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.

CCI Industries, Inc.
Respondents.

Case No.: 07-P-109

Date of Ruling: December 16, 2009
Date Mailed: January 7, 2010

TO:

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

Peter Ordower
Law Office of Peter Ordower
10 S. LaSalle St., Suite 3500
Chicago, IL 60603

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on December 16, 2009, 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 to take the following actions:

1. To pay to Complainant compensatory damages in the amount of $1.00.

2. To pay a fine to the City of Chicago in the amount of $100, receipt of which is hereby acknowledged.[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.

---

[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.

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.

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 **March 4, 2010**. Any response to such petition must be filed and served on or before **March 18, 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
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.
CCI Industries, Inc.
Respondent.

Case No.: 07-P-109

Date of Ruling: December 16, 2009

FINAL RULING ON LIABILITY

I. STATEMENT OF THE CASE

On October 18, 2007, Complainant Anthony Cotten filed this Complaint against Respondent CCI Industries, Inc., alleging that on October 9, 2007, Respondent discriminated against Complainant based on his disability when he was unable to access Respondent's business because of steps and the lack of an elevator. After an investigation, the Commission found substantial evidence of the alleged violation. An administrative hearing was held on July 24, 2009. The hearing officer issued his recommended ruling on October 23, 2009, and Respondent filed objections to the recommended decision on November 20, 2009.

II. FINDINGS OF FACT

Facts about Complainant's Interaction with Respondent

1. Complainant testified without contradiction that he is a T-12 paraplegic and is confined to a wheelchair. Complainant testified that he is a fashion designer, designing men's and women's urban street-wear. (Tr. 19)

2. Respondent leases its facility located at 603 West Roosevelt Road, second floor, in Chicago. (Resp. Ex. 6)

3. Complainant testified that on October 9, 2007, he went to Respondent's facility to purchase Swarovski crystals. He planned to use the crystals in a clothing design. Complainant testified that he had a design worked out.

4. Upon arriving at the facility, Complainant noticed stairs leading to the second floor. Complainant testified that he called a number posted in the window from his cell phone, but got no answer. He then had two companions, whom he identified as Dawn Dixon and Calvin, go up to the second floor to find out if there was an accessible entrance to Respondent's facility. They returned and advised Complainant that there was no accessible entrance. He asked them to return to the facility and obtain a card or other information that would allow Complainant to view the product online. They returned with a card. (Tr. 20-21, 23-24, 24-25, 50, 55, 61, 62)

5. Complainant testified that he had not used crystals in fashion designs before. (Tr. 48) He related that he was not sure how many crystals he was interested in or what their cost would be. (Tr. 49) Complainant testified that he noticed a sign in Respondent's window advertising Swarovski crystals. (Tr. 50) He could not recall the size or color of crystals

he was seeking. (Tr. 64) Complainant testified that after being unable to access Respondent's facility, he did not purchase the crystals from another source because most manufacturers insist on attaching the crystals to the garments and charge too much money for that service. (Tr. 51, 53)

6. Complainant testified that he felt humiliated and embarrassed. He related that he has seen a psychiatrist for these feelings, which he gets when he cannot access a facility. (Tr. 24) He further testified that he is seeking $1,000 in damages for emotional distress because "[t]hat's what the Commission rules." (Tr. 38)

7. Raul Quiroz testified that he is Respondent's office manager. (Tr. 74) He has worked for Respondent for more than eight years. (Tr. 95) In addition to Quiroz, Respondent has two other employees, Carlos Colin and Adrian Ibarra. (Tr. 80-81) Quiroz testified that he did not speak to Complainant on October 9, 2007. (Tr. 66) Although he was present at the facility on October 9, 2007, he could recall no one telephoning or coming up and asking about accessibility and could recall no other employee advising him that someone had asked about accessibility. (Tr. 141-142)

8. Quiroz testified that the crystals Respondent sells are not designed for clothing. They have holes in them and are used by jewelers to make bracelets and similar jewelry. In contrast, crystals used on clothing have flat backs and are applied to the garment with heat. Although there are some large crystals that are sold individually, generally Respondent sells crystals in bulk in lots of 144. (Tr. 102-104, 107, 113) However, he conceded that there was no reason that the crystals Respondent sells could not be used on clothing. (Tr. 147)

Facts about the Nature of Respondent's Business

9. Quiroz characterized Respondent as a wholesaler of sterling silver jewelry. (Tr. 75) He stated that a person cannot ring a bell and purchase crystals because, "We don't have retail sales." (Tr. 75) According to Quiroz, on October 9, 2007, although Respondent was selling Swarovski crystals, Respondent was selling only to retail jewelry stores and independent consultants. (Tr. 106)

10. Retail jewelers must present a resale license and a business card and must make an initial order of at least $300 to open an account. (Tr. 82-83) Independent consultants deal with Respondent through Ultimo, Inc., which Quiroz characterized as a multi-level marketing business and a subdivision of CCI Industries. (Tr. 81) Independent consultants make purchases which they may resell and also receive commissions based on sales to other independent consultants whom they have referred to Respondent. (Tr. 81) To be an independent consultant, an individual must fill out an application and open an account. (Tr. 99) No specific credentials are necessary. (Tr. 177) Independent consultants purchase items at one-third of the suggested retail price, provided that they purchase at least $200 worth of jewelry in a month. If the independent consultant's order in a given month falls below $200, the independent consultant will receive less of a discount. (Tr. 172-174)

11. Quiroz testified that independent consultants are able to purchase for their own purposes rather than to resell, but Respondent frowns on such activity and discourages it by requiring monthly purchases of at least $200. However, if a person came in off the street and sought to buy in sufficient quantities, Quiroz would try to sign the person up as an independent consultant. (Tr. 175-177) He testified further that if Complainant wanted to

use Respondent's crystals in his jewelry and was willing to purchase at least $200 worth, he could do so and, if in the following month, his needs declined to $100 worth, he could still make the purchase but at less of a discount. (Tr. 178-179)

