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:

Anthony Cotten
Complainant,
v.

Eat-A-Pita
Respondent.

Case No.: 07-P-108

Date Mailed: June 4, 2009

TO:

Matthew Weems
Law Office of Matthew Weems
1652 W. Ogden Ave.
Chicago, IL 60612

George Anton and Dean Sampras
Eat-A-Pita
3155 N. Halsted
Chicago, IL 60657

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on May 20, 2009, the Chicago Commission on Human Relations issued a ruling in favor of Complainant in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, the Commission ORDERS Respondent to pay damages to Complainant in the total amount of $500 plus interest from October 9, 2007, and to pay to the City of Chicago a fine of $500.[1] The Commission also awards Complainant his attorney fees and associated costs. Finally, the Commission ORDERS Respondent to comply with the order for injunctive relief set forth in the ruling.

Pursuant to Commission Regulations 100(15) and 250.150, parties seeking a review of this decision may file 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 at the Commission, such a petition cannot be filed until after issuance of the Final Order concerning those fees.

Pursuant to Reg. 240.630, Complainant may now file with the Commission and serve on the other parties and the hearing officer a petition for attorney fees and/or costs, supported by argument and

---

[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 the 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.

affidavit. Complainant has already submitted such a petition; any supplement to the petition must be served and filed on or before **June 18, 2009**. Any response to the petition must be filed with the Commission and served on Respondent and the hearing officer on or before **July 2, 2009**. 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.

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

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:

Anthony Cotten
Complainant,
v.

Eat-A-Pita
Respondents.

Case No.: 07-P-108

Date of Ruling: May 20, 2009

FINAL RULING ON LIABILITY AND RELIEF

I. PROCEDURAL HISTORY

Complainant Anthony Cotten alleges that on October 9, 2007, Respondent Eat-A-Pita, located at 3155 N. Halsted in Chicago, Illinois, discriminated against him due to his disability when he attempted, but was unable, to buy food from the restaurant. Cotten is a paraplegic and uses a wheelchair for mobility. In his Complaint, Cotten asserts that Eat-A-Pita was not fully accessible because several steps prevented him from entering the building and that this lack of accessibility violated the Chicago Human Rights Ordinance, Chapter 2-160 of the Chicago Municipal Code (the "CHRO").

Cotten filed his Complaint with the City of Chicago Commission on Human Relations on October 24, 2007, alleging the violation described above. Respondent served a letter response on November 28, 2007, denying the allegations of discrimination. Respondent asserted that the restaurant takes specific steps to accommodate those with disabilities so that they can patronize the establishment.

On June 12, 2008, the Commission entered an Order Finding Substantial Evidence of a violation of the CHRO. Although the parties participated in a settlement conference in August of 2008, efforts to resolve this matter failed and an administrative hearing was held on February 5, 2009, before Hearing Officer Darlene M. Oliver. The parties were given an opportunity to file post-hearing briefs. Complainant filed his brief on February 19, 2009. Respondent did not file a brief. The hearing officer issued her Recommended Ruling on Liability and Damages on April 3, 2009. Neither party has filed any objections.

II. FINDINGS OF FACT

1. On October 9, 2007, while in the neighborhood for a business appointment, Cotten went to Eat-A-Pita located at 3155 N. Halsted to purchase a bite to eat.[1] (Tr. 6, 27).[2] Cotten is a paraplegic, having suffered a spinal cord injury in 1991 that has left him with permanent disability. (Compl. Ex. 1, Jan. 26, 2009 letter from Dr. David Chen, Rehabilitation Institute of Chicago). Cotten uses a wheelchair for mobility. *Id.*

---

[1] Eat-A-Pita also has a location on LaSalle and Division. (Tr. 21). However, that location is not at issue in Cotten's Complaint.

[2] The February 5, 2009 transcript of proceedings will be cited herein as "Tr."

2. When Cotten arrived at the front of the restaurant, he saw several stairs leading to the entrance. Cotten testified that he did not see a sign, bell or telephone number around the entrance of the building so that he could seek assistance to get into Eat-A-Pita. (Tr. 9).

3. Cotten had left his cell phone in his truck and rather than going to the vehicle, getting the phone, and returning to Eat-A-Pita, Cotten decided to leave and go on to his business appointment. *Id.* Cotten felt "humiliated," "embarrassed," and "like a second class citizen" as a result of his inability to gain access to the restaurant. (Tr. 11).

4. There are seven steps leading up to the entrance of Eat-A-Pita and there is no ramp for wheelchair accessibility into the building. (Compl. Ex. 2, Photographs of Eat-A-Pita taken January 2009; Resp. Ex. 1, Photographs of Eat-A-Pita taken November 3, 2008).[3] The telephone number for the establishment is visible on the awning attached to the front of the restaurant and on the door leading inside. *Id.*

5. Dean Sampras is one of the owners of Eat-A-Pita. He opened the Halsted location in 1988. (Tr. 23). At that time, the building was over 100 years old. (Resp. Answer to Compl.).

6. In July 1988, Sampras submitted building plans to the City of Chicago for the restaurant. *Id.*[4] Sampras had asked Zemenidis and Sons, the architectural firm that had prepared the building plans, if a ramp could be built for wheelchair accessibility into the restaurant. (Tr. 25). The architect determined that the height of the stairs and the width of the property did not allow room to do so. (Tr. 23).

