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.

La Luce Restaurant
Respondents.

Case No.: 08-P-34

Date of Ruling: April 21, 2010
Date Mailed: April 28, 2010

TO:

Matthew P. Weems
Attorney at Law
180 N. Stetson St., Ste. 3500
Chicago, IL 60610

Angelo Ruggiero
Attorney at Law
1438 N. Lathrop Ave.
River Forest, IL 60305

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on April 21, 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 Respondent:

1. To pay to Complainant compensatory damages in the amount of $800, plus interest on that amount from May 29, 2008, in accordance with Commission Regulation 240.700.

2. To pay a fine to the City of Chicago in the amount of $500.[1]

3. To pay Complainant's reasonable attorney fees and associated costs as determined pursuant to the procedure described below.

4. To comply with the orders for injunctive relief stated in the enclosed ruling.

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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.

In addition, Attorney Angelo Ruggiero is ordered to pay a fine to the City of Chicago in the amount of $500 as a sanction for failing to comply with discovery requirements.

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 **May 27, 2010**. Any response to such petition must be filed and served on or before **May 13, 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
COMMISSION ON HUMAN RELATIONS
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IN THE MATTER OF: Anthony Cotten **Complainant,** **v.** La Luce Restaurant, Inc. **Respondent.**	**Case No.:** 08-P-34 **Date of Ruling:** April 21, 2010

FINAL RULING ON LIABILITY AND RELIEF

I. PROCEDURAL HISTORY

Complainant Anthony Cotten filed this Complaint on June 3, 2008, alleging that on May 29, 2008, Respondent La Luce Restaurant, located at 1393 W. Lake Street in Chicago, Illinois, discriminated against him because of his disability in violation of the Chicago Human Rights Ordinance, Chapter 2-160 of the Chicago Municipal Code ("CHRO").

Respondent filed a response on July 17, 2008. On January 30, 2009, the Commission entered an Order Finding Substantial Evidence of a violation of the CHRO. A bifurcated administrative hearing was held on August 24 and November 17, 2009.

On February 4, 2010, the hearing officer issued her Recommended Ruling on Liability and Relief, in favor of Complainant. On March 15, 2010, Respondent filed its Objection to Recommended Ruling.

II. 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 people 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.

To prove his *prima facie* case, a 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 La Luce Restaurant 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 a complainant establishes these elements by a preponderance of the evidence, a respondent may 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 of undue hardship is made, a respondent must also establish that (1) it reasonably accommodated the complainant or (2) it could not reasonably accommodate the complainant without undue hardship. *Id.*

The Commission has consistently applied these principles to claims that a person who uses a wheelchair for mobility due to disability was not able to fully access and utilize a facility that is a public accommodation. In addition to the decisions cited above, see, e.g., *Hanson v. Association of Volleyball Professionals*, CCHR No. 97-PA-61 (Oct. 21, 1998); *Massingale v. Ford City Mall and Sears Roebuck and Co.*, CCHR No. 99-PA-11 (Sept. 14, 2000); *Winter v. Chicago Park District*, CCHR No. 97-PA-55 (Oct. 18, 2000); *Schell v. United Center*, CCHR No. 98-PA-30 (Mar. 20, 2002); *Smith v. Owner of Sullivan's et al.*, CCHR No. 03-P-107 (Dec. 1, 2003); *Luna v. SLA Uno, Inc., et al.*, CCHR No. 02-PA-70 (Mar. 29, 2005); *Maat v. Villareal Agencia de Viajes*, CCHR No. 05-P-28 (Aug. 16, 2006); *Cotten v. Taylor Street Food and Liquor*, CCHR No. 07-P-12 (July 16, 2008); *Cotten v. Eat-A-Pita*, CCHR No. 07-P-108 (May 20, 2009); *Cotten v. 162 N. Franklin, LLC d/b/a Eppy's Deli and Café*, CCHR No. 08-P-35 (Sept. 16, 2009); *Cotten v. Addiction Sports Bar and Lounge*, CCHR No. 08-P-68 (Oct. 21, 2009); *Cotten v. Lou Mitchell's*, CCHR No. 06-P-9 (Dec. 16, 2009); and *Cotten v. CCI Industries, Inc.*, CCHR No. 07-P-109 (Dec. 16, 2009).

III. FINDINGS OF FACT

In determining the following facts, the hearing officer relied on the testimony of Complainant Anthony Cotten and Respondent's witness Michael Moretti but excluded the photographs offered as evidence by Complainant at the hearing as well as the testimony of Complainant's witness Eric Carter, as further discussed below.

1. Complainant Anthony Cotten is a T12 paraplegic and needs a wheelchair for mobility. (Tr. 12-13)

2. Respondent La Luce Restaurant is located at 1393 Lake St., Chicago. The president is Anna Moretti. The Moretti family owns the property and Michael Moretti manages the restaurant (Tr. 113)[1]

3. Complainant and a friend, Eric Carter, decided to go to lunch at La Luce Restaurant, a restaurant selected by his friend. (Tr. 66, 77) When they arrived at La Luce Restaurant on May 29, 2008, they noticed a large step at the entrance. (Tr. 11) Complainant would not have been able to negotiate the step in his wheelchair to enter the restaurant. (Tr. 14-15) Complainant asked Carter to go inside to see if there was an accessible entrance or if they had a portable ramp. (Tr. 87) Complainant waited outside three or four minutes. (Tr. 12)

4. Complainant learned from Carter, who returned with a man whom Complainant believed to be an employee, that Respondent did not have an accessible entrance or a portable ramp, but he could be picked up and carried into the restaurant. (Tr. 12) Complainant refused to be carried in, out of fear for his safety. (Tr. 12) Complainant and his friend then went to eat at another restaurant. (Tr. 12)

5. Michael Moretti testified that he has a background in construction. (Tr. 105) The building housing La Luce Restaurant was built in 1883 and is a brick structure. (Tr. 107) Moretti testified that the Loomis-Lake corner entrance on the corner of Lake and Loomis has not been used for many years. There are two other entrances to La Luce Restaurant. At the corner entrance, patrons are directed to a side entrance on Lake Street which, according to Moretti, has a rise of five to six inches to the door. (Tr. 110) There is also an entrance on Loomis used by customers with a lower rise, approximately four inches. (*Id.*)

6. Witness William Kehoe is a paraplegic who uses a wheelchair. (Tr. 93) He testified that he frequents La Luce Restaurant and gains access by being lifted in by two or three people. (Tr. 98) La Luce does not offer training regarding lifting wheelchair users into the entrance. (Tr. 114)

7. Moretti testified that other patrons have brought their own portable ramps to utilize in gaining access, but La Luce Restaurant does not provide a portable ramp for wheelchair access. (Tr. 115). Moretti testified that he offers "all the time" to assist wheelchair users, but "some people don't want to be touched." (Tr. 114)

8. Complainant testified that he and Eric Carter had specifically gone to La Luce Restaurant to eat lunch. His friend suggested that restaurant because he had been there before. (Tr. 11, 18, 66) When they encountered stairs that did not permit Complainant to enter the restaurant, they went to another restaurant, Wishbone, for lunch. (Tr. 12)