12. Respondent leases its facility, which is located on the second floor. Quiroz testified that Respondent vacuums the stairs but does not otherwise control them. (Tr. 129) However, no one other than persons affiliated with or doing business with Respondent uses the stairs. (Tr. 144) Respondent's lease requires it to obtain the prior consent of the landlord for any structural alterations to the premises. (Resp. Ex. 6) Respondent has never discussed with the landlord the possibility of making the premises wheelchair accessible. (Tr. 158)

Facts About Undue Hardship

13. Quiroz testified that he investigated the cost of installing an elevator. He contacted Hopkins Illinois Elevator Company and asked for an estimate for installing a passenger elevator in a two-story building. Hopkins did not come out to inspect the building. (Tr. 135-136) Hopkins provided an estimate of $90,000. (Resp. Ex. 10) Quiroz also e-mailed Chicago Elevator Company, requesting a ballpark estimate for installing an elevator in a two story building. (Tr. 138) Chicago Elevator provided an estimate of $120,000. (Resp. Ex. 11) Respondent never inquired into the feasibility of installing a lift. (Tr. 160)

14. Quiroz testified that in 2007, Respondent operated at a loss. He based this response on the response he received when he asked for a raise. He also testified that he saw Respondent's 2007 tax return, which showed a loss of $8,000. (Tr. 140-141)

III. CONCLUSIONS OF LAW

Whether a Public Accommodation is Involved

Section 2-160-070 of the Chicago Human Rights Ordinance prohibits discrimination in public accommodations on the basis of disability and other protected classifications. The Human Rights Ordinance defines "public accommodation" as follows:

> "Public accommodation" means a place, business establishment or agency that sells, leases, provides or offers any product, facility or service to the general public, regardless of ownership or operation (i) by a public body or agency; (ii) for or without regard to profit; or (iii) for a fee or not for a fee....

§2-160-020(j), Chgo. Muni. Code. The Commission's regulations reiterate that a public accommodation is "any...place or establishment which offers any kind of services, facilities or goods to the general public." Reg. 510.110(o).

Respondent maintains that it is not a public accommodation because it does not sell at retail. Respondent argues that in October 2007, it only sold to retail jewelry stores and independent consultants. Because it did not sell at retail to the general public, it was not a public accommodation.

There is a rich body of Commission precedent interpreting when a party is a public accommodation under the Human Rights Ordinance. Such precedent makes it clear that what is at issue is not whether a particular respondent regularly deals with the public but whether the

particular function, product, service, or facility at issue is available to the public. Where access to the product, function, service, or facility is dependent on a special relationship between the user and the respondent, then no public accommodation is involved.

For example, the Commission's decisions involving schools and colleges make it clear that allegations of discriminatory conduct in grading or interacting with enrolled students are not allegations of discrimination involving a public accommodation because the services at issue are available only to students and not to the general public. See, e.g., *Parker v. Chicago Bd. Of Educ.*, CCHR No. 02-PA-40 (Dec. 13, 2002); *Palacios v. City Colleges of Chicago*, CCHR No. 02-PA-21 (Mar. 19, 2002); *Kenny v. Loyola Univ.*, CCHR No. 01-PA-44 (Sept. 24, 2001). *Maat v. Chicago Bd. Of Educ.*, CCHR No. 01-PA-115 (May 17, 2002), illustrates the point. Complainant, a person with a disability who used a wheelchair, alleged discrimination by a teacher who gave her daughter a failing grade; by the school when teachers whose classrooms were on the upper level floors refused to meet with her on the first floor and the upper level floors were not wheelchair accessible; when she was unable to observe her daughter's classes because they were on the second floor, which was not wheelchair accessible; and when she was unable to attend dance performances, sporting events, and art exhibits at the school because they were not wheelchair accessible. The Commission dismissed the claims concerning the grade and the parent-teacher conferences because those were functions or services which depended on complainant's daughter's status as a student and were not available to the general public. However, the Commission denied the respondent's motion to dismiss with respect to the classroom observation and the dance performances, sporting events, and art exhibits because the record did not enable the Commission to determine whether such services were available to the general public.

Similarly, the Commission has held that various functions of City of Chicago employees are not public accommodations where those functions are not products, facilities, or services provided to the general public. See, e.g., *Maggio v. Chicago Police Dept.*, CCHR No. 03-P-22 (Apr. 3, 2003), holding that alleged discrimination in issuing parking tickets does not involve a public accommodation; *Saadah v. Chicago Depts. of Consumer Services and Aviation*, CCHR No. 01-PA-84/93/95 (Jan 30, 2002), holding that alleged discrimination in the inspection of a licensed taxicab and in operation of the taxi lines at Midway Airport do not involve public accommodations; and *Spanjer v. White Hen Pantry and Chicago Police Dept.*, CCHR No. 00-PA-33/34/35/36 (Mar. 5, 2002), holding that a police officer's allegedly discriminatory refusal to intervene in a civil dispute does not involve a public accommodation. To a like effect is *Sims-Higgenbotham v. Fox & Grove*, CCHR No. 99-PA-132 (Apr. 11, 2002), recognizing that although its regulations list a law office as an example of a public accommodation, alleged discrimination in the handling of a client's case does not involve a public accommodation because, for it to occur, there must be a special relationship of attorney-client.

In this case, Respondent argues that because it does not sell at retail, it is not a public accommodation. However, this argument does not take into account that not everything Respondent does may be immune from classification as a public accommodation under the Human Rights Ordinance. For example, in *Oliva v. Simmons Corp.*, CCHR No. 01-PA-32 (July 7, 2001), the complainant alleged that he purchased a Simmons mattress at a retail store, had problems with the mattress, and contacted the store, which referred him to the manufacturer. Simmons, the manufacturer, maintained that it did not sell at retail and therefore was not a public accommodation. However, the Commission held that the complainant's allegations of discrimination arising from his contact to Simmons' customer service agents did state a claim of public accommodation discrimination, because Simmons' customer service function was offered to the general public. By contrast, in *Blakemore v. Kinko's and BT Office Products Int'l, Inc.*, CCHR No. 99-PA-71 (Nov. 10, 1999), the Commission held that the employee of a wholesale

supplier of office products to a retail business that sold them to its customers was not providing any service or facility to the general public but only to the retail business; consequently the employee's conduct toward a customer of the retail business while the employee was in the store stocking shelves with his employer's products did not involve a public accommodation.