7. Sampras also considered putting a wheelchair lift onto the stairs but "it was a little out of [their] reach financially to do so." (Tr. 24). After 1988, Sampras took no further steps to make the restaurant wheelchair accessible. *Id.*

8. A doorbell is on the front door of Eat-A-Pita, but not at street level. (Tr. 26-27). Sampras testified that he would be willing to install another bell and a sign at street level to accommodate individuals that use a wheelchair. (Tr. 28). Prior to the hearing, Sampras had never considered these accommodations. (Tr. 31).

9. Sampras testified that Eat-A-Pita services "people in Cotten's condition" often and tries to accommodate all of its patrons by offering curbside and delivery service at the Halsted location. (Tr. 13).

10. Sampras testified that if Cotten was in the area of the Halsted location and had a cell phone to call the restaurant, they "would have been more than happy to accommodate him in any way possible." (Tr. 21).

---

[3] Neither party provided photographs of the restaurant as it existed in October 2007 when Complainant attempted to go in. However, Complainant testified that the building looked the same in October 2007 as it did in the picture taken by Complainant's attorney in January 2009. (Tr. 9-11). Further, Respondent never argued or presented any evidence at the hearing that the appearance of the building in October 2007 differed from how it appeared in Complainant's photograph.

[4] Prior to the hearing, Sampras looked for but was unable to locate copies of those plans. (Tr. 25-26). Accordingly, the building plans were not provided at the hearing or submitted into evidence.

III. APPLICABLE LEGAL STANDARDS

Full Use, Undue Hardship, and Reasonable Accommodation

The Chicago Human Rights Ordinance, prohibits discrimination based on disability (along with other protected classes) concerning the full use of a public accommodation. Section 2-160-070 of the CHRO states:

> 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...disability.

Subpart 500 of the Commission's Regulations further defines the obligations of persons who control a public accommodation. Reg. 520.110 defines the "full use" requirement:

> Full use...means that all parts of the premises open for public use shall be available to persons who are members of a Protected Class...at all times and under the same conditions as the premises are available to all other persons....

The CHRO and corresponding regulations attempt to balance the requirement of providing full use of a public accommodation to persons with disabilities with the practical realities of making that possible. Thus Reg. 520.105 states:

> No person who owns, leases, rents, operates, manages or in any manner controls a public accommodation shall fail to fully accommodate a person with a disability unless such person can prove that the facilities or services cannot be made fully accessible without undue hardship. In such a case, the owner, lessor, renter, operator, manager or other person in control must reasonably accommodate persons with disabilities unless such person in control can prove that he or she cannot reasonably accommodate the person with a disability without undue hardship.

Reg. 520.120 provides a definition of "reasonable accommodation" as applied to a public accommodation:

> Reasonable accommodation... means... accommodations...which provide persons with a disability access to the same services, in the same manner as are provided to persons without a disability.

Reg. 520.130 defines what is necessarily for a public accommodation to prove that it is an undue hardship to provide either full use or reasonable accommodation to a person with a disability:

> Undue hardship will be proven if the financial costs or administrative changes that are demonstrably attributable to the accommodation of the needs of persons with disabilities would be prohibitively expensive or would unduly affect the nature of the public accommodation.
>
> (a) there must be objective evidence of financial costs, administrative changes, or projected costs or changes which would result from accommodating the needs of persons with disabilities.

To prove his *prima facie* case here, Complainant must show that he (1) is a person with a disability within the meaning of the CHRO; (2) is a qualified individual in that he satisfied all

non-discriminatory standards for service; and (3) did not have full use of Eat-A-Pita as other customers did. *Maat v. String-A-Strand*, CCHR No. 05-P-05 at 4 (Feb. 20, 2008), citing *Doering v. Zum Deutchen Eck*, CCHR No. 94-PA-35 (Sept. 14, 1995, as reissued Sept. 29, 1995). An individual may be deprived of the full use of a facility where he or she cannot readily enter the front entrance in a wheelchair because of the existence of a barrier. *Maat v. String-A-Strand, supra* at 5.

If Complainant meets these standards, the burden is then on Eat-A-Pita to prove by a preponderance of the evidence that providing full use of its public accommodation would cause undue hardship. See Commission Regulation 520.105 and *Maat v. El Novillo Steak House*, CCHR No. 05-P-31 at 3 (Aug. 16, 2006). However, even if that initial showing is made, Eat-A-Pita must also establish that (1) it reasonably accommodated the individual with the disability or (2) it could not reasonably accommodate the individual with a disability without undue hardship. *Id.*

Proof of Undue Hardship

As set forth in Reg. 520.130, undue hardship will be proved "if the financial costs or administrative changes that are demonstrably attributable to the accommodation of the needs of persons with disabilities would be prohibitively expensive or would unduly affect the nature of the public accommodation." There must be "objective evidence" of the financial costs, administrative changes, or other projected costs or changes which would result from accommodating the needs of persons with disabilities. Factors to be considered in determining whether an accommodation would impose an undue hardship include, but are not limited to:

a. The nature and cost of the accommodation;

b. The overall financial resources of the public accommodation, including resources of any parent organization;

c. The effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the public accommodation; and

d. The type of operation or operations of the public accommodation.