9. On direct testimony Complainant testified that he was "humiliated, embarrassed" at not being able to get in the restaurant and that this was a "big inconvenience" to his friend. (Tr. 18-19) Complainant acknowledged that it was frustrating to have to come

[1] La Luce Restaurant Incorporated is listed in the corporation database of the Illinois Secretary of State with Michael Moretti named as registered agent.

to the hearing to prosecute the Complaint and that he felt bad having to have his friend come in to testify. (Tr. 19) Complainant sees a psychiatrist for ongoing depression and his exclusion from Respondent's restaurant has contributed to his hesitancy to go out and go places with people. He sometimes doesn't go because of the inconvenience to friends and the embarrassment he feels not being able to get into establishments. (Tr. 21)

10. During cross examination, Complainant was questioned as to the particulars of his therapy, the name and location of his psychiatrist, and how long he has been participating in therapy. (Tr. 66-67) During further questioning as to how his depression affects him and what it causes him to do, Complainant stated that he is not always able to work to his full capacity, that it depends on the severity of his depression, as it varies. (Tr. 70-72) During a long line of questioning regarding depression, Complainant became visibly upset and emotional. This was particularly the case in regard to answers regarding not going out with friends when he doesn't know if an establishment is accessible. Complainant was asked to explain what "emotional" means. He testified that the incident made him "sad" and that it made him "look at not wanting to go out." (Tr. 78) It was the Hearing Officer's impression that Respondent's cross examination elicited a genuine emotional response from Complainant that was a more direct reflection of the damage incurred than his actual testimony, although the hearing officer found that credible as well.

IV. CONCLUSIONS OF LAW AND ANALYSIS

1. Complainant has proved a *prima facie* case of disability discrimination.

The evidence of record is sufficient to prove by a preponderance of the evidence that Respondent violated Section 2-160-070, Chicago Muni. Code ("Discriminatory Practices—Public Accommodations") and Commission Regulation 520.105.

First, Complainant has proved that he is a person with a disability within the meaning of the Chicago Human Rights Ordinance. He stated in his sworn Complaint that he is paraplegic and uses a wheelchair for mobility (Compl. Par. 1). He testified at the administrative hearing that he is a T12 paraplegic. Respondent cross-examined Complainant about his disability, apparently in an effort to establish that he did not have a disability or did not really need to use a wheelchair. Respondent succeeded in establishing only that Complainant is able to transfer to and from his shower, his vehicle, and his bed. (Tr. 49)

This activity on the part of Complainant does not undermine a finding that Complainant's condition meets the definition of disability established by the Chicago Human Rights Ordinance. Sec. 2-160-010(c), Chicago Muni. Code and Reg. 100(11). The definition is like that in the Illinois Human Rights Act and requires only that a condition not be transitory or insubstantial to be a disability. *Moore v. Northwestern Memorial Hospital et al.*, CCHR 96-E-224 (Jan. 20, 1999). Complainant has proved that he is a paraplegic who uses a wheelchair for mobility and this is sufficient. In particular, there was no evidence that Complainant is able to enter and utilize a restaurant without his wheelchair or in any other respect to move about in the community without a wheelchair. See *Nichols v. Northwestern Memorial Hospital et al.*, CCHR No. 01-PA-15 (June 27, 2001); *Cotten v. Eat-A-Pita, supra.*

In addition, Complainant has proved that he sought to use a public accommodation within

the meaning of the Chicago Human Rights Ordinance, namely by eating a meal at Respondent La Luce Restaurant on May 29, 2008. Specifically, Complainant went to La Luce Restaurant with a friend, Eric Carter, to have lunch, at his friend's suggestion.

Finally, Complainant has proved that the restaurant was not fully accessible to him as a wheelchair user. When he arrived, he encountered a barrier which prevented him from entering in his wheelchair on his own. He explained on cross examination that the entrance he sought to use had a "big step," and he asked his friend to go inside and see if there was an accessible way to enter. (Tr. 12, 87) When his friend returned from entering the restaurant to inquire, complainant learned that the only option was to be carried into the restaurant in his wheelchair.

2. Respondent has failed to plead and to prove by objective evidence that it would have been an undue hardship to make at least one public entrance to the restaurant fully wheelchair accessible.

Respondent had the opportunity to plead and prove that it was an undue hardship to make the restaurant entrance fully accessible as contemplated by Reg. 520.130, but has not done so. Reg. 520.130 defines what is necessary 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.
>
> Factors to be considered 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.

Respondent failed to plead undue hardship as an affirmative defense. First, Respondent did not claim undue hardship in its response to the Complaint, the first opportunity to do so. Reg. 210.250 sets forth the form and content of a response and provides that any affirmative defenses must be stated in the response in order to be considered in determining whether there is substantial evidence of discrimination. The entirety of Respondent's response filed on July 17, 2008, reads "Respondent, La Luce, denies the allegations in the Complaint that Respondent discriminated against the Complainant in violation of Chap. 2-166 [*sic.*] of the Municipal Code."

Second, Respondent failed to give notice of any defense of undue hardship in its Pre-Hearing Memoranda, despite the requirement of Reg. 240.130(a)(4) that a pre-hearing memorandum include from each respondent a statement of any affirmative defenses asserted. Respondent filed and served an initial Pre-Hearing Memorandum on May 4, 2009, using the Commission's form. Respondent left entirely blank the section for listing affirmative defenses.

Respondent then filed and served a second Pre-Hearing Memorandum on August 19, 2009, again on the Commission's form. There Respondent made an entry in the section for affirmative defenses stating, "Building is 'grandfathered'—see Statement of Position and Memorandum of Law attached." Nowhere in the attachment did Respondent assert an undue hardship defense within the meaning of Reg. 520.130.[2]

Finally, at the administrative hearing, Respondent's witness Michael Moretti provided some testimony suggesting a possible defense of undue hardship to make permanent alterations to create an accessible entrance, even though Respondent never explicitly argued for the undue hardship defense. Complainant did not object to the testimony. However, under these circumstances the Commission is unable to find that Respondent has proved by objective evidence that it was an undue hardship to make at least one restaurant entrance fully wheelchair accessible (although Respondent may be able to provide such evidence pursuant to the order for injunctive relief outlined below).

Moretti did provides some evidence suggesting that it may be an undue hardship to create a *permanent* wheelchair accessible entrance to the restaurant. His testimony demonstrated a high level of familiarity with the condition of the building housing the restaurant. He testified that original occupancy was granted by the Building Department of the City of Chicago through a "Grandfather Clause, because of the way the building is, and its age." (Tr. 111) Moretti testified to some experience in construction. He had been involved in the construction business for 20-25 years including the building of single family housing and the remodeling of multi-unit buildings, and in that context he acquired the ability to read plans and at least some familiarity with Chicago's Building Code. (Tr. 105-106) However, Moretti's testimony did not establish specific expertise regarding the requirements of the Chicago Accessibility Code, Ch. 18-11, Chicago Municipal Code, or of the Illinois Accessibility Code, 71 Ill. Admin. Code 400.110 *et seq.* Also, although Respondent's building may have been able to meet the requirements of the Building Code, Moretti did not describe the factual basis on which this compliance was established, so the Commission does not have enough evidence to evaluate whether those facts would also establish undue hardship under the Human Rights Ordinance. The Department of Buildings does not enforce or certify compliance with the Human Rights Ordinance, nor does the Commission on Human Relations enforce the Building Code, and the applicable standards differ in important respects. Thus the Commission cannot accept Respondent's vague assertions about being "grandfathered," presumably under the Building Code, as objective evidence of the undue hardship which must be proved under the CHRO.

