. And I don't like Mexicans. I don't like Mexicans in my business."

Respondents contend Flores "was never terminated...she was asked to sign a letter that she would no longer be a disruptive influence in the restaurant.... She chose not to sign. In effect, she was never terminated, but quit." This argument is without merit. A letter offering reinstatement only "tolls the accrual of backpay liability...[if it] *unconditionally* offer[s] the claimant the job he sought." *Ford Motor Co. V. EEOC*, 458 U.S. 219 (1982) [emphasis added]. McCauley's October 28, 2005, letter was conditional in that "it inaccurately described Ms. Flores' work performance, and it withdrew Ms. Flores' supervisory responsibilities.... Therefore, to the extent Respondents' conduct can be construed as an offer of reinstatement, it is far from unconditional and does not relieve Respondents of their liability for Ms. Flores's back pay." *Id.*

Respondents also assert that, after leaving their employment, Flores looked for work for only four months or so. The hearing officer took that fact into account; see Finding of Fact 23. Flores seeks back pay for only this limited period, namely 15 weeks. In 2005, Flores earned $11.25 per hour. The Commission thus approves and accepts the hearing officer's recommendation that Flores be granted damages for her lost wages in the amount of $6,750.

Although Flores testified that she received unemployment compensation benefits during the time period when she was out of work, such benefits have no bearing on Flores' damages award for lost wages, despite Respondents' argument for an offset. There is no Commission authority to offset against Flores' back pay the monies she received for unemployment benefits.

The general view is that unemployment benefits should not be deducted from a back pay award. See, e.g., *NLRB v. Gullett Gun Co.*, 340 U.S. 361 (1951); *Gaworski v. ITT Commercial Fin. Co.*, 17 F.3rd 1104 (8th Cir. 1994). Whether Flores is required to report or repay any reimbursement she may receive for lost wages due to termination of her employment is an issue which arises under other laws. This Commission can consider only whether there has been a violation of the Chicago Human Rights Ordinance (or the Chicago Fair Housing Ordinance) and order remedies to address those violations. See, e.g., *Brown v. Chicago Transit Authority et al.*, CCHR No. 97-E-10 (Apr. 29, 2004). This Commission is neither authorized nor required to enforce any reporting or reimbursement provisions regarding unemployment compensation benefits.

2. Emotional Distress Damages

It is well established that the compensatory damages which may be awarded by the Commission are not limited to out-of-pocket losses but also include damages for the embarrassment, humiliation, and emotional distress caused by the discrimination. *Nash & Demby v. Sallas et al.*, CCHR No. 92-H-128, (May 17, 1995), citing *Gould v. Rozdilsky*, CCHR No. 92-FHO-25-5610 (May 4, 1992). Such damages can be inferred from the circumstances of the case, as well as proved by testimony. *Id.*; see also *Campbell v. Brown and Dearborn Parkway*, CCHR No. 92-FHO-18-5630 (Dec. 16, 1992); *Marable v. Walker*, 704 F.2d 1219, 1220 (11 Cir. 1983); and *Gore v. Turner*, 563 F.2d 159, 164 (5 Cir. 1977).

In general, the size of the award is determined by (1) the egregiousness of the respondent's behavior and (2) the complainant's reaction to the discriminatory conduct. The Commission considers factors such as the length of time the complainant has experienced emotional distress, the severity of the mental distress and whether it was accompanied by physical manifestations, and the vulnerability of the complainant. *Houck v. Inner City Horticultural Foundation*, CCHR No. 97-E-93 (Oct. 21, 1998) at 13-4; *Nash and Demby, supra;* and *Steward v. Campbell's Cleaning Svcs. et al.*, CCHR No. 96-E-170 (June 18, 1997). "The Commission does not require `precise' proof of damages for emotional distress. A complainant's testimony standing alone may be sufficient to establish that he or she suffered compensable distress." *Diaz v. Wykurz et al.*, CCHR No. 07-H-28 (Dec. 16, 2009).