Commission case law has further explained the level of proof needed to establish undue hardship. In *Doering, supra,* a case also involving a restaurant, the Commission considered the issue after receiving evidence at a disability evidentiary conference held for the purpose of determining whether there was substantial evidence of an ordinance violation. The restaurant's front entrance and restrooms were not accessible to people who use wheelchairs. Initial cost estimates for modifications ranged from $6,000 (the Commission's site surveyor's estimate) to $250,000, later modified to $92,000 (the restaurant's estimate). An architect then estimated the cost of modifications at $17,550, $3,000 for a ramp and $14,550 for changes to two restrooms. The restaurant agreed to installation of a doorbell and some restroom modifications; however, it objected that the ramp at a side entrance would cause congestion and obstruct the sidewalk, and that the proposed restroom modifications would be too expensive and would cause operational problems due to loss of one sink in the women's restroom, the need for the restrooms to be out of service for 3-4 weeks, harm to the interior decorating, and potential congestion. In finding substantial evidence of an ordinance violation, the Commission determined that the restaurant had not established undue hardship at that point in the proceedings. The fact that the restaurant's contractor's cost estimate was higher than the architect's did not establish that the restaurant's estimate was correct. The restaurant failed to explain how the alleged harm to its interior

decorating or appearance rose to the level of an undue hardship. The restaurant also failed to provide any information about traffic in its restrooms to show how the loss of one sink in the women's restroom might affect that. As the Commission concluded, "Unsupported allegations of undue hardship are not sufficient to carry Zum Deutschen Eck's burden of persuasion."

In *Massingale v. Ford City Mall and Sears Roebuck and Co.*, CCHR 99-PA-11 (Sept. 14, 2000), the Commission considered whether there was substantial evidence of an ordinance violation where a wheelchair user was unable to enter a Sears store in a shopping mall through a pedestrian passageway available to other customers. Although it was structurally possible to install an elevator, it would have opened into what was then the shoe department's stock room, which Sears argued would have reduced the space available for storage and display of goods. Sears also argued that the construction time and changes to the store would disrupt Sears customers and "would likely" cause a decrease in sales. Both Sears and the shopping center argued that complex issues would arise about which entity was responsible for the costs of an elevator, estimated to exceed $100,000, thus interfering with their contractual rights. The Commission held that, at that point in the case, it did not have enough evidence to support a finding of undue hardship because no information was provided about how easy or difficult it would have been for Sears to reorganize its displays, nor was a copy of the lease provided to help assess the claims about contractual problems. Also, the evidence was insufficient to determine the accuracy of the $100,000 cost estimate or whether a less expensive option such as a platform lift could be used, nor was their any evidence at all about ability to pay. This decision again illustrates the need for objective evidence and a sufficient factual basis, beyond mere assertions, to support a finding of undue hardship.

In a case under the Chicago Fair Housing Ordinance, the Commission considered whether it was an undue hardship to make the front entrance to an architecturally-significant condominium building wheelchair accessible. Although it was established that the estimated cost of creating an accessible entrance was $333,600, the Commission noted that this amount was not proved to be prohibitively expensive because the condominium had the capacity to finance the alterations over time with a line of credit, there was no evidence that the lender would not consent to such financing, and there was no evidence that the condominium unit owners were unable to pay an increased assessment for the purpose. The Commission also evaluated conflicting testimony at a hearing and found that based on the record presented, it was not proved that the proposed alteration (a sliding door) would unduly harm the architectural integrity of the building. Again, this decision illustrates that undue hardship determinations must be proved through an adequate factual foundation. *Belcastro v. 860 North Lake Shore Drive Trust*, CCHR No. 95-H-160 (Feb. 20, 2002).

IV. CONCLUSIONS OF LAW AND ANALYSIS

1. Complainant has established his *prima facie* case. The evidence is undisputed that Complainant has a disability and is therefore a member of a protected class under the CHRO because he is a paraplegic and uses a wheelchair for mobility.

2. Complainant satisfied all of the non-discriminatory standards for service. He testified that he arrived at the restaurant and was fully prepared to make a purchase.

3. Complainant established that he did not have full access to or use of the restaurant because, as he testified, six or seven stairs prohibited his entry into Eat-A-Pita. That testimony is further supported by photographs of the establishment entered into evidence by both the

Complainant and the Respondent, which show steps leading up to the entranceway of the restaurant.

4. Complainant having established a *prima facie* case of discrimination, Respondent had the burden to establish an undue hardship, which it failed to do. While a respondent can satisfy this burden by establishing the significant financial costs or administrative changes necessary to accommodate the needs of the person with disabilities, there must be some objective evidence of these costs and/or changes, which Respondent failed to provide at the hearing. See Commission Regulation 520.130.

5. Sampras testified that he inquired into making the building wheelchair accessible when he opened Eat-A-Pita at the Halsted location in 1988, but was told that there was no room to build a ramp. Respondent also testified that putting a wheelchair lift in was "out of their reach" financially. However, he also admitted that no further steps toward accessibility had been made in the past 21 years and that he did not consider other less costly alternatives to putting in a ramp or a lift. More importantly, Respondent offered no objective evidence regarding the financial costs to make Eat-A-Pita wheelchair accessible. Indeed, no specific cost information or figures were ever presented by Respondent. Vague comments that the cost of the wheelchair lift was "out of their reach" simply will not constitute objective evidence for purposes of establishing undue hardship. Accordingly, Respondent failed to show that making Eat-A-Pita fully accessible would have been an undue hardship.

6. Nor did Respondent establish the other required showings of the undue hardship analysis, namely (1) it reasonably accommodated the individual with the disability or (2) it could not reasonably accommodate the individual with a disability without undue hardship. *Id.*

7. The Board of Commissioners agrees with the hearing officer that Respondent failed to establish that it was providing reasonable accommodations to wheelchair users, short of full use, at the time Complainant attempted to eat at the restaurant. The Commission applies Reg. 520.120, discussed by the hearing officer, in conjunction with Reg. 520.105. Together these regulations require that wheelchair users and other persons with disabilities have access to the same services in the same manner as provided to persons without a disability, although only *to the extent possible without undue hardship.* However, undue hardship is an affirmative defense which Respondent was required to prove by objective evidence pursuant to Regs. 520.105 and 520.130. Here, Respondent failed to establish by objective evidence either that it was an undue hardship to provide full access to wheelchair users or that it was providing reasonable accommodation short of full access to the extent possible without undue hardship.