Moretti acknowledged that of the two public entrances that were used (a third entrance at the corner being unused), each had a step. He explained that the step at the Lake Street entrance was five or six inches high and part of the steel structure of the building which could not be altered without jacking up the building, at a cost Moretti estimated at $60-70,000. (Tr. 110-112) The basis for Moretti's cost estimate was not explained and was not compared to the financial resources of Respondent as required by Reg. 520.130. Thus no objective evidence for that cost

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[2] In fact, in complete misunderstanding of the applicable law, the document argues that it was *Complainant's* burden to prove undue hardship:

> There is also no undue hardship. There is nothing in the complaint that says that complainant could not have access through other parts of the premises and assuming, but not conceding that that complainant alleges which it does not, complainant does not allege nor can complainant show that service was not offered under the same conditions as are applied to other persons and could not have fully use of the facilities as customers without disabilities did. Other disabled customers in wheelchairs had access to the building. Other disabled customers could enter the building. [*sic.*]

estimate was presented. See *Cotten v. Eat-A-Pita, supra. at 6*, holding that "vague comments" regarding cost do not constitute objective evidence sufficient to establish undue hardship. Nor did Moretti discuss whether a permanent wheelchair ramp was feasible for this entrance either structurally or economically.

Moretti testified that the step at the Loomis entrance is about four inches high and made of "brick silt." (Tr. 111) Moretti also testified that a permanent ramp could not be installed on the Loomis side because it is only eight feet from the building to the curb, and a 36" permanent ramp would impede the sidewalk. (Tr. 115) Although somewhat general and conclusory, this testimony suggests that it may be an undue hardship to install a permanent ramp at the Loomis entrance due to the requirements of other laws regarding intrusions on the public sidewalk. However, from this testimony, it also appears that the Loomis entrance could be surmounted with a portable ramp, perhaps more readily than the Lake Street entrance because it is slightly lower. It also appears there is enough sidewalk space to support a slope with not over a one inch rise per twelve inches in length, the commonly used standard for a wheelchair ramp found in the Illinois Accessibility Code and elsewhere. Indeed, Moretti affirmed that if a wheelchair user had a "small ramp," it would be possible to enter the restaurant using it. (Tr. 115)

Thus Respondent failed to meet its burden of proving as an affirmative defense, by objective evidence, that it was an undue hardship to make the restaurant fully accessible. Moreover, Respondent had failed to respond to Complainant's document requests regarding its financial condition, which under Reg. 240.463 allowed the hearing officer to draw a negative inference that the non-produced documents do not support a defense of undue hardship

3. Respondent failed to offer Complainant any *reasonable* accommodations to mitigate the lack of full access to the restaurant.

Even if Respondent had pleaded and proved the affirmative defense of undue hardship to make at least one restaurant entrance fully accessible, under the CHRO and Reg. 520.105, Respondent still had the duty to provide reasonable accommodations short of full accessibility to the extent that was achievable without undue hardship. Respondent did not do so.

Complainant testified that after his companion, Eric Carter, went into the restaurant to inquire about an accessible way for Complainant to enter, a man came out with Carter. (Tr. 12, 84, 88). Complainant's direct testimony could be read in the transcript to suggest that Complainant had a conversation with the man who came out or that it was Carter who explained what had occurred inside the restaurant. *Id.* However, on cross examination Complainant explained that the man did not speak and speculated that he may not have been able to speak English. (Tr. 88) Rather, it was Carter who told Complainant "they wanted him and the guy to carry me into the restaurant." (Tr. 88-89) Complainant testified he refused to be carried into the restaurant, so he and his companion left and went to another restaurant in the area, Wishbone. (Tr. 12)

The Commission interprets the CHRO as not allowing the carrying or lifting of a wheelchair user as either a full or reasonable accommodation. Respondent has argued and reiterates in its Objection to Recommended Ruling that lifting or pulling a person in a wheelchair over its entrance barriers should be considered acceptable, even as a full accommodation. Witness William Kehoe, a wheelchair user, testified that he did not object to having Respondent's staff lift him over the entrance barrier in his wheelchair. However, even if this may be a well-meaning gesture, the Commission has rejected Respondent's view, regardless of

whether some wheelchair users may be willing to accept being carried in this way. See, e.g., *Cotten v. Lou Mitchell's, supra.*

Lest it be thought that this interpretation of the requirements of the CHRO is unduly harsh or out of step with accepted practices, it should be noted that under federal regulations implementing the Americans with Disabilities Act (a federal law prohibiting disability discrimination which also applies to public accommodations including Respondent), "'carrying an individual with a disability is considered ineffective and therefore an unacceptable method for achieving...accessibility.'" *Matthews v. Jefferson,* 29 F.Supp.2d at 533 (W.D.Ark. 1998), quoting 28 C.F.R. §35.150(b)(1); and *Ramirez v. District of Columbia,* 10 A.D. Cases 738, 740 (D.D.C. 2000). This is particularly pertinent given that there was no evidence Respondent's employees had any training regarding "the safest and least humiliating means of carrying" a wheelchair user. See *Matthews,* 29 F.Supp.2d at 533, quoting 28 C.F.R. §35.150(b)(1) stating that in the "'manifestly exceptional'" circumstances where carrying is appropriate, "'personnel who are permitted to participate in carrying an individual with a disability [must be] formally instructed on the safest and least humiliating means of carrying.'" In this case, Respondent acknowledged that none of its personnel had been trained to carry individuals in wheelchairs and that some wheelchair users objected to it.[3] (Tr. 114)

Nor does the Commission find it acceptable to require wheelchair users to bring their own portable ramps where such an accommodation can substitute for a permanent alteration and where the operator of a public accommodation has the capacity to purchase and use a portable ramp without undue hardship. Not everyone may be arriving by automobile or otherwise able to transport a portable ramp, for example. Moretti acknowledged that other wheelchair users had utilized their own portable ramps for entry to the restaurant, but that La Luce does not itself have a portable ramp available for wheelchair users. (Tr.115) Thus Respondent admits that a portable ramp is a feasible accommodation short of permanent alteration of the premises. Yet Respondent provided no evidence to establish that it would have been prohibitively expensive or otherwise infeasible to purchase a portable ramp and teach its staff to deploy it.

Respondent offered no other options to Complainant and adamantly argues that it was not obligated to do so. This is an incorrect view of the law. Thus Respondent has not shown that it offered any *reasonable* accommodations to Complainant in an effort to mitigate the effect of its inaccessible entrances.