As of October 9, 2007, Respondent sold products only to retail jewelry stores and independent consultants. It is clear that with the function of sales to retail jewelry stores does was not a public accommodation. To establish an account as a retail jewelry store, one had to show a resale license and a business card and submit an initial order of at least $300. Thus, members of the general public who lacked resale licenses could not qualify.

The record concerning independent consultants, however, is markedly different. To be an independent consultant, one need only open an account and purchase at least $200 worth of goods in a month. Thereafter, if the independent consultant's purchases drop below the $200 level, the individual is not dropped as an independent consultant but receives less of a discount. Unlike retail jewelry stores which are required to produce a resale license and a business card, no credentials are required of an independent consultant. Although Respondent intends that its independent consultant purchase for the purpose of resale, it does not require that and Quiroz conceded that there may be independent consultants who purchase for their own accounts.

Although Respondent continues to argue in its objections that its business with independent consultants does not involve a public accommodation, Quiroz candidly admitted that if Complainant wanted to purchase crystals in sufficient quantities for use in his clothing designs, he could do so and Quiroz would try to sign up any individual looking to purchase in quantity as an independent consultant regardless of whether the individual's intent was to resell. The Commission agrees with the hearing officer that with respect to offering the opportunity to be an independent consultant, Respondent is providing a public accommodation. Moreover, access to Respondent's facility to view the relevant merchandise and meet with Quiroz or another agent of Respondent is part of the process by which a member of the public may become an independent consultant. Consequently, with respect to what Complainant was attempting to do, namely to purchase a quantity of Swarovski crystals, Respondent was providing a public accommodation within the meaning of §2-160-202(j) of the Human Rights Ordinance and Reg. 510.110(f), and thus is subject to the Ordinance. Moreover, access to Respondent's second-floor facility for the purpose of viewing the crystals available and discussing a possible purchase with staff was a part of the public accommodation Respondent was providing. Complainant testified that his companions readily accessed Respondent's second-floor facility on October 9, 2007, and obtained a business card. He also testified that a sign was posted at street level advertising the availability of Swarovski crystals.

Respondent further points out in its objections that it is Ultimo, Inc., and not CCI Industries, Inc., which was selling to independent consultants, and Ultimo is not a party to this Complaint. This is immaterial, as the evidence shows that the same staff and facility are used by both entities, and a member of the public could have worked with the staff at the facility to find a way to purchase Swarovski crystals.

Nor is there anything improper, despite Respondent's contentions in its objections, about the hearing officer's questioning of Quiroz at the end of the administrative hearing about the sale of crystals. A hearing officer may ask questions of the witnesses as he or she considers necessary to elicit the truth or clarify material issues. See *Comito v. Police Board of the City of Chicago*, 317 Ill.App.3d 677, 687 (2000). Nothing in this hearing officer's questioning can be construed as undertaking to prosecute the case for Complainant, who was represented by counsel

in the hearing, or in other respects as suggesting bias or any other breach of the hearing officer's neutral adjudicatory role. *Id.* The resulting evidence was material to the issue of whether a member of the general public could become an independent consultant and thereby purchase crystals. The responses of Quiroz confirmed that it was possible, even though purchases for one's own account were somewhat discouraged. That means that the opportunity to become an independent consultant was offered to the general public, not just to people with, for example, a resale license.

Thus there was evidence that this was *not* the type of business which restricts "to the trade" the ability to enter its showroom or to purchase the Swarovski crystals that were of interest to Complainant.[1] To that extent at least, Respondent was and appears to remain a public accommodation within the meaning of the Human Rights Ordinance.

Complainant's *Prima Facie* Case

The Chicago Human Rights Ordinance, at §2-160-170, provides in pertinent part:

> 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....

See also Reg. 520.100. Under Regulation 521.110, "full use" of a public accommodation means that "all parts of the premises open for public use shall be available to persons who are members of a Protected Class...at all times and under the same conditions as the premises are available to all other persons, and that the services offered to persons who are members of a Protected Class shall be offered under the same terms and conditions as are applied to all other persons." See also *Luna v. SLA Uno, Inc.,* CCHR Case No. 02-PA-70, at 6 (Mar. 29, 2005), noting that "the CHRO does require that public accommodations be available to person with disabilities under the same terms and conditions as to all other persons."

More specifically with respect to the accommodation of persons with disabilities, Reg. 520.105 provides as follows:

> 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.

See also *Maat, supra* at 3; *Massingale v. Ford City Mall and Sears Roebuck and Co.,* CCHR Case No. 99-PA-11, at 6 & n.1 (Sept. 14, 2000); *Doering v. Zum Deutschen Eck,* CCHR Case No. 94-PA-36, at 5 (Sept. 29, 1995).

---

[1] A review of Resp. Ex. 4, copies of information on Respondent's web site as of July 20, 2009, reinforces that Respondent had not clearly restricted access to its showroom or to the purchasing of Swarovski crystals to members of a certain trade, although it encouraged people use the crystals in a nail design business. In addition, Complainant testified that he saw a sign at the sidewalk-level entrance to the stairway advertising the availability of Swarovski crystals; an exclusively "to the trade" business is unlikely to market products to people passing on the sidewalk of a neighborhood commercial street.