8. Sampras testified that Eat-A-Pita offers curbside and delivery service to accommodate patrons "in Cotten's condition." (Tr. 13) The hearing officer correctly noted that such an accommodation fails to provide access in the same manner as provided to those without disabilities. However, it must also be recognized that *if* Respondent had proved by objective evidence that it could not make the restaurant fully wheelchair accessible without undue hardship, providing curbside and/or delivery service *may* be acceptable as part of a plan for reasonable accommodation short of full access.

9. The Commission agrees with the hearing officer that curbside and delivery service cannot be determined to be a reasonable accommodation based on the evidence provided. Sampras' testimony about the nature of this service was vague and uncorroborated. Although the photographs of the entrance taken after the incident do show a telephone number (plus the statement "We Deliver"), and that is a positive step toward reasonable accommodation, nothing

in this signage indicates that curbside service was available by telephoning or any other means. Moreover, Respondent's arrangements did not accommodate a wheelchair user who, like Complainant, happened to notice the restaurant and wanted to patronize it immediately, but who did not have a cell phone available at the time.

10. The Board of Commissioners agrees with the hearing officer that it is not generally acceptable to require a person with disabilities to have a cell phone available and call to get service when people without disabilities can readily enter and obtain immediate service, and indeed are invited to do so. Even though many people now carry mobile phones, not everyone does and even a cell phone user may not have a working unit available at all times. Displaying a telephone number so that a person with a disability can call and inquire about service options is only a partial solution for a public accommodation that invites the public to enter spontaneously. As part of a plan of reasonable accommodation, Respondent needed to provide a means for a wheelchair user passing its facility to make immediate contact without using a cell phone. The only qualification is that Respondent would not have been expected to provide such an accommodation if able to prove it would be an undue hardship to do so. That proof was not provided in this case.

11. Thus the Board of Commissioners agrees with the hearing officer's conclusion that Respondent failed to provide satisfactory evidence that it was reasonably accommodating Complainant and other wheelchair users at the time of the incident.

12. Accordingly, the evidence adduced at the hearing establishes that Respondent violated the Chicago Human Rights Ordinance.

V. REMEDIES

Damages and Interest

Complainant seeks $1,000 in damages for emotional distress caused by the discriminatory denial of access to Eat-A-Pita, and that amount was recommended by the hearing officer. However, the Commission believes that amount is not supported by the evidence in this case. Complainant's testimony about his emotional distress was very limited and conclusory. He was asked by his counsel how he felt about not being able to access the restaurant and he replied, "I felt humiliated. I felt embarrassed. I felt like a second-class citizen." (Tr. 11) That is the only evidence regarding the extent of emotional distress Complainant experienced.

The sum of the single incident in this case is that, on the way to a business appointment in the area, Complainant "discovered Eat-A-Pita," which he had previously heard about as having good food. (Tr. 7) Complainant testified that he "stopped to grab a bite to eat." *Id.* In reality, however, he did not eat. He saw several stairs leading to the entrance and no other means of access, so he decided instead to go on to his business appointment. (Tr. 11)

Complainant had not traveled to the area for the purpose of eating at Eat-A-Pita and was not looking for a place to eat when he noticed it. He did not testify that he had planned to eat a meal or pick up food prior to his business appointment. He noticed Eat-A-Pita in passing on his way to the appointment, recalled its reputation for good food, determined that he would like to try the food, and stopped to see if there was a way to do so. Given the obvious barrier of the staircase as photographed, it must have become immediately clear to Complainant that he could not utilize that entrance, simultaneously with the formation of his desire to try the food. His next

observation was that there was no bell or signage about an alternate entrance or other way to contact restaurant staff. Complainant testified that he "didn't observe" any telephone number (although one appears on the entry door in the photographs) and in any event he did not have his cell phone with him. (Tr. 9). Then he "just left and continued to go and meet the party that I had set out to meet." *Id.*

Complainant did not testify that he tried to obtain food elsewhere after the incident. He did not interact with anyone else and was not subjected to any slurs or epithets related to his disability. There was no evidence that anyone else noticed him attempting to utilize the restaurant. This testimony does not support more than a nominal award of emotional distress damages.

It is true that the Commission has often awarded $1,000 in emotional distress damages on minimal evidence of emotional distress. Also, the Commission has awarded some emotional distress damages for a single incident of short duration based on the inherent distress which is inferred to flow from experiencing discrimination.

For a wheelchair user, there is no question that some emotional distress is likely to flow from an encounter with an obviously exclusionary barrier. The photograph of the staircase at Eat-A-Pita shows it to be a dominating feature of the restaurant entrance, clearly excluding people using wheelchairs and others with mobility impairments that prevent them from climbing that many stairs. Nothing was available at sidewalk level to enable a person to learn of another entrance or make contact with someone who might provide alternative service.