4. Respondent's proffered defense that it is "grandfathered" and thus not required to comply with the Human Rights Ordinance has no legal basis.

The accessibility requirements for public accommodations under the Chicago Human Rights Ordinance have been described in this ruling and the legal authority for them has been set forth. It is true that the accessibility requirements of Chapter 18-11 of the Municipal Code (known as the Chicago Accessibility Code and a part of the Building Code) do have more limited application to an "existing" building, and these policies might be characterized as being "grandfathered" for purposes of the Building Code. But no similar exemption exists in the Chicago Human Rights Ordinance (Chapter 2-160 of the Municipal Code) although the age and structure of a building may be relevant to the proof of an undue hardship defense. See, e.g. *Cotten v. Lou Mitchell's, supra.,* where the Commission found that a respondent restaurant

[3] In fact, in its Objection to Recommended Ruling, Respondent expressed disdain at the notion that any such training would be needed.

proved it was an undue hardship to make permanent alterations based on factors which included the age and configuration of the building.

Multiple ordinances of the City of Chicago regulate businesses. The Building Code is one of them; the Human Rights Ordinance is another and separate from the Building Code. In addition, different City departments enforce different ordinances. That Respondent may have obtained a license or permit from another City department under another ordinance, or may have been inspected and found in compliance with other City ordinances, does not mean that any of those City departments have certified compliance with the Chicago Human Rights Ordinance or Chicago Fair Housing Ordinance, both of which are enforced only through the Commission on Human Relations under Chapters 2-120, 2-160, and 5-8 of the Chicago Municipal Code. Other departments are not authorized to enforce or certify compliance with the Human Rights Ordinance or the Fair Housing Ordinance Indeed, Respondent has cited no legal authority whatever to support this position, because none exists.

5. That Complainant has filed multiple complaints alleging the inaccessibility of public accommodations is not relevant to the outcome of this case.

Respondent has placed much emphasis on that fact that Complainant has filed many similar complaints alleging disability discrimination by a public accommodation due to lack of wheelchair accessibility, calling it an "abuse of due process." Although Complainant stated on cross examination that he did not remember the number of complaints he has filed, he did not deny that he has filed other, similar complaints at the Commission on Human Relations.[4]

The hearing officer correctly found this information irrelevant to the outcome of this case or to Complainant's credibility. As noted in *Blakemore v. Kinko's*, CCHR No. 01-PA-77 (Dec. 6, 2001), the fact that a complainant has filed other cases at the Commission has no bearing on whether the instant complaint is or is not sufficient to state a claim; the Commission must and does review each complaint on its merits. See Section 2-120-510(e) *et seq.*, Chicago Muni. Code. The Commission may not and does not regard a complainant's allegations or testimony as inherently incredible merely because that complainant may have filed other complaints, nor is a complaint subject to dismissal for that reason.

Members of the public have the right to file complaints at the Commission on Human Relations alleging violations of the Chicago Human Rights Ordinance or the Chicago Fair Housing Ordinance. The Commission is responsible to conduct a neutral investigation and adjudication of each complaint based on its established procedures. See §2-120-510(e) and (f).

6. The Complaint is sufficient to state a claim under the pleading standards established for the Human Rights and Fair Housing Ordinances.

Respondent argues (for the first time) in its Objection to Recommended Ruling that the Complaint is insufficient to state a claim because it does not plead all of the necessary elements of proof and did not request specific relief. This argument is without merit. The Complaint is sufficient to state a claim on which relief can be granted if the allegations are proved at an administrative hearing. The Commission's notice pleading standard established by Reg.

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[4] The Commission disclosed to Respondent's counsel pursuant to his Freedom of Information Act request that Complainant had filed 117 public accommodation discrimination complaints at the Commission as of August 25, 2009. Complainant never disputed that he has filed multiple discrimination complaints at the Commission; it is a matter of public record.

210.120(c) requires only enough detail to substantially apprise a respondent and the Commission of the timing, location, and facts about each alleged ordinance violation. Complainants are not required to prove their cases or even allege a *prima facie* case in the complaint (although this Complaint does allege a *prima facie* case). They are not required to provide all supporting evidence or to allege facts supporting each element of any claim asserted. *De los Rios v. Draper & Kramer, Inc., et al.,* CCHR No. 05-H-32 (Aug. 23, 2006). Nor are they required to request certain types of relief or amounts of damages in a complaint, and if such requests are made, they are not deemed waivers of any other types of relief or amount of damages. *Frazier v. Midlakes Management LLC et al.,* CCHR No. 93-H-41 (Sept. 15, 2003); *Smith, supra.*.

Complainant alleged in his Complaint that he has a disability, namely that he is paraplegic, and that he uses a wheelchair for mobility. He alleged that on May 29, 2008, he and a friend went to La Luce Restaurant for lunch, and on arrival Complainant observed there was a big step at the entrance. Complainant's friend went in to see if there was an accessible way to enter and was told there wasn't one by a woman named Beatrice, but that they could carry Complainant in. These allegations are sufficient to state a claim under the CHRO, to notify Respondent of the timing, location, and facts establishing the scope of Complainant's claim, and to trigger the Commission's complaint adjudication process. See *Smith, supra*, finding sufficient a wheelchair user's complaint stating that he went to the entrance of the restaurant named as respondent but was unable to enter it because it was accessible only by a step in excess of one inch and had no wheelchair accessibility. See also *Luna, supra.*

Under the Commission's procedure, a complainant is not required to prove the case in the complaint. To the extent that there may be inconsistent allegations or insufficient evidence to support particular allegations, those are factual issues to be resolved through the investigation and, if the investigation reveals substantial evidence, through the administrative hearing of the case. *Stokfitz v. Spring Air Mattress et al.,* CCHR No. 97-E-105 (Feb. 11, 1999); *Chapman v. City of Chicago Public Library,* CCHR No. 00-E-65 (Aug. 13, 2003); *Cline v. Chicago Patrolman's Federal Credit Union et al.,* CCHR No. 02-E-73 (Aug. 26, 2003). Further, the pleading stage of a case is not the appropriate point to evaluate credibility of witnesses. *Chambers v. Unicorn Club Ltd./Steamworks et al.*, CCHR No. 03-E-16 (Nov. 9, 2004)

Thus there is no merit to Respondent's assertion that the Complaint does not state a cause of action. As the elements of a disability discrimination claim involving the wheelchair accessibility of a public accommodation are set forth above, including the standards of proof and supporting legal authority, the allegations of the Complaint are entirely adequate.[5]

7. The hearing officer's determinations as to the credibility of Complainant's testimony are not contrary to the evidence.