To prove a *prima facie* case of disability discrimination with respect to a public accommodation, Complainant must show that (a) he is a person with a disability within the meaning of the Ordinance; (b) he is a qualified individual in that he satisfied all non-discriminatory standards for use of the public accommodation; and (c) he did not have full use of the products, facilities, or services constituting the public accommodation, as customers without disabilities did. See, e.g., *Pryor and Boney v. Echeveria*, CCHR No. 93-PA-62/83 (Oct. 19, 1994); *Sohn and Cohen v. Costello and Horwich*, CCHR No. 92-PA-0019 (Oct. 20, 1993). Also see *Cotten v. Taylor Street Food and Liquor*, CCHR Case No. 07-P-12, at 3 (Aug. 22, 2008); and *Maat v. El Novillo Steak House*, CCHR Case No. 05-P-31, at 3 (Aug. 16, 2006).

There is no dispute that Complainant is a member of a protected class; he is a person with a disability (paraplegia) who uses a wheelchair. Respondent contends, however, and reiterates in its objections to the Recommended Ruling, that Complainant has failed to establish a *prima facie* case because he has failed to prove that, on October 9, 2007, he sought to use the public accommodation at issue.

Respondent is correct on the law. One does not have a claim for disability discrimination regarding access to a public accommodation merely because one uses a wheelchair and observes that a facility is not wheelchair accessible. The Human Rights Ordinance makes it a violation for a party to "discriminate concerning the full use of" the public accommodation. For such discrimination to occur, an individual must actually seek to use the public accommodation at issue. See *McCabe v. Chipotle, Alladin's, Panera, and Monsoon*, CCHR No. 03-P-119 (Aug. 8, 2003).

Respondent, however, is wrong on the facts. The hearing officer found it is more likely than not that Complainant attempted to utilize Respondent's facility and services. The hearing officer found credible Complainant's testimony that he attempted to utilize Respondent's facility on October 9, 2007. Corroboration of Complainant's testimony is not required in order to find it credible. The fact that Respondent does not acknowledge any contact with Complainant does not require a finding to the contrary.

Respondent contends that Complainant did not come to its facility on October 9, 2007, and never sought entry to the facility. Respondent accuses Complainant of fabricating his testimony. Respondent argues that Complainant's testimony is incredible because Complainant did not attempt to obtain crystals elsewhere, could not provide specifics as to the number of crystals he was seeking, and did not know what price Respondent charged for crystals. Furthermore, Respondent relies on Quiroz's testimony that he had no conversation with Complainant on October 9, 2007, and that no one came to the facility inquiring about accessibility.

Complainant testified without inconsistency that he is in the business of fashion design. His testimony that he was seeking to purchase Swarovski crystals to use in his designs is plausible. Although Quiroz testified that the crystals generally used on clothing are flat-backed and are applied with heat, he conceded that the crystals Respondent sells could be used on clothing and Complainant testified without inconsistency that manufacturers of other crystals insisted on applying them to the clothing themselves and charged excessive fees for doing so.

Although Quiroz testified that he never spoke to Complainant on October 9, 2007, that testimony does not contradict Complainant's testimony, as Complainant testified that he attempted to call the store and got no answer. Although Quiroz testified that he had no recollection of anyone coming up that day and asking about wheelchair accessibility, Quiroz is

not Respondent's only employee and there is no evidence that Quiroz was the only employee working that day. The hearing officer found it more likely than not that Complainant did attempt to access Respondent's facility on October 9, 2007, as he described. He was of course unable to do so because it is undisputed that the facility cannot be accessed by a person in a wheelchair.

The hearing officer found that Complainant did not fabricate his story about attempting to access Respondent's facility on October 9, 2007. See Findings of Fact 3 and 4 above. As provided in Section 2-120-510(l) of the Chicago Municipal Code, the Commission must adopt the findings of fact recommended by a hearing officer if they are not contrary to the evidence presented at the hearing. The hearing officer's findings in this case are consistent with the evidence. Determining credibility of 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).

A person with a disability who uses a wheelchair but cannot readily enter a facility because of a barrier has been deprived of full use of the facility in violation of the Human Rights Ordinance. See *Maat v. String-A-Strand*, CCHR No. 05-P-5 (Feb. 20, 2008). With regard to users of standard-size wheelchairs, the Commission has consistently interpreted the Human Rights Ordinance as not strictly requiring that a personal request for accommodation be made as an element of a disability discrimination claim involving the accessibility of a public accommodation.[2] To the extent that other members of the public have the opportunity to access a facility without making an advance request, the rights to full use and full accommodation as described in Regs. 520.105 and 520.110 (and as modified only by proof of undue hardship) mean that wheelchair users must be able to do so as well.[3]

Therefore, Complainant has established a *prima facie* case of disability discrimination in violation of the Human Rights Ordinance. The next consideration is whether Respondent has established an undue hardship.

Respondent's Undue Hardship

Once a complainant has established a *prima facie* case of failure to fully accommodate a disability, a public accommodation may prove by a preponderance of objective evidence the affirmative defense that providing full use of its public accommodation would cause it undue hardship. *Cotten v. Eat-A-Pita,* CCHR Case No. 07-P-108, at 4, 6 (May 20, 2009). The standards for proof of undue hardship are set forth in Reg. 520.130:

> "[U]ndue 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 unduly affect the nature of the public accommodation.

---

[2] Compare Reg. 265.130 regarding reasonable accommodation in an employment context: "Unless the employer knows that the qualified individual or applicant has a disability requiring accommodation (because it is apparent, for example), the individual or applicant must initiate a request to the employer for accommodation." Also compare Reg. 420.180(b) listing as conduct which discriminates against persons with disabilities in a housing context "[r]efusing to provide, upon request, a reasonable accommodation in the rules, policies, practices, amenities or services, unless such accommodation cannot be made without undue hardship...."

[3] Put another way, the need to provide full accommodation is deemed "apparent" or "obvious."

(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.

(b) Factors to be considered in determining whether an accommodation would impose an undue hardship include, but are not limited to:

(1) the nature and cost of the accommodation;

(2) the overall financial resources of the public accommodation, including resources of any parent organization;

(3) the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the public accommodation; and

(4) the type of operation or operations of the public accommodation.

See also *Doering, supra,* at 7; and *Cotten v. Eat-a-Pita, supra,* at 6, 5, holding that "objective evidence" is required to provide an "adequate factual foundation" sufficient to prove an undue hardship.