However, Complainant did not provide evidence of any emotional distress beyond what any wheelchair user might experience when observing a barrier which forecloses access to a public accommodation such as a restaurant, which other members of the general public can readily patronize. The decisions cited by the hearing officer for an award of $1,000 involved stronger facts than those here:

- The cases of *Maat v. Villareal Agencia de Viajes*, CCHR No. 05-P-28 (Aug. 16, 2006), and *Maat v. El Novillo Steak House*, *supra*, involved incidents occurring sequentially on the same occasion, and the complainant wheelchair user was awarded $1,000 in emotional distress damages against each respondent. First, she could not enter a storefront travel agency after traveling there by paratransit service specifically for the purpose of patronizing the business, which she heard offered good prices. She then had to wait two hours for the paratransit service to return. She tried to eat at a nearby restaurant in the meantime but was unable to enter it either. It was a hot day and the two-hour wait outside aggravated her respiratory condition. The Commission held that, despite this "sparse" evidence of emotional distress, such an injury is reasonably expected to cause more than minor inconvenience.

- In *Jenkins v. Artists' Restaurant*, CCHR No. 90-PA-14 (Aug. 14, 1991), it was noted in awarding $1,000 that the complainant put on "slim" evidence of emotional distress. However, the incident itself involved race discrimination against an African-American man who went to the restaurant to meet a friend, ordered coffee and told the waitress he was waiting for a friend, then read a novel at his table while waiting and drinking his coffee. A waitress approached two white women at the next table and the complainant heard her warn them to watch their purses. The waitress and later a manager then went to the complainant's table and demanded that he leave. When he objected, he was told,

"We'll have you locked up. We lock people like you up every day." Consequently the complainant waited across the street for his friend to arrive. Complainant's testimony that he felt angry and humiliated was corroborated by his friend's observation of him. Even though the evidence of emotional distress was deemed minimal, the incident itself was more personally insulting and egregious than the one at issue in this case.

Other rulings involving wheelchair access to public accommodations illustrate stronger facts supporting an award of $1,000 or more:

- In *Maat v. String-A-Strand*, CCHR No. 05-P-5 (Feb. 20, 2008), the complainant was awarded $1,500 where a store owner not only failed to provide a wheelchair accessible entry but also treated the complainant in a hostile manner. The Commission found that the owner's hostile conduct would have caused any reasonable customer to become upset and leave the store, and once the complainant left, she encountered sub-zero temperatures and had to find a restaurant to wait until her paratransit ride returned. The hearing officer observed that the complainant was noticeably upset when she recounted the experience three years later at the hearing, providing evidence of lasting emotional injury. The complainant had also testified that she suffered pain from being jostled while being pushed over a step to enter and exit the store.

- In *Cotten v. Taylor Street Food and Liquor*, CCHR No. 07-P-12 (July 16, 2008), the Commission awarded $1,000 in emotional distress damages to this Complainant where he was unable to enter a convenience store due to two steep steps. There, Complainant testified that he tried unsuccessfully to get the attention of employees inside the store (who should have been able to see him from store windows). He waited outside for five to ten minutes hoping an employee would come out to assist him, and felt "silly and stupid" having to do this. This is stronger evidence of personal rejection by store personnel and of an incident of longer duration.

Other Commission decisions awarding $1,000 in single-incident cases of public accommodation discrimination illustrate a more egregious incident and/or stronger evidence of impact on the complainant:

- In *Efstathiou v. Café Kallisto*, CCHR No. 95-PA-1 (May 21, 1997), the Commission awarded $1,000 based on evidence that the complainant was "very upset" by the denial of entry when he and a white friend arrived with two black companions, and that although he had been a regular patron, he stopped going to respondent's restaurant and club.

- In *Carter v. CV Snack Shop*, CCHR 98-PA-3 (Nov. 18, 1998), the $1,000 in damages was awarded after restaurant staff refused to serve the complainant due to his race—taking his order but not bringing food for half an hour, then doing nothing when the complainant said he was leaving because they did not seem to want to serve him. The complainant testified that he felt sick and angry whenever he passed the restaurant, which was on his work route. He did not feel he could go there although it was one of only a few restaurants open in the early morning hours when he took his lunch break from work.

- In *Horn v. A-Aero 24 Hour Locksmith et al.*, CCHR No. 99-PA-32 (July 19, 2000), the complainant awarded $1,000 was called racially-derogatory names and refused service due to her race, and established that she suffered ongoing stress from the incident.

- In *Blakemore v. General Parking*, CCHR No. 99-PA-120 (Feb. 21, 2001), the Commission awarded $1,000 for emotional distress due to race discrimination. Although the distress described was not all attributable to the respondent but also to the complainant's distress about underlying racism in society, and it was not credible that the described range of stress could have been caused by the relatively minor incident, nevertheless, the complainant was yelled at by a cashier to "get off the lot" even though he was a customer, and he did suffer some harm directly attributable to this incident.

- In *Trujillo v. Cuauhtemoc Restaurant*, CCHR No. 01-PA-52 (May 15, 2002), an Afro-Hispanic complainant was awarded $1,000 for emotional distress after he was left unattended in a restaurant for about 45 minutes while customers of Mexican ancestry were immediately and politely assisted, during which time the server and restaurant owner were observed whispering to one another while looking in the complainant's direction; then after complaining, the complainant's order was taken from the center of the room rather than at his table and the food was pushed across the table to him.

- In *Blakemore et al. v. Bitritto Enterprises, Inc. d/b/a Cold Stone Creamery #0430 et al.*, CCHR No.s 06-P-12,13,14,15,24 (Mar. 21, 2007), the Commission awarded $1,000 for emotional distress to each of several African-American complainants who were not given coupons a store manager was dispensing to similarly-situated white customers, then were told to leave and never return, and one complainant later experienced retaliation when refused service by the store manager on a later occasion. These were more severe incidents involving direct personal mistreatment in the presence of other customers.