Flores did not present any expert testimony or medical evidence at the hearing that would have aided in determining whether she suffered emotional distress. However, despite Respondents' objection, Flores's own testimony is sufficient to establish an emotional injury. *Craig v. New Crystal Restaurant*, CCHR No. 92-PA-40 (Oct. 18, 1995). An aggrieved person need not proffer medical evidence to support a claim of mental or emotional impairment." *Sellers v. Outland, supra.* Medical documentation or testimony may add weight to a claim of emotional distress but is not required to sustain a damages award.

Higher awards of emotional distress damages are appropriate when one or more of the following features are present:

a. Detailed testimony reveals specific effects of the discriminatory conduct.
b. The conduct took place over a prolonged period of time.
c. The effects of the emotional distress were felt over a prolonged period of time.
d. The mental distress was accompanied by physical manifestations and/or medical or psychiatric treatment.

e. The discriminatory conduct was particularly egregious, accompanied by face-to-face conduct, slurs or epithets referencing the protected class, and/or actual malice.

f. The complainant was particularly vulnerable.

Nash and Demby, supra., recently reaffirmed in *Cotten v. Eat-A-Pita*, CCHR No. 07-P-108 (May 20, 2009).

In this case, a relatively high award is warranted. The record demonstrates that during the period between November 2004 and October 2005, McCauley directed repeated and highly-insulting slurs to Flores involving her age, sex, and national origin, which created a hostile and offensive work environment. The record further demonstrates that McCauley's conduct occurred in front of other employees, and that on one occasion both her husband and her son were present when McCauley called her a "fucking bitch," said he didn't like Mexicans, and told her that she was too old to work.

Flores has presented evidence in the form of her testimony that she experienced emotional injury as a result of McCauley's conduct, including that she was afraid to go to work, became depressed, gained weight, and had trouble sleeping. Flores also testified that she sought professional help for her emotional injury for a period of time as a result of the harassment and discrimination.

However, Flores's also testified that she made many attempts to get her job back, which included asking McCauley at the October 24, 2005, meeting if she was going to work, calling on three occasions after that meeting to ask for her job, and going back to A Taste of Heaven later to again ask for her job back. Flores's desire to continue working at A Taste of Heaven, notwithstanding McCauley's offensive actions, somewhat reduces the effect of Respondents acts (although the Commission recognizes that people need to make a living and may feel compelled to accept unsatisfactory working conditions).

On this evidence, the hearing officer recommended that Flores be awarded $20,000 in emotional distress damages. The Board of Commissioners approves and adopts this recommendation as consistent with the emotional distress damages awarded in recent similar employment discrimination cases before the Commission. For example, in *Johnson v. Fair Muffler Shop*; CCHR No. 07-E-23 (Mar. 19, 2008), the Commission awarded $20,000 for emotional distress in another case where a manager directed racially derogatory epithets toward the complainant over a period of six months, then discharged him without legitimate reasons after he complained to the owner. Johnson testified credibly that this discrimination made him feel "less than a human being," caused problems eating and sleeping for a month, caused him to undergo anger management therapy after taking his anger out on his wife, and required him to be separated from his wife while searching for another job in a different state. See also *Mullins v. AP Enterprises*, LLC, CCHR No. 03-E-164 (Jan 19, 2005), awarding $20,000 for emotional distress to an employee who was fired after her employer found out she had undergone mental health treatment.

In *Manning v. AQ Pizza LLC et al.*, CCHR No. 06-E-17 (Sept. 19, 2007), the Commission awarded $15,000 for emotional distress where a restaurant manager sexually harassed the complainant and addressed her in racially derogatory terms, terminated her employment when she continued to refuse sexual activity, then retaliated against her through racially and sexually derogatory messages after she filed her discrimination complaint. Manning

testified that as a result she lost her housing because she could not afford the rent and had to stay with a friend; and in addition she had frequent frightening nightmares and flashbacks.