Thus, it is not enough for a respondent merely to cite the prospective costs of an accommodation without providing concrete evidence that such costs would impose an undue hardship on respondent. See *Massingale, supra,* at 8, stating that "whether costs are 'too high' depends, in large part, on the circumstances of the party who would have to pay them." For example in *Belcastro v. 860 N. Lake Shore Drive Trust,* CCHR No. 95-H-160 (Feb. 20, 2002), the respondent (a residential condominium building) asserted that it would incur $333,600 in costs to provide the complainant, a wheelchair user, with his requested accommodation of ability to enter and exit from the front of the building. *Belcastro, supra,* at 31.[4] Despite the expensive nature of the proposed accommodation, the Commission noted that the respondent failed to prove that the costs would impose an "undue hardship" because it "offered no evidence of the [in]ability of [its] residents to pay an increased assessment" needed to cover the costs of the accommodation and the evidence showed that the respondent could secure financing for the costs. *Belcastro, supra,* at 31-32; see also *Massingale, supra,* at 8, finding that the $100,000 cost for renovations was "not dispositive" where respondent offered no evidence about its inability to pay for the construction; *Doering, supra,* at 8; *Guzman v. Denny's Inc.,* 40 F.Supp.2d 930, 935-36 (S.D.Ohio 1999), finding it an issue of fact whether renovation of a restaurant's inaccessible restroom was "readily achievable" notwithstanding evidence that the work would cost $21,500, eliminate storage and seating space, and cause lost profits where it appeared that defendant had the financial ability to pay for the renovation.

Here, Respondent's undue hardship defense has two prongs. First, Respondent contends that full accommodation is impossible because Respondent does not "control" the stairs and does not have the authority to under its lease to install an elevator. Second, Respondent contends that full accommodation would be prohibitively expensive. Respondent has the burden of proving its undue hardship defense. See *Cotten v. Eat-A-Pita, supra,* and cases cited therein. Respondent has failed to carry its burden of proof with respect to either prong of its defense.

[4] Although the Commission's discussion of the parameters of the undue hardship defense in *Belcastro* was *dicta* (see *Belcastro, supra,* at 26), the Commission reaffirms that its analysis in that case was correct.

Respondent's lease prohibits it from making structural alterations without its landlord's consent. However, Quiroz testified that Respondent has never discussed making the facility wheelchair accessible with the landlord. Thus Respondent cannot establish that the landlord would withhold consent to whatever alterations may be needed to accommodate wheelchair users. Accordingly, Respondent has failed to prove that accommodation is not possible because of the landlord's unwillingness to agree to structural alterations.

Respondent's further arguments on this point in it objections are not persuasive. Respondent clearly has rights of use of the stairway and street-level entrance in question as part of its lease of the second-floor "demised premises." Respondent admits that it is the only user of the stairway and that it is the entrance its customers use to access its facility. Respondent advertises this showroom (See Resp. Ex. 4) and even posts notices at the street-level entrance to the stairway, as Complainant testified (See Comp. Ex 1.) Indeed, the lease would have little meaning if Respondent and its customers could not use the stairway, street-level entrance, and other common areas that allow it to access the "demised premises." The language of the lease does not, as Respondent argues, "deny" Respondent the right to make any alterations in these common areas; rather it contemplates that approval might be sought and might be granted. Respondent has not established that it would be an undue hardship or futile gesture to have asked.

Respondent has also failed to prove by objective evidence, as Reg. 520.130 requires, that fully accommodating Complainant and other wheelchair users would be prohibitively expensive. Respondent did provide two generic "ballpark" estimates of the cost to install an elevator in a two-story building. Neither estimate was specific to Respondent's facility and neither contractor actually inspected Respondent's facility (which might also have helped Respondent to assess whether installation of an elevator or lift is even structurally feasible). The hearing officer found this evidence of cost insufficient to prove the financial costs of full accommodation. Respondent in its objections further argues that this evidence of undue hardship is uncontroverted.

The Commission is less troubled than was the hearing officer about the evidence of the cost of a typical elevator installation in a two-story building; it is at least a starting point to analysis of possible undue hardship. However, even if the Commission were to accept these "ballpark" estimates as objective evidence that the minimum cost to install an elevator in a building like the one at issue is $90,000, Respondent has wholly failed to prove by objective evidence that it cannot afford this level of cost. As pointed out in the decisions cited above, evidence of financial capacity must be particularized to the business in question. Respondent offered no objective evidence of its assets, liabilities, revenue, or any other financial data. The only evidence of Respondent's financial condition which was offered consisted of the conclusory testimony of Quiroz that Respondent lost money in 2007. He based that testimony on an observation of Respondent's 2007 tax return which, according to Quiroz, showed a loss of $8,000, along with the negative response Quiroz received when he asked for a raise. Not even the tax return itself was introduced, let alone any fuller statement of the financial status of the business, including its capacity to obtain financing for any permanent alterations that may be feasible. It is impossible for the Commission to conclude on this vague and incomplete evidence that it would have been prohibitively expensive for Respondent to install and maintain an elevator or otherwise fully accommodate a wheelchair user. Respondent *may* have been able to prove by objective evidence that it could not afford the cost of installing and maintaining an elevator, but this minimal, second-hand evidence of a tax loss in a particular filing year does not provide that proof.[5]

[5] Respondent also argues in its objections that it is "self-evident that the stairway is long, narrow and not conducive to modification for wheelchairs." The Commission recognizes it is probably infeasible to utilize a portable ramp or

Accordingly, Respondent has not proved an undue hardship to make its second-floor showroom fully accessible to people using wheelchairs. Having determined that Complainant proved his *prima facie* case, it was Respondent's burden to provide that proof by objective evidence. Because Respondent did not do so, the Commission must find Respondent liable for disability discrimination in violation of the Chicago Human Rights Ordinance.