The Commission has awarded less than $1,000 when the evidence of emotional distress was slight:

- In *Prior/Boney v. Echevarria*, CCHR No. 92-PA-62/63 (Oct. 19, 1994), one complainant was awarded $500 for emotional distress based on little evidence of damages after an incident where a store owner asked both complainants to leave and referred to them as "niggers." The other was awarded $1,000 where he testified she had been angry and upset and had gotten medication for her nerves after the incident.

- In *Craig v. New Crystal Restaurant*, CCHR No. 92-PA-40 (Oct. 18, 1995), the Commission awarded $500 for emotional distress due to sexual orientation discrimination when a server called the complainant a "holier than thou damn faggot." The complainant testified that he was humiliated, angry, and upset when the comment was made and continued to feel "greatly offended" by it. However, the incident was an isolated one, the complainant himself made a comment during the incident which was "somewhat obnoxious," the complainant had been a regular customer and continued to eat at the restaurant after the incident, and the complainant provided no evidence of physical or psychological injury.

- In *Puryear v. Hank*, CCHR 98-H-139 (Sept. 15, 1999), a housing discrimination case involving race discrimination, the Commission awarded $500 for emotional distress where the complainant put on minimal evidence of distress and the underlying conduct was neither lengthy nor severe: the complainant was given an appointment to view an apartment then was told someone else had rented it when she arrived; she later

telephoned under another name and was told the apartment was available. She testified that she was "very upset" for two or three weeks and fearful of looking for another apartment, yet she found one and moved within a month.

- In another housing discrimination case, *Huff v. American Management and Rental Service*, CCHR No. 97-H-187 (Jan. 20, 1999), the complainant was awarded $750 for emotional distress after being rejected as a tenant due to her source of income, where her evidence about distress was minimal and not all of the distress was attributable to the respondent.

- In *Godard v. McConnell*, CCHR No. 97-H-64 (Jan. 17, 2001), a case involving refusal to rent based on parental status, the Commission awarded $400 for emotional distress where the complainant testified that the respondent was one of dozens of landlords who may have discriminated against her and she was experiencing other traumatic events in her life at the time, finding that this amount was appropriate to the distress caused by the respondent in the case. The complainant had only one brief telephone conversation with the respondent involving no explicit discriminatory statements; she testified only that she felt "rejected" and "depressed."

- In *Hoskins v. Campbell*, CCHR No. 01-H-101 (Apr. 16, 2003), the Commission awarded $750 for emotional distress where a landlord refused to rent to her because she would have used a Section 8 voucher, finding that her testimony about the emotional effects was minimal but did demonstrate frustration and stress due to the discrimination. The evidence including the complainant's demeanor did not support a claim of heightened vulnerability to due previous rejections for the same reason, where the interaction with the landlord was brief and not egregious and where no medical consequences linked to the violation were shown.

- In an employment discrimination case, *Richardson v. Chicago Area Council of Boy Scouts of America*, CCHR No. 92-E-80 (Feb. 21, 1996), dismissed on other grounds, CCHR No. 92-E-80 (Feb. 19, 2003), the Commission awarded $500 for emotional distress where the complainant was admittedly a "tester" who knew of the respondent's anti-gay hiring policy before he inquired about employment and was rejected.

The Commission reviewed the factors to be considered in determining the amount of emotional distress damages in *Nash/Demby v. Sallas Realty & Sallas*, CCHR No. 92-H-128 (May 17, 1995). Although *Nash/Demby* was a housing discrimination case, the principles are applicable to all types of discrimination cases decided by this Commission. 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. More modest awards are appropriate when one or more of the following features are present:

a. There was negligible or merely conclusory testimony concerning emotional distress.
b. The discriminatory conduct consisted of discrete acts which took place over a brief period of time.
c. There were no prolonged effects of the discriminatory conduct.
d. There was no medical treatment and/or a paucity of physical symptoms.
e. The discriminatory conduct was not so egregious that one would expect a reasonable person to suffer extensive or ongoing distress.

f. The complainant was not unusually fragile due to past experiences or a pre-existing condition.
g. The conduct involved a refusal to rent (or serve or hire) rather than harassment or an attempt to evict (or eject or fire).

In contrast, higher awards 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 particular egregious, accompanied by face-to-face conduct, slurs or epithets referencing the protected class, and/or actual malice.
f. The complainant was particularly vulnerable.

The Commission recognizes that an award of $1,000 is relatively modest and that, although a "cost of living" increase as argued by Complainant is not strictly applicable, the value of emotional distress in monetary terms can increase over time. However, given the lack of any personal contact with Respondent's personnel, the very brief duration of the incident, and Complainant's very minimal testimony which merely states what any wheelchair user who observes an entry barrier is likely to feel, the Commission is not persuaded that Complainant's emotional distress in this instance should be valued at $1,000. The Commission finds that Complainant's experience and his evidence of emotional distress were closer to those of the complainants in the cases cited above where less than $1,000 was awarded, and so awards $500 as emotional distress damages in this case.

Commission Regulation 240.700 provides for pre- and post-judgment interest at the prime rate, adjusted quarterly, and compounded annually starting at the date of the violation. As recommended by the hearing officer, such pre- and post-judgment interest on the emotional distress damages of $500 is awarded, starting from October 9, 2007, through the date of this final order and ruling.