Also, in *Alexander v. 1212 Restaurant Group et al.*, CCHR No. 00-E-110 (Oct. 15, 2008), aff'd Cir. Ct. Cook Co. No. 09 CH 16337 (Feb. 19, 2010), the Commission awarded $35,000 in emotional distress damages to a complainant subjected to harassment by company owners and employees in the form of continuing derogatory comments about his perceived sexual orientation over a period of a year. His testimony about the impact described stress related diarrhea, nausea, and loss of sleep, and was supported in part by the testimony and records of his treating physician.

Consistent with these standards and precedents, the recommended award of $20,000 for emotional distress is supported by the evidence.

3. Punitive Damages

The Commission has repeatedly held that punitive damages may be awarded when a Respondent's actions are shown to be willful, wanton, or reflective of "callous indifference to the...protected rights of others." *Houck, supra,* quoting *Smith v. Wade,* 461 U.S. 30, 56 (1983), a case under 42 U.S.C. §1983. See also *Blacher v. Eugene Washington Youth & Family Svcs.*, CCHR No. 95-E-261 (Aug. 19, 1998), stating, "The purpose of an award of punitive damages in these kinds of cases is 'to punish [the respondent] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" See also *Restatement (Second) of Torts* §908(1) (1979).

In determining the amount of punitive damages to be awarded, the size and profitability of a respondent are factors that normally should be considered. *Soria v. Kern,* CCHR No. 95-H-13 (July 17, 1996) at 17, quoting *Ordon v. Al-Rahman Animal Hospital,* CCHR No. 92-E-139 (July 22, 1993) at 18. Nevertheless, neither Complainants nor the Commission have the burden of proving Respondent's net worth for purposes of deciding on a specific punitive damages award.'" If a respondent fails to produce credible evidence mitigating against the assessment of punitive damages, the penalty may be imposed without consideration of his/her financial circumstances. *Soria, supra,* quoting *Collins & Ali v. Magdenovski,* CCHR No. 91-H-70 (Sept. 16, 1992) at 13.

In *Soria, supra,* the Commission awarded $10,000 in punitive damages against a defaulted respondent who refused to rent to the complainant due to her race, and also made racially derogatory comments to her and to a tester and disregarded Commission procedures. See also *Buckner v. Verbon,* CCHR No. 94-H-82 (May 21, 1997), awarding $10,000 in punitive damages where a landlord and her companion made racially derogatory comments to a neutral apartment broker and a tester, and refused to rent to complainant once she learned he was black. These cases involved direct derogatory comments similar in nature and effect to the ones made in this case, although the conduct was of much shorter duration than what occurred here.

The Commission agrees with the hearing officer that the standards cited above compel an award of punitive damages in this case. Most importantly, Respondents' behavior is easily characterized as willful, wanton, and carried out in reckless disregard of Flores' rights. However, Flores' argument that punitive damages should be awarded because of Respondents' failure to cooperate with the Commission's procedures is rejected as recommended by the hearing officer. Although disregard for Commission procedures is a factor to be considered in awarding punitive damages, and Respondents engaged in such conduct in the course of

adjudicating this case, they have already been penalized for that behavior by the Order of Default, which prevented them from defending themselves on liability.

The hearing officer recommended that Flores be awarded $15,000 in punitive damages.[4] The Board of Commissioners finds that on this evidence the amount should be even higher and therefore awards $25,000 in punitive damages. The Board finds the conduct of owner Dan McCauley to be shocking and out of the ordinary. He engaged in repeated and flagrant disregard of this Complainant's rights to work under conditions free of ongoing slurs and derogatory comments about her age, national origin, and sex. This kind of treatment of an employee is precisely what the Chicago Human Rights Ordinance and punitive damages are designed to punish and deter. The level and duration of the harassment approach what warranted a high punitive damages award ($35,000) in *Alexander, supra.* The Board of Commissioners condemns the callous, discriminatory treatment of this Complainant, and by this increased award emphasizes to McCauley and similar employers that it continues to regard such conduct as an egregious violation of an employee's human rights. See *Nuspl v. Marchetti*, CCHR No. 98-E-207 (Sept. 25, 2002) and *Osswald v. Yvette Wintergarden Restaurant et al.*, CCHR No. 93-E-93 (July 19, 1995).