Respondent argues that it had reasonable accommodations in place to serve Complainant and other persons in wheelchairs even though they could not access the showroom—citing that it has its complete catalog available for perusal on its website, and also that it is possible to make contact by telephone or internet. Indeed, Complainant testified that he tried to telephone Respondent had his companions obtain information about how he might do business with Respondent "online." There was also some evidence that Respondent had a buzzer and intercom system. Had Respondent proved it was an undue hardship to provide full access, the Commission would have moved to the issue of reasonable accommodations and may well have found that Respondent was providing acceptable alternatives. But on this record, the issue is not reached and does not affect liability.[6]

IV. RELIEF

A. Emotional Distress Damages

Complainant seeks an award of $1,000 in damages for emotional distress. Complainant relies on his testimony that he experienced humiliation and embarrassment when he could not access Respondent's facility. From his testimony, Complainant appears to believe that an award of $1,000 in emotional distress damages is automatic with the Commission. That is not the case.

A thorough analysis of the Commission's jurisprudence with respect to emotional distress damages appears in *Cotten v. Eat-A-Pita, supra*, and need not be repeated here. The hearing officer found this case to be comparable in every relevant way to *Eat-A-Pita*: As in *Eat-A-Pita*, Complainant testified in only conclusory fashion to feelings of humiliation and embarrassment. Although Complainant claimed that he has seen a psychiatrist for the feelings he gets when he is unable to access a facility, no further evidence to document such visits was presented and it was not established that the inability to access Respondent's facility specifically resulted in any medical attention. The incident was very brief in time and Complainant did not seek to obtain the goods and services he sought from Respondent's facility (here crystals, in *Eat-A-Pita* a sandwich) from any other source. As in *Eat-A-Pita*, there was no evidence of any emotional distress beyond what any wheelchair user is likely to feel when confronted with a barrier. Based on this analysis, the hearing officer recommended that the Commission follow *Eat-A-Pita* and award Complainant $500 in emotional distress damages.

The Commission respects the hearing officer's recommendation but has determined that it will award only $1.00 in emotional distress damages in this case.

---

chair lift on a the type of stairway described in the hearing record. It may even be structurally infeasible to install an elevator in this building. However, suppositions and assumptions enough to establish that Respondent adequately evaluated its capacity to provide full wheelchair access.

[6] The availability of such options may be a factor in determining the extent of damages and whether steps have been taken to mitigate damages.

Since *Eat-A-Pita*, the Commission has issued two additional rulings in similar disability discrimination cases filed by this Complainant: *Cotten v. 162 N. Franklin, LLC, d/b/a Eppy's Deli and Café*, CCHR No. 08-P-35 (Sept. 16, 2009) ("*Eppy's*"), and *Cotten v. Addiction Sports Bar and Lounge*, CCHR No. 08-P-68 (Oct. 21, 2009) ("*Addiction*"). In *Eppy's*, the Commission awarded $500 in emotional distress damages, following *Eat-A-Pita*, even though the hearing officer had recommended only $100. In *Addiction*, the Commission awarded only $1.00 as nominal damages for emotional distress.

In deciding to award only $1.00 in *Addiction*, the Commission took into account Complainant's minimal and conclusory testimony which merely repeated the Commission's criteria for emotional distress, the evidence that staff of the business courteously assisted him to purchase carry-out food despite his inability to enter, and the hearing officer's assessment of Complainant's testimony regarding his emotional distress. On those facts, the Commission found that Complainant did not prove that he suffered any actual emotional injury despite the ordinance violation. In *Addiction*, the Commission cautioned against relying on its precedents to argue that a complainant is "automatically" entitled to emotional distress damages without proving the extent of emotional distress that actually occurred.

As fully discussed in *Eat-A-Pita*, in deciding emotional distress damages, the Commission evaluates both the duration and severity of the underlying discriminatory conduct and the effect of that conduct on the complainant, as called for in *Nash & Demby v. Sallas Realty & Sallas*, CCHR No. 92-H-128 (May 17, 1995) and numerous succeeding cases. The Commission also takes into account the purpose of emotional distress damages, namely to fully compensate a complainant for the suffering caused by the unlawful conduct. *Osswald v. Yvette Wintergarden Restaurant et al.*, CCHR No. 93-E-93 (July 19, 1995). In *Addiction*, the Commission also cited as guidance certain federal court decisions awarding only $1.00 in nominal damages to plaintiffs with disabilities as affirming the principle that a plaintiff is entitled to more than nominal damages *only* if able to prove that he or she was actually damaged: *Casna v. City of Loves Park*, --- F.3d ---, 2009 WL 2194706 (7th Cir. July 24, 2009), involving a due process deprivation, and *Briggs v. Marshall*, 93 F.3d 355 (7th Cir. 1996), involving a civil rights claim. The Commission made clear its view that it is not necessary to award damages merely because a complainant has proved the discrimination underlying claim. Within the range of relief available to a prevailing complainant in a case before this Commission, an emotional distress damages award is not intended as a reward or fee to the complainant for winning a case. The Commission again emphasizes that although it considers its precedents when awarding damages, it has not established any "automatic" amount of damages that it awards to a complainant for a particular type of violation.

In this case, when Complainant was asked by his attorney how he felt about not being able to access the store, he responded as follows:

> At first I felt humiliated and just embarrassed for the fact that—I mean, this is something that goes on quite often, where I run into problems of entering businesses that's not accessible. Especially when I'm out on a date, or a friend or someone invites me out somewhere and I get to an establishment and it's not accessible. It's very embarrassing. It's very humiliating, and it's very depressing.