As provided in §2-120-510(l) of the Chicago Municipal Code, the Commission must and does adopt the findings of fact recommended by a hearing officer if they are not contrary to the evidence presented at the hearing. The Commission will not re-weigh a hearing officer's recommendation as to witness credibility unless it is against the manifest weight of the evidence. *Stovall v. Metroplex et al.,* CCHR No. 94-H-87 (Oct. 16, 1996). Determining credibility of

[5] Respondent makes additional unsupported arguments in its Objection to Recommended Ruling, including that there was no barrier, that Complainant had the same use of the facility that others did, that nothing in the ordinance says a public place must have a ramp or facility to gain access, and that nothing says a person cannot have access with the help of others assisting him. These arguments are noted but no legal basis for them is discerned. If anything, they display inability or unwillingness to understand the applicable law.

witnesses and the reliability of their testimony and related evidence is a key function of hearing officers, who have the opportunity to observe the demeanor of those who testify. *Poole v. Perry & Assoc.*, CCHR No. 02-E-161 (Feb. 15, 2006).

The hearing officer's findings in this case are consistent with the admitted evidence and adequately supported in the hearing record. The hearing officer explained the reasons for her credibility determinations and the Commission does not find them to be against the weight of the evidence. She did not find any inconsistencies in Complainant's testimony, including inconsistencies between his testimony at the hearing and in his sworn Complaint, that were sufficient to overcome the testimony in support of his *prima facie* case.

The hearing officer also considered Respondent's attempt to characterize the multiple filings of Complainant as an income-producing endeavor, finding it un persuasive and irrelevant. In reviewing the transcript and Respondent's Objection to Recommended Ruling, the Commission agrees. As previously discussed, this has no bearing on whether or not Complainant's testimony was credible in this case[6] or whether this Respondent violated the CHRO, and thus it provides no defense to the Complaint.

Respondent in its Objection to Recommended Ruling makes much of Complainant's testimony that he could not remember his friend Eric's last name and that he could not confirm the number of complaints he had filed at the Commission. The Commission has reviewed Complainant's testimony and does not find that this lack of precise testimony on certain facts is not sufficient to cause the Commission to reject the hearing officer's finding that Complainant's testimony was credible on the factual issues material to the outcome of the case.

8. Complainant's exhibits and the testimony of Eric Carter are not admitted into evidence; however, the admitted evidence is sufficient to establish liability and entitlement to relief.

At the administrative hearing, Complainant offered the following six exhibits into evidence:

Exhibit A	Copy of letter of Complainant's physician
Exhibit B	Photograph
Exhibit C	Photograph
Exhibit D	Photograph
Exhibit E	Investigation Summary
Exhibit G	Complaint

The hearing officer indicated in her findings of fact that she did not consider any of the photographs offered. The Commission agrees with this determination as to the photographs, denoted as Exhibits B, C, and D. There was insufficient foundation as to who made these photographs and when they were taken. However, the sworn Complaint and the testimonial evidence are sufficient to establish that the two public entrances to La Luce Restaurant were not, and apparently still are not, fully wheelchair accessible due to steps of approximately four and

[6] Respondent did not support this argument with any specific information about Complainant's other complaints. As such, the fact of having filed multiple complaints is insufficient to establish any general lack of credibility or pattern of fraud. That a wheelchair user may encounter many public accommodations which are not accessible is not inherently incredible. Even if an individual may hope or desire to "make money" through filing a discrimination complaint, that is not a basis for dismissal if the underlying claim is meritorious and no actual misconduct is shown.

six inches. Further, even if Respondent had proved it was an undue hardship to make the entrances fully accessible, Respondent failed to provide reasonable accommodations to Complainant or establish that it would have been an undue hardship to do so.

The hearing officer did not explicitly state that she admitted or relied on Exhibit A, a photocopy of a letter from Complainant's physician stating that he is permanently disabled as a T12 paraplegic and must use a wheelchair for mobility. Respondent did not specifically object to admission of the document; however, the hearing officer did not cite or otherwise indicate reliance on this letter. Her treatment of it is consistent with *Blakemore v. General Parking*, CCHR No. 99-PA-120 (Feb. 21, 2001), holding that where a complainant provided no foundation that an invoice for therapy services was a business record or involved services related to the respondent's conduct, the invoice was deemed inadmissible hearsay. The hearing officer cited only Complainant's testimony about the nature of his disability. That testimony is sufficient to establish Complainant's disability and need to use a wheelchair despite Respondent's effort to discredit it on cross-examination.

Regarding Exhibit E, the hearing officer correctly pointed out that an Investigation Summary is not generally admissible. Pursuant to Reg. 240.510, it is not part of the hearing record unless introduced and admitted into evidence at the administrative hearing. Complainant's counsel offered it into evidence at the time of Complainant's direct examination, "not to prove the matter asserted, but merely to impeach the witnesses, because it very clearly states in here that they said that they saw Mr. Carter come in and that he requested, you know, an accommodation." (Tr. 17) Although the hearing officer stated that she would let it in and reserve the right to exclude it later, there was no further discussion of its admissibility. The Commission confirms that it excludes the Investigation Summary in this case as inadmissible hearsay and has not considered it in making this ruling. The hearing officer (correctly) excluded all of Eric Carter's testimony because Respondent did not have the opportunity to cross-examine him, so there was no need for Respondent to impeach Carter's testimony and no need for Complainant to respond to any effort to impeach it. Nor did Respondent's witnesses present any testimony or other evidence to controvert Complainant's own testimony that Carter entered the restaurant after being asked by Complainant to go in and inquire about accessibility and returned with a man who appeared to be a restaurant employee, and that Complainant understood the man to be there to help carry Complainant into the restaurant in his wheelchair. Moreover, Respondent has acknowledged throughout this case that its practice regarding accessibility for people using wheelchairs was only to offer to have its staff lift the wheelchair over the entry barrier—exactly what Complainant says was offered to him. Thus there was nothing to impeach and no other basis to admit the Investigation Summary.

Regarding Exhibit G, the sworn Complaint, admission into evidence as an exhibit is unnecessary and superfluous. Pursuant to Reg. 240.510, it is already part of the hearing record and may be cited as such.

Finally, as noted above, the hearing officer made it clear in her Recommended Ruling that she did not admit or consider the testimony of Complainant's witness Eric Carter. The Commission agrees that Carter's testimony cannot be considered because Respondent did not have the opportunity to cross-examine Carter, who was unable to remain for the second day of the hearing on November 17, 2009. However, Respondent's counsel was able to cross-examine Complainant on that date, after reviewing the transcript of his direct testimony. He was also able to make objections to Complainant's direct testimony. (Tr. 33-36) Thus Respondent was afforded the right to confront the only witness against it whose testimony was admitted into

evidence, namely Complainant. Respondent was also able to call its own witnesses and even to introduce testimony suggesting undue hardship despite its failure to give notice of that defense in its Pre-Hearing Memoranda.

Respondent in its Objection to Recommended Ruling appears to argue that, despite the exclusion of Carter's testimony, Respondent should have granted its motion for a "directed finding" (a procedure not available under Commission Regulations) because it was not able to cross-examine Carter and the hearing officer could not have erased Carter's testimony from her mind. Respondent also challenges the hearing officer's ruling sustaining an objection to Respondent's questioning about "why the complainant did not go down Loomis Street to see the third entrance to the restaurant" (although Respondent's witness clearly testified that the Loomis entrance also had a step, so it was not fully accessible either). Finally , Respondent asserts that Complainant's counsel's reference in argument to the race of Complainant was prejudicial in that it may have unduly swayed the hearing officer.