Fine

Commission Regulation 2-160-120 provides that the Commission "shall" impose a fine between $100 and $500 for each offense if a party is found to have violated the CHRO. The hearing officer recommended a fine of $200, noting that Respondent violated the ordinance but accepted responsibility for that violation by acknowledging at the hearing that the restaurant is not wheelchair accessible and stating that he would install a bell at street level and a sign to assist those individuals who use wheelchairs.

The Board of Commissioners appreciates these acknowledgements and Respondent's willingness to come into compliance with the CHRO. However, Respondent allowed many years to pass during which more action could have been taken to make the business accessible to wheelchair users to the extent possible without undue hardship. Moreover, even though this Complaint was filed in October of 2007, during the pendency of the case Respondent has not documented its claim of undue hardship with objective evidence despite ample opportunity to do so, nor has it established that it has taken any steps to improve its reasonable accommodations to

wheelchair users during the pendency of this case. Respondent has apparently waited to be explicitly ordered to act.

Accordingly, the Board of Commissioners believes that the maximum but still relatively modest fine of $500 is warranted and appropriate.

Order for Injunctive Relief

Complainant seeks injunctive relief but failed to specify or suggest how that relief should be fashioned. Injunctive relief is explicitly authorized by Section 2-120-510(l), Chicago Municipal Code. Commission case law also makes it clear that the Commission is authorized to enter injunctive relief to remedy past violations of the CHRO and to prevent future violations. *Maat v. String-A-Strand, supra* at 6, citing *Frazier v. Midlakes Management*, LLC, CCHR No. 03-H-41 (Sept. 15, 2003); *Sellers v. Outland*, CCHR No. 02-H-73 (Oct. 15, 2003); and *Leadership Council for Metropolitan Open Communities v. Souchet*, CCHR No. 98-H-107 (Jan. 17, 2001).

During the administrative hearing, Sampras stated that when the restaurant first opened in 1988, it was determined with the assistance of an architectural firm that the configuration of the property did not allow for a permanent ramp. (Tr. 23-26). As the hearing officer pointed out, this possible undue hardship was not documented with objective evidence, and it is time for Respondent to revisit the entire question of what permanent alterations and/or reasonable accommodations are possible without undue hardship. The hearing officer recommended that Respondent be ordered to eliminate all physical barriers to access by wheelchair users at the front entrance of Eat-A-Pita at its Halsted Street location, with all modifications to be in accordance with the Illinois Accessibility Code and the relevant standards established by the American National Standards Institute. The hearing officer next recommended that, if it is determined that a permanent ramp cannot be installed pursuant to these standards, then a portable ramp may be used. Finally, the hearing officer recommended that Respondent be required to install a doorbell at the bottom of the staircase leading to the restaurant, along with a sign informing patrons with disabilities that they can use the doorbell to contact an employee and have a portable ramp deployed at the door. The hearing officer recommended a 30-day timetable for compliance with these recommended injunctive orders.

The Board of Commissioners agrees with these recommendations but believes the provisions for injunctive relief should be expanded consistent with the CHRO and Part 500 of the Commission's regulations to clarify the Commission's expectations and facilitate compliance. The Board also believes that extending the compliance deadlines will allow enough time to facilitate compliance and document any undue hardship.

It appears possible that Respondent can prove it is an undue hardship to install a permanent ramp or make other permanent modifications of the restaurant entrance. It may also be infeasible to utilize a portable ramp given the number and pitch of the stairs as observed in the photographs. But because Respondent failed to prove by objective evidence any facts which may support a finding of undue hardship, Respondent must now do so if it continues to contend that it cannot create a permanent wheelchair accessible entrance.

Accordingly, the Commission directs Respondent to take the following actions to remedy its past violation and prevent future violations:

1. **Provide a permanent accessible entrance if able to do so without undue hardship.** If able to do so without undue hardship (as defined in Commission Regulation 520.130), on or before *six months from the date of mailing of this Final Ruling on Liability and Relief*, Respondent must file with the Commission and serve on Complainant (through his attorney of record) documentary evidence that Respondent has made permanent alterations sufficient to make at least one public entrance to the business fully accessible to persons using wheelchairs (pursuant to Commission Regulations 520.105 and 520.110, the applicable standards of the Illinois Accessibility Code, and any other applicable code requirements). The documentary evidence must include a certification signed by Respondent's authorized representative or a qualified professional describing the alterations made, and it may include photographs or drawings. If only one of multiple public entrances is being made accessible, there must be conspicuous signage at any non-accessible entrance directing the public to the accessible one. The accessible entrance must be substantially equivalent to other public entrances.

2. **Provide objective documentary evidence of any undue hardship**. If unable to provide a permanent accessible entrance or any reasonable accommodation due to undue hardship (as defined by Commission Regulation 520.130), on or before *three months from the date of mailing of this Final Ruling on Liability and Relief*, Respondent must file with the Commission and serve on Complainant (through his attorney of record if applicable) at least the following objective documentary evidence of undue hardship:

   a. If the undue hardship is based on *physical infeasibility* or the *requirements of other applicable laws*, a signed certification of Respondent or a qualified professional[5] which sets forth in detail the factual basis for the claimed undue hardship.

   b. If the undue hardship is based on *prohibitively high cost*:

      i. A signed certification of a qualified professional describing and itemizing the cost of the *least expensive* physically and legally feasible alterations which would make the entrance fully accessible.

      ii. Adequate documentation of all available financial resources of Respondent which may include (a) a photocopy of Respondent's last annual federal tax return filed for the business or (b) a CPA-certified financial statement completed within the calendar year prior to submission. ***Complainant is ordered*** *not to disclose this financial information to any other person except as necessary to seek enforcement of the relief awarded in this case. Similarly, the Commission shall not disclose this financial information to the public except as necessary to*

[5] For example, Respondent may be able to provide a certification by the architectural firm which Respondent says had made such a determination in July 1988. Other sources of technical assistance or referral include the City of Chicago's Mayor's Office for Persons with Disabilities and the Great Lakes ADA Center, also located in Chicago.

seek enforcement of the relief awarded in this case or as otherwise required by law.