(Tr. 24) Complainant went on to reiterate that he "would use the crystals to put on clothing" (Tr. 24), noting that at the time "there was big trend going on in the fashion industry where they're embellishing a lot of garments with these kind of crystals." (Tr. 25) When asked by his attorney whether there is any other store that focuses on selling crystals, Complainant replied, "Not that I

know of" (Tr. 25), although he had earlier testified that he knew some businesses demanded a fee to attach crystals to clothing. (Tr. 51, 53)

This testimony does not detail any particular emotional distress arising from inability to access this particular Respondent's facility. Complainant wanted to look into purchasing crystals as a business activity. On cross-examination, he explained that he had a design worked out and approached Respondent's facility because he lived in the area and had seen a sign on Respondent's window "for ages" stating that said they had Swarovski crystals. (Tr. 50, 51) Complainant admits that he never followed up with Respondent or any other business about his interest in crystals—by phone, mail, internet or other means—which might also have mitigated any damages arising from inability to see Respondent's merchandise and discuss a purchase on the occasion in question. Complainant's interest in actually purchasing crystals appeared not especially strong or lasting.

Complainant's testimony about the effect of this incident was only to the effect that he felt "humiliated" and "embarrassed," apparently because it was a repetition of other instances when he had "run into problems of entering businesses that's not accessible." Yet he failed to detail how he was humiliated or embarrassed in the particular incident at issue—where he was not on a date or other social outing, or even seeking a meal, but only looking for materials to use in his clothing designs, that is "for business." (Tr. 24) Although the inquiries of his companions confirmed what he already must have realized—that there was no way for him to enter Respondent's second-floor showroom—Complainant provides no explanation of specifically how this was humiliating or embarrassing to him but only moves on to describe his cumulative feelings about being unable to access many places of public accommodation, especially when on social outings. This evidence does not persuade the Commission that Complainant has proved any more than nominal emotional distress arising from this particular incident.

B. Interest on the Damages

Because only nominal damages have been awarded to Complainant, the Commission does not in this case award any pre- or post-judgment interest on the damages.

C. Fine

The hearing officer recommended the maximum fine of $500 for violation of the Human Rights Ordinance. However, as further discussed below in connection with Respondent's request for review of an interlocutory order, the Commission finds that a lower fine of $100 is sufficient in conjunction with the other relief ordered to punish this violation and encourage future compliance with the accessibility requirements of the Human Rights Ordinance. This violation was not egregious and affects only a portion of the business conducted at the facility in question.

D. Injunctive Relief

Complainant has requested injunctive relief but did not specify what injunctive relief he is seeking. 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). The Commission finds that injunctive relief is an appropriate remedy in this case.

As the hearing officer noted, this situation is similar to that in *Cotten v. Eat-A-Pita, supra*; that is, Respondent has been found liable because Complainant proved a *prima facie* case and Respondent failed to prove its affirmative defense of undue hardship by objective evidence. But it is recognized that Respondent may be able to prove that it is an undue hardship within the meaning of Reg. 520.130 to make its showroom fully wheelchair accessible. It is not known on this record what permanent alterations (such as an elevator) are structurally feasible, whether the landlord would approve them, and whether Respondent can afford them. As in *Eat-A-Pita*, the goal of this injunctive relief is not to punish but to secure compliance with the Chicago Human Rights Ordinance going forward. In essence, Respondent is being afforded one more opportunity to document any undue hardship with objective evidence, and then to document what reasonable accommodations it will offer if undue hardship is established.

Accordingly, the Commission accepts the hearing officer's recommendation and orders injunctive relief comparable to that awarded in *Eat-A-Pita*, as follows:

1. **Provide a permanent means of access to the second-floor showroom and sales facility 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 second-floor showroom 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 wheelchair-accessible entrance to the showroom, 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 or contractual agreements*, a signed certification of Respondent or a qualified professional[7] which sets forth in detail the factual basis for the claimed undue hardship.

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

[7] In addition to private services, 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.

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 showroom 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 and/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 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): [8]

a. 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 first-floor entrance for the purpose of providing alternative service, or to activate an intercom system to allow communication with staff about 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.

b. Maintain *exterior signage* conspicuously displaying a telephone number which may be used to contact staff during business hours to request 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.

c. 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.

d. 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.

[8] Based on the evidence of record, it does not appear likely that a portable ramp or some form of lift could be used to reach the second floor, so that alternative is not specifically discussed in this injunctive order. Respondent is nevertheless expected to investigate whether any options short of an elevator are feasible.

e. 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.

f. 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).

E. Attorney Fees

Section 2-120-510(l) of the Chicago Municipal Code provides for an award of attorney fees and associated costs to a prevailing Complainant, and the Commission routinely awards such fees and costs. Accordingly, the Commission approves and adopts the hearing officer's recommendation to award reasonable attorney fees and costs.

Respondent objects, citing no legal authority, that authorizing an award of attorney fees to a prevailing complainant but not a prevailing respondent violates "fundamental constitutional rights of equal protection under the law and due process of law." This constitutional argument is without merit; see *Sanderson v. Allstate Insurance Co.*, 738 F.Supp 432 (D.Colo. 1990). Respondent further argues that the facts do not warrant an award of fees because Complainant "brought suit with no notice of any kind" and because Complainant's accusations are false. These arguments are also without merit, as explained above.

Pursuant to Reg. 240.630, Complainant may serve on the hearing officer and Respondent, and file with the Commission, a petition for attorney fees and/or costs including the information specified in Reg. 240.630, no later than 28 days from the date of mailing of this Board of Commissioners ruling. Respondent may respond and the Commission will proceed as provided in Reg. 240.630.

V. REQUEST FOR REVIEW OF INTERLOCUTORY ORDER

Respondent submitted along with objections to the Recommended Ruling a Request for Review of an interlocutory order of the hearing officer issued on June 24, 2009. In that order,

the hearing officer modified his earlier Order of Default and Monetary Sanctions issued on April 8, 2009, which found Respondent in default for failure for failure to attend a scheduled pre-hearing conference and imposed a fine of $250 against Respondent's then-counsel. The June 24 order vacated the default (and apparently vacated the fine against former counsel) but imposed a larger fine of $350 against Respondent directly, citing the "increased administrative expense to the Commission of dealing with Respondent's motion to vacate default."

Respondent through its new counsel argues that it was error for the hearing officer to impose a fine for filing a "meritorious motion which was granted" and punishing Respondent for having to deal with the issue. Respondent maintains that the $350 fine, which it has paid, should be refunded.