Whether these arguments are treated as requests for review of interlocutory decisions of the hearing officer or as objections to the recommended ruling finding liability, the Commission denies them. The Commission has struggled to understand and address Respondent's arguments in its Objection to Recommended Ruling despite the lack of transcript references and the minimal legal analysis presented, contrary to the requirements of Regs. 240.610 and 250.130,[7] but finds these arguments unpersuasive and unsupported by any authority. The record in this matter amply supports that Complainant proved his *prima facie* case by evidence the hearing officer found admissible and credible, that Respondent did not present any relevant evidence to controvert it or to prove the affirmative defenses it had available, and that Respondent had adequate notice and opportunity to be heard and so was not denied due process. There is no evidence that the hearing officer was actually prejudiced or likely to be prejudiced by any excluded or irrelevant evidence or arguments of counsel. Respondent's generalized accusations questioning the capacity and neutrality of the hearing officer are unsupported and must be rejected.

9. Respondent's motion to depose Complainant was properly denied.

Respondent maintains that it has been denied due process because it was not allowed to depose Complainant as part of pre-hearing discovery. This argument is treated as a request for review of an interlocutory decision by the hearing officer, pursuant to Reg. 240.610(b). As such, it is without merit. As pointed out in *Robinson v. Crazy Horse Too*, CCHR No. 97-PA-89 (May 11, 1999), the Commission's hearing procedures contemplate only limited discovery and require a showing of good cause in order to conduct a deposition; in that decision, the Commission rejected the argument that testimony at a hearing may be a surprise. A deposition is not a due process right; rather, due process rights are satisfied through the opportunity to cross-examine opposing witnesses and to introduce evidence, which Respondent had. See *McGavock v. Burchett*, CCHR No. 95-H-22 (Oct. 16, 1995).

The Commission on Human Relations is authorized to enact its own procedural regulations pursuant to Section 2-120-510(p), Chicago Muni. Code, and is not acting under the procedures and rules of discovery of the Illinois state courts. Rather, it is the City of Chicago's home rule authority which authorizes the enactment of the City ordinances under which this case

[7] See also *Jones v. 4128 N. Clarendon Building Assoc. et al.*, CCHR No. 01-H-107 (July 19, 2006), noting that vague contentions or accusations and generalized conclusions without other support are insufficient to support a request for review.

proceeds. *Smith v. Goodchild*, CCHR No. 98-H-77 (Apr. 13, 1999). See also *Smith, Torres, & Walker v. Wilmette Real Estate and Management Co.*, CCHR No. 95-H-159 & 98-H-44/63 (Apr. 13, 1999 and Oct. 6, 2000). The Commission has chosen to provide parties only limited discovery as of right, and this choice is not improper under state law or constitutional principles.[8]

The Commission has allowed depositions only of seriously ill witnesses unlikely to live long enough to testify. *Seyferth v. Peco, Inc., et al.*, CCHR No. 94-E-186 (Jan. 15, 1995); *Cunningham v. Bui & Phan*, CCHR No. 01-H-36 (Aug. 1, 2006); see also *Nadeau et al. v. Suson & Family Physicians Center*, CCHR No. 96-E-159/160/161 (June 30, 1998). Unless the parties agree, depositions are not allowed merely for preparation and for the speculative potential to elicit contradictory statements to undermine credibility. *McGavock, supra*, and *Thomas v. Chicago Dept. of Health et al.*, CCHR No. 97-E-221 (Mar. 13, 2000).

Moreover, in Commission cases that reach the hearing stage, under Reg. 220.410(a) respondents have access not only to the Investigation Summary describing the evidence on which the substantial evidence determination was based (which is mailed to the parties with the order finding substantial evidence), but also to the investigation file, which may contain documentation of interviews and other statements made by parties and witnesses to the Commission.

In this case, Respondent made no effort whatever, in its motion seeking to depose Complainant, to present good cause for taking the deposition. Rather, Respondent argued only that it should be allowed to take the deposition as a matter of right. The hearing officer correctly denied the motion.

V. REMEDIES

1. Emotional Distress Damages and Interest

Complainant seeks $1,000 plus interest for emotional distress caused by the discriminatory denial of access to La Luce Restaurant, plus $1,000 in punitive damages.

The Commission has awarded emotional distress damages to prevailing complainants in accessibility cases when they have proven that they suffered emotional distress as a result of the unlawful discrimination. The size of the award is generally determined by (1) the egregiousness of the respondent's behavior and (2) the complainant's reaction to the discriminatory conduct. *Cotten v. Eat-A-Pita, supra.*

In *Eat-A-Pita*, the Commission awarded $500 to Complainant, not the $1,000 sought. In awarding the lower amount, the Commission concluded that a larger amount was not supported by the evidence and that Complainant's testimony about his emotional distress was only limited and conclusory. *Id.* at 7. Complainant's testimony of "I felt humiliated. I felt embarrassed. I felt like a second-class citizen" was the only evidence regarding the extent of emotional distress Complainant experienced. *Id.* Also considered by the Commission in determining damages was that Complainant had not traveled to the area with the intent of eating at Eat-A-Pita, but "discovered Eat-A-Pita," which he had previously heard had good food, on the way to a business appointment. *Id.* Complainant testified that he "stopped to grab a bite to eat," but after

[8] See also the discussion of procedural due process rights in the context of administrative agency adjudication in *Cooper v. Salazar*, 196 F.3d 809 (7 Cir. 1999), a case involving the procedures of the Illinois Department of Human Rights.

encountering several stairs went on to his business appointment. *Id.* The Commission did acknowledge that for a wheelchair user, there is no question that some emotional distress is likely to flow from an encounter with an obviously exclusionary barrier. *Id.* at 8. The Commission also noted that Eat-A-Pita had attempted to provide some amount of accessibility even though it was found insufficient.

The evidence for emotional distress damages here is stronger than in *Eat-A-Pita*. The egregious element of Respondent's behavior is not overt hostility toward people with disabilities but rather lack of consideration and lack of awareness that complying with accessibility requirements requires an inquiry into whether accessibility can be achieved without undue hardship, and if full accessibility cannot be achieved, what reasonable accommodations would then be acceptable.

The Commission views the distinctions between this case and Eat-A-Pita somewhat differently from the hearing officer, who noted that Eat-A-Pita had at least explored the possibility of a permanent alteration at the time it opened the business. Although the management of Eat-A-Pita may have articulated a bit more awareness of the need to make itself accessible to people in wheelchairs, the Commission regards both businesses as having failed to inform themselves adequately about their responsibilities under the Chicago Human Rights Ordinance and having failed to correct their situations even after learning a complaint had been filed. Eat-A-Pita came a bit closer in providing an alternative accommodation by having some helpful signage (a telephone number) and an expressed willingness to provide curbside service, but the Commission still found that accommodation inadequate because not everyone may be carrying a mobile phone. La Luce—which has an easier task given that its entrances have only one step while Eat-A-Pita's entrance has several—did not go beyond the offer to carry a wheelchair even though it knew some wheelchair users objected and even though it appears that a portable ramp is a feasible accommodation for La Luce. In addition, staff of Eat-A-Pita were not aware of Complainant's attempt to patronize the restaurant, while La Luce staff had some interaction with Complainant and his companion but offered only an inadequate accommodation. On this basis, the Commission agrees with the hearing officer that La Luce's violation is somewhat more egregious.