3. **Make reasonable accommodations if undue hardship is claimed**. If claiming undue hardship to make the entrance fully accessible by means of permanent alterations to the premises, on or before *three months from the date of mailing of this Final Ruling on Liability and Relief*, Respondent must take the following steps to provide reasonable accommodations (within the meaning of Reg. 520.120):

   a. File with the Commission and serve on Complainant documentary evidence of the purchase of an adequate *portable ramp* and certification that staff on all shifts are trained to utilize it when requested. If it is not feasible to utilize a portable ramp (for example, if the incline to be ramped is too steep), a signed certification by Respondent's authorized representative or a qualified professional detailing why use of a portable ramp is not feasible must be provided.

   b. Install and maintain a *doorbell or buzzer* at street level which can be utilized by a person in a wheelchair and which is adequate to summon staff to the entrance for the purpose of deploying a portable ramp or providing carryout or other alternative service. The doorbell or buzzer must be accompanied by conspicuous signage indicating that it is a means for people with disabilities to seek assistance.

   c. Maintain *exterior signage* conspicuously displaying a telephone number which may be used to contact staff during business hours to request deployment of a portable ramp, carryout or delivery service, or other alternative service. If service (such as carryout or delivery) is provided to the general public by internet, the signage must also include applicable web site and electronic mail addresses.

   d. Provide other or additional *reasonable accommodations as feasible without undue hardship* to enable a wheelchair user to access the services Respondent provides to the general public in a manner which is as nearly equivalent as possible. Such steps may include carryout or curbside service; other physical changes; or changes in rules, policies, practices or procedures.

   e. Ensure that Respondent's staff are trained and supervised to respond to the doorbell or buzzer and to provide equivalent service and/or reasonable accommodation consistent with Respondent's plan for compliance with the Chicago Human Rights Ordinance.

   f. Provide *notice of the reasonable accommodations* being provided in lieu of a permanent accessible entrance by filing with the Commission and serving on Complainant (through Complainant's attorney of record) a detailed written description of Respondent's plan for reasonable accommodations in compliance with the Chicago Human Rights Ordinance, which may include photographs or drawings. The description must be signed by an authorized representative of Respondent or a qualified professional.

   g. If claiming that it is an undue hardship to provide *any* reasonable accommodation to enable a wheelchair user to utilize the public accommodation in question (pursuant to Reg. 520.105), on or before *three months from the date of mailing of*

this Final Ruling on Liability and Relief, Respondent must file with the Commission and serve on Complainant (through complainant's attorney of record if applicable) objective, documentary evidence of the undue hardship as described in Section 2 of this order for injunctive relief and Reg. 510.130.

4. **Extension of time.** Respondent may seek a short extension of time to meet any deadline set with regard to this order for injunctive relief, by filing and serving a motion pursuant to the procedures set forth in Regs 210.310 and 210.320. (The hearing officer need not be served.) The motion must establish good cause for the extension. The Compliance Committee of the Commission shall rule on the motion by mail.

5. **Effective period.** This injunctive relief shall remain in effect for *three years* from the date of mailing of this Final Ruling on Liability and Relief for the purpose of Complainant's seeking enforcement of it (by motion pursuant to Reg. 250.220).

Attorney Fees

Section 2-120-510(l), Chicago Municipal Code, allows the Commission to order a respondent to pay a prevailing complainant's reasonable attorney fees and costs. Indeed, the Commission has routinely found that prevailing complainants are entitled to an award of their reasonable attorney fees and costs. See, e.g., *Godard v. McConnell* and *Jenkins v. Artists' Restaurant, supra.* The Commission adopts the hearing officer's recommendation that Respondent pay Complainant's reasonable attorney fees and costs.

Pursuant to Commission Regulation 240.630, Complainant may serve on the hearing officer and Respondent, and file with the Commission, a petition for attorney's fees and/or costs, supported by arguments and affidavits no later than 28 days from the mailing of 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.

As Complainant has already filed a fee petition in this matter, the Final Order on Liability and Relief accompanying this Final Ruling will specify further filing deadlines.

VI. SUMMARY AND CONCLUSION

The Board of Commissioners finds Respondent Eat-A-Pita liable for public accommodation discrimination in violation of Chapter 2-160 of the Chicago Human Rights Ordinance and orders the following relief:

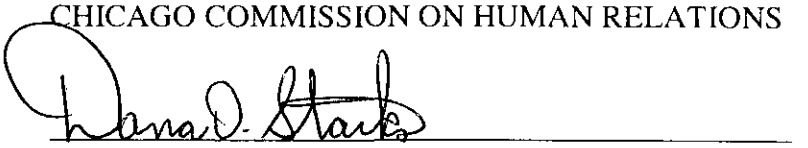
1. Payment to Complainant of emotional distress damages in the amount of $500 plus pre- and post-judgment interest dating from October 9, 2007;

2. Payment to the City of Chicago of a fine of $500;

3. Compliance with the order for injunctive relief outlined above;

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

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Dana V. Starks, Chair and Commissioner
Entered: May 20, 2009