4. Interest

Section 2-120-510(l), Chicago Municipal Code, allows an additional award of interest on damages ordered to remedy violation of the Chicago Human Rights Ordinance or the Chicago Fair Housing Ordinance. Pursuant to Commission Regulation 240.700, the Commission routinely awards pre- and post-judgment interest at the prime rate, adjusted quarterly from the date of violation, and compounded annually. The hearing officer recommended an award of interest only as to the lost wages; however, the Commission routinely awards interest on all damages and sees no reason to vary that procedure here. Accordingly, the Commission awards pre- and post-judgment interest on all damages (lost wages, emotional distress, punitive damages) awarded in this case, starting from October 21, 2005, the date when McCauley told Flores to get out of his business, and calculated as provided in Reg. 240.700.

5. Fine

Section 2-160-120 of the Chicago Human Rights Ordinance requires a fine to be assessed against a party found in violation of the Ordinance, in an amount not less than $100 and not more than $500. The hearing officer recommended a fine of $250 against each Respondent (individual and business), for total fines of $500. The Commission accepts and adopts this recommendation.

6. Attorney Fees

In addition, Section 2-120-510(l) of the Chicago Municipal Code allows the Commission to order a respondent to pay all or part of a prevailing complainant's reasonable attorney fees and associated costs. Indeed, the Commission has consistently found that prevailing complainants are entitled to such an order. *Hall v. Becovic*, CCHR No. 94-H-39 (Jan. 10, 1996), aff'd *Becovic v. City of Chicago et al.*, 296 Ill. App. 3d 236, 694 N.E. 1d 1044 (1st Dist. 1998); *Soria v. Kern, supra.* The Commission thus awards Complainant her reasonable attorney fees and costs.

Pursuant to CCHR Reg. 240.630, Complainant may serve and file a petition for attorney fees and/or costs, supported by argument and affidavit, no later than 28 days from the mailing of

[4] In her Amended Pre-Hearing Memorandum, Complainant included a request for $30,000 in punitive damages.

this Final Ruling on Liability and Relief. The supporting documentation shall include the following:

1. A statement showing the number of hours for which compensation is sought in segments of no more than one-quarter hour, itemized according to the date performed, the work performed, and the individual who performed the work;

2. A statement of the hourly rate customarily charged by each individual for whom compensation is sought;

3. Documentation of costs for which reimbursement is sought.

Respondents may file and serve a written response no later than 14 days after the filing of the petition. Replies will be permitted only on leave of the hearing officer.

IV. CONCLUSION

The Commission on Human Relations finds Respondents A Taste of Heaven and Dan McCauley liable for age, race, and sex discrimination in violation of the Chicago Human Rights Ordinance and orders the following relief:

1. Payment to the City of Chicago of a fine of $250 by each Respondent, for total fines of $500;

2. Payment to Complainant of damages for lost wages in the amount of $6,750;

3. Payment to Complainant of damages for emotional distress in the amount of $20,000;

4. Payment to Complainant of punitive damages in the amount of $25,000;

5. Payment of interest on the foregoing damages from October 21, 2005;

6. Payment of Complainant's reasonable attorney fees and costs as determined by further order of the Commission pursuant to the procedures outlined above.

The damages and interest are assessed against Respondents jointly and severally. The fines are assessed against each Respondent individually.

CHICAGO COMMISSION ON HUMAN RELATIONS
Entered: August 18, 2010

By: _____
Dana V. Starks, Chair and Commissioner