In addition Complainant presented stronger evidence about his own reaction to the violation of La Luce, which makes the case for emotional distress damages more compelling. Cases where the Commission has awarded $1,000 or more have even more compelling elements. For example, in *Maat v. Villareal Agencia de Viajes*, CCHR No. 05-P-28 (Aug. 16, 2006) the complainant wheelchair user could not enter a storefront travel agency after traveling there by paratransit service specifically for the purpose of patronizing that business. She then had to wait in inclement weather for the paratransit service to return. In *Cotten v. Taylor Street Food and Liquor*, CCHR No. 07-P-12 (July 16, 2008), two steep steps prohibited Complainant's entry and, although there was a window, he was unable to get the attention of employees inside the store, which required him to wait outside for five to ten minutes hoping an employee would come out to assist him, and to feel "silly and stupid" having to do this. The Commission considered this to be stronger evidence of personal rejection by store personnel and of an incident of longer duration. *Eat-A-Pita* at 9.

Utilizing the reasoning set out in *Eat-A-Pita* and comparing the damages here to other Commission awards, an amount of $800 in compensatory damages was recommended by the hearing officer for this case. The hearing officer has explained her reasoning for the recommended amount, and with the qualification noted above the Commission finds it warranted

under the evidence presented. The Commission especially notes that Complainant went to La Luce Restaurant as a destination, with a companion who proposed going there. He was distressed about having to inconvenience his companion and ultimately having to go to another restaurant. He brought out that he undergoes ongoing treatment by a psychiatrist for depression regarding the impact of his disability and (although he was unable to connect this incident to specific treatment), and his testimony emphasized that he becomes especially distressed when lack of accessibility inhibits his social interactions, making him less interested in going out socially. The Commission must and does accept the hearing officer's assessment of Complainant's demeanor while testifying under direct and cross examination about his reaction to the incident at La Luce Restaurant. (Findings of Fact 8-10) See *Hanson v. Association of Volleyball Professionals, supra,* another wheelchair accessibility case in which it the Commission noted that a complainant's own testimony can be sufficient to establish emotional distress; neither expert testimony nor medical evidence is required.

Section 2-120-510(l), Chicago Muni. Code, and Commission Regulation 240.700 provide for pre- and post-judgment interest at the prime rate, adjusted quarterly, and compounded annually from the date of the violation. Such pre- and post-judgment interest on the emotional distress damages of $800 was recommended, starting from May 29, 2008. The Commission accepts and adopts the recommendation, as such interest is routinely granted.

2. Punitive Damages

The Commission has long-established standards for determining whether to award punitive damages. See, e.g. *Castro v. Georgeopoulos*, CCHR No. 91-FHO-6-5591 (Dec. 18, 1991), holding that punitive damages may be awarded where a respondent acted willfully or wantonly or where actions were motivated by ill will or malice. See also *Akangbe v. 1428 W. Fargo Condo. Assn.*, CCHR No. 91-FHO-7-5595 (Mar. 25, 1992), explaining that punitive damages are intended as both deterrence and punishment when a respondent has acted in reckless disregard of a complainant's protected rights.[9]

In this case, Complainant requested $1,000 in punitive damages but the hearing officer recommended that no punitive damages be awarded. The Commission agrees that Respondent has been shown to be uninformed and relatively indifferent to its obligation to provide full access or reasonable accommodation to people in wheelchairs, only offering to carry them over the barrier at the doorway and maintaining that it is their obligation to bring along a portable ramp. Yet there was no evidence that Respondent's staff displayed any ill will or malice toward wheelchair users generally or Complainant and his companion specifically. The Commission further finds that the other relief awarded is sufficient on these facts to make Complainant whole and carry out the purposes of the Human Rights Ordinance.

3. Fine

Commission Regulation 2-160-120 provides that the Commission "shall" impose a fine

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[9] Respondent complains of the hearing officer's citation of federal cases including in this instance *Smith v Wade*, 461 U.S. 30, 56 (1983) (a case under 42 U.S.C. §1983). Regarding the awarding of punitive damages, the federal standards are similar; however, the standards for punitive damages are supported by ample Commission precedent beginning with the decisions cited above. See Reg. 270.510 regarding applicable precedent. In any event, as no punitive damages were ordered, Respondent has not been harmed by the citation of these federal decisions.

between $100 and $500 for each offense if a party is found to have violated the CHRO.

In *Eat-A-Pita*, the Commission imposed a $500 fine, noting that during the pendency of the case the respondent did not document any undue hardship with objective evidence, nor did the respondent take any steps to improve its accommodations for wheelchair users. *Id.* at 12, 13. The Commission further stated, "Respondent has apparently waited to be explicitly ordered to act." *Id.*

In this case, Respondent likewise did not document undue hardship for its lack of accessibility, did not attempt to address accessibility or reasonable accommodations throughout the case, and took no measures to improve during the pendency of this case to improve the restaurant's accessibility to patrons using wheelchairs. Rather Respondent argued, without legal basis, that it was under no obligation to do anything beyond offering to lift a wheelchair over the entrance step. Thus the maximum fine of $500 was recommended by the hearing officer, and the Commission finds it warranted.

4. Injunctive Relief

Complainant seeks injunctive relief but did not 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).

Respondent argues that injunctive relief should be denied because Complainant failed to state that he was seeking it and failed to propose any specifics. This is not entirely correct. First, Complainant did list a request for injunctive relief in his initial Pre-Hearing Memorandum of June 18, 2009, in the section of the Commission's form for listing requested relief, and Complainant stated in the attached legal memorandum that relief should include making La Luce Restaurant fully accessible. Further detail is not required. Respondent in this case had notice that Complainant was seeking injunctive relief directed to making the premises wheelchair accessible.

Commission Regulation 210.120(f) specifically provides that a complainant is not required to specify the relief requested at the time of filing, plus a request in a complaint for certain types or amounts of relief shall not be deemed a waiver of any other relief. A complainant is asked to itemize the "nature and amount of damages sought" in the pre-hearing memorandum, as set forth in Reg. 240.130(a)(3). Even there, a complainant is not strictly required to state or itemize a request for injunctive relief.

Indeed, the Commission is authorized to fashion and order injunctive relief *sua sponte* to remedy discrimination. The Commission on Human Relations Enabling Ordinance, which establishes the powers and duties of the Commission, in §2-120-510(l) calls for the Commission "to render a decision upon the conclusion of a hearing, or upon receipt of a hearing officer's recommendation at the conclusion of a hearing, including findings of fact relating to the complaint, and to order such relief *as may be appropriate under the circumstances determined in the hearing.*" [emphasis supplied]

The relief which the Commission is empowered to order pursuant to §2-120-510(l) is extensive and includes injunctive relief:

> Relief may include but is not limited to an order: to cease the illegal conduct complained of;...to admit the complainant to a public accommodation; to extend to the complainant the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of the respondent;...[and] to take such action as may be necessary to make the individual complainant whole....

In addition, after a hearing officer submits written recommendations including recommended findings of fact and recommended relief, under §2-120-510(l) the Commission "may adopt, reject or modify the recommendations, in whole or in part...."

The order for injunctive relief set forth below is modeled on that established in *Eat-A-Pita, supra,* and succeeding rulings involving wheelchair accessibility of public accommodations. See *Cotten v. 162 N. Franklin,* LLC d/b/a Eppy's Deli and Café, and *Cotten v. CCI Industries, Inc., supra.*

The order for injunctive relief is appropriate to the facts of this case. It is closely tailored to the terms of the Chicago Human Rights Ordinance, to Commission Regulations interpreting the Ordinance, and to previous Commission decisions further interpreting the Ordinance and Regulations and awarding relief. The order gives Respondent another opportunity to come into compliance with the Chicago Human Rights Ordinance and perhaps avoid future discrimination complaints and findings. It is in essence a road map for compliance. There is no legal basis for Respondent's argument that the Commission is not authorized to order this injunctive relief. See, e.g., the extensive discussion of the Commission's authority in *Cotten v. Lou Mitchell's, supra.*

Accordingly, the Commission adopts the hearing officer's recommendation as to injunctive relief and orders 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[10] 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.

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 each public entrance 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

[10] For example, Respondent may be able to provide a certification by an architect or other professional with expertise in accessibility, or even to document manager Moretti's own qualifications. 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.

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 measures 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).

5. 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. The Commission has routinely found that prevailing complainants are entitled to such an award. See, e.g., *Jenkins v. Artists' Restaurant,* CCHR No. 90-PA-14 (Aug. 14, 1991); and *Hanson, supra.* Such an award was recommended by the hearing officer and is ordered by the Commission.

Pursuant to Commission Regulation 240.630, Complainant may serve and file 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.

VI. PROCEDURAL SANCTIONS

Procedural sanctions are warranted for Respondent's failure to comply with discovery requirements. Sanctions will not be imposed in connection with any other procedural violations.

Respondent never responded or properly objected to Complainant's document requests under Reg. 240.407, which included requests for income statements and for documents that demonstrated the physical appearance and dimensions of Respondent's restaurant.[11] Complainant filed a Motion to Compel and on July 3, 2009, the hearing officer explicitly ordered Respondent to answer certain requests while relieving Respondent from the responsibility to answer other requests which she *(sua sponte)* found unwarranted. The order put Respondent on notice, citing *Efstathiou v. Café Kallisto*, CCHR No. 95-PA-1 (July 5, 1996), that a further failure to comply with deadlines could result in sanctions. Still, Respondent failed to respond at all and provided no good cause for failure to do so. The hearing officer included in her Recommended Ruling a recommendation that Respondent be sanctioned for this failure to comply with deadlines and orders by imposition of a fine of $500. Respondent never responded to this recommendation in its Objection to Recommended Ruling.

As the hearing officer noted, sanctions were ordered under similar facts in *Jones v. Zvizdic*, CCHR No. 91-FHO-78-5663 (Jan. 15, 1992). Procedural sanctions are authorized under Reg. 235.110 for failure to comply with a procedural regulation, notice, or order, and a fine is authorized in lieu of other sanctions for procedural noncompliance under Regs. 235.410 and 235.420. The Commission agrees with the recommendation of a $500 fine for initial noncompliance with Reg. 240.407, compounded by the further failure to comply even when explicitly ordered to do so. However, pursuant to its authority under Reg. 235.440, the Commission imposes the fine only on Respondent's attorney, Angelo Ruggiero, because it appears that it was Ruggiero's conduct which caused the noncompliance, and not that of any owner or other agent of Respondent.

The hearing officer also recommended an additional $250 fine as sanctions against Respondent based on its counsel's blatant disregard for deadlines, the procedures of the Commission, and orders of the hearing officer throughout this case. The hearing officer cited

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[11] If Respondent had no responsive documents, or if Respondent objected to any of the document requests, it still needed to document that by serving a written response on Complainant and submitting the certificate of service to the Commission and the hearing officer. Reg. 240.407.

that Respondent's counsel failed to serve certain documents on the hearing officer as required by the Order Appointing Hearing Officer and Commencing Hearing Process and the accompanying Standing Order on Administrative Hearings and Pre-Hearing Procedures—in particular its Motion for Discovery Deposition and the Pre-Hearing Memorandum of July 21, 2009. Although certificates of service accompanying the documents state that they were sent to the hearing officer, they were addressed to the Commission's office, not to the office of the hearing officer.[12] That the hearing officer must be served at his or her own office address, not at the Commission's, was explicitly explained in the Standing Order. The correct address for the hearing officer was provided in the Order Appointing Hearing Officer and Commencing Hearing Process. As a result of counsel's incorrect addressing, it was necessary for Commission staff to discern the problem and send those documents to the hearing officer, creating administrative delay, inconvenience, and burden on public resources.

The Commission agrees with the hearing officer that Respondent's counsel displayed disregard and disrespect for the Commission's process during the adjudication of this case. Nevertheless the Commission has determined that it will not impose an additional fine for the service violations, which may have been attributable to indifference and inattentiveness than to willful disregard of Commission procedures. In addition, the impact of the service errors was on the Commission rather than on Complainant. The Commission hopes this forbearance will offer Respondent some incentive toward compliance going forward.

CONCLUSION

The Commission finds Respondent liable for public accommodation discrimination based on disability in violation of Chapter 2-160 of the Chicago Human Relations Ordinance as more specifically set forth in Reg. 520.105. The Commission directs Respondent to comply with the following orders for relief:

1. Pay to Complainant emotional distress damages in the amount of $800 plus pre- and post-judgment interest dating from May 29, 2008;

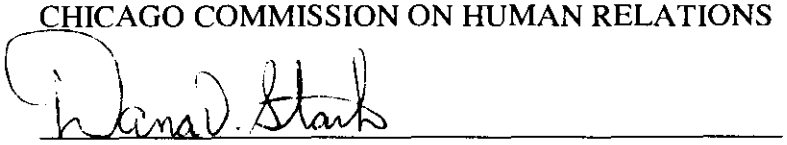
2. Pay to the City of Chicago of a fine of $500;

3. Comply with the orders for injunctive relief outlined above;

4. Pay Complainant's reasonable attorney fees and costs as determined by further order of the Commission pursuant to the procedures outlined in Reg. 240.630;

In addition, the Commission orders Respondent's attorney, Angelo Ruggiero, to pay to the City of Chicago a fine of $500 as a sanction for failing to comply with discovery requirements.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: 

Dana V. Starks, Chair and Commissioner
Entered: April 21, 2010

[12] Hearing officers are independent contractors, not employees, and their offices are not at the Commission.