Under Subpart 235 of the Commission's regulations, adopted as part of amended Commission Regulations effective July 1, 2008, a party that fails to comply with a procedural regulation, notice, or order is subject to one or more of the sanctions described in that subpart. Such sanctions are to be limited to what is sufficient to punish the conduct and deter repetition of it by the party or others. Reg. 235.110. Under Reg. 235.310(d), a respondent that fails to attend a scheduled proceeding without good cause may be sanctioned by an order of default, as had been the case under previous Commission regulations. However, amended Reg. 235.410 has made it clear that monetary sanctions are also available:

> Monetary sanctions may be imposed *in addition to or in lieu of* other sanctions for procedural noncompliance. In determining the appropriateness and amount of monetary sanctions, the Commission may consider, among other factors, the severity of the noncompliance as well as the party's record of cooperation in the case and in other cases before the Commission. [emphasis supplied]

In modifying his earlier Order of Default and Monetary Sanctions, the hearing officer did not determine that there was any error in defaulting Respondent for failure to attend the pre-hearing conference; indeed, the hearing officer reaffirmed that sanctions were properly imposed, that the failure to appear was "more than a simple ministerial error," and that it justified the entry of default. The Commission agrees with the hearing officer that the imposition of the initial default and fine was fully warranted.

However, the hearing officer exercised his discretion to adjust the sanctions for the procedural violation, vacating the severe sanction of default but increasing the fine by $100 and imposing it directly on Respondent rather than on his former counsel, whom Respondent had replaced. Overall, the result of this modification was favorable to Respondent, reinstating its ability to present defenses at the administrative hearing. Moreover, the $350 fine amount is reasonable as what then became the total sanction for the procedural violation of failing to attend a scheduled proceeding and failing to establish good cause for not attending.

The Commission has held that the negligent conduct of an attorney can be imputed to the party represented, who can be sanctioned for it. *Howery v. Labor Ready et al.*, CCHR No. 99-E-131 (Mar. 10, 2000); *Aljazi v. Owner*, CCHR No. 99-H-75 (Apr. 27, 2000); *McGraw v. Chicago Dept. of Aviation*, CCHR No. 99-E-27 (June 27, 2002); *Barren-Johnson v. Mahmood*, CCHR No. 03-P-9 (May 18, 2006). For example, in *Leadership Council for Metropolitan Open Communities v. Carstea and Berzava*, CCHR No. 98-H-76 (Apr. 26, 2002), a default order was entered against two respondents for their failure to attend a scheduled conciliation conference without good cause, after counsel for each respondent failed to properly provide updated contact

information to the Commission which would have enabled them to be notified of the proceeding; the decision recites Illinois law which holds clients responsible for inaction of their attorneys.

Prior to adoption of amended Commission Regulations effective July 1, 2008, the Commission did not have the option to impose a monetary sanction on counsel, but could only sanction the attorney's client. New Reg. 235.440 now provides, "Monetary sanctions *may* be imposed on an attorney in whole or in part if the attorney's conduct contributed to the procedural noncompliance." [emphasis supplied]

New Reg. 235.440 by its terms does not *require* that a monetary sanction be imposed on a party's attorney if the attorney was fully or partly responsible for the procedural violation, nor does it limit the Commission's authority to impose sanctions directly on an attorney's client rather than on the attorney. Imposing a monetary sanction on an attorney is merely another option available to the Commission in the exercise of its discretion under Subpart 235.

As Respondent noted in its Request for Review, the hearing officer modified the sanctions for failure to attend the pre-hearing conference for two reasons: first, that Complainant did not oppose modification and reinforced his indifference by not exercising his option to file a motion for costs (under Reg. 235.430); and second, that the procedural violation was due to the shortcomings of former counsel and Respondent had at that point retained new counsel who appeared more mindful of the importance of complying with Commission orders and regulations.

However, the hearing officer in vacating the default correctly noted that Respondent remained responsible for the misfeasance of its former counsel and so assessed the $350 fine against Respondent directly. The stated basis for the increase from the prior $250 fine against former counsel was "the increased administrative expense to the Commission of dealing with Respondent's motion to vacate default." The Commission does not find this higher fine improper in light of the concomitant benefit to Respondent of vacating the default, a much more severe penalty. The Commission does not regard Respondent as penalized for having filed the motion to vacate the default; rather, Respondent was fortunate that the hearing officer was persuaded, in part by the substitution of counsel, to soften the sanctions although not required to do so. It was not unreasonable, in vacating the default and reconsidering the fine, to take into account the overall administrative burden to the Commission which flowed from Respondent's failure to attend the pre-hearing conference.

However, the Commission wishes to encourage Respondent to focus its resources at this point on compliance with its orders for relief relating to the ordinance violation itself, and so makes the following additional adjustments regarding the fines in this case:

1. The Commission reduces the $350 fine against Respondent for the procedural violation to $250, which it affirms has been paid by Respondent.

2. The Commission reaffirms the apparent intent of the hearing officer and vacates the $250 fine previously imposed against Respondent's former counsel (which former counsel never paid).

3. As stated above, the Commission has imposed a fine of $100 for the disability discrimination against Complainant in violation of the Human Rights Ordinance, rather than the $500 fine recommended by the hearing officer. The Commission credits this $100 fine as paid in light of Respondent's previous payment of the $350 fine now reduced to $250. The Commission shall not take any steps to collect this

$100 fine and shall not refund the $100 amount by which the fine for the procedural violation has been reduced.

VI. CONCLUSION

For the foregoing reasons, the Commission on Human Relations finds Respondent liable for disability discrimination in violation of the Chicago Human Rights Ordinance. As relief, Respondent is ordered:

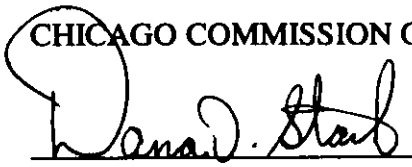
1. To pay to Complainant emotional distress damages in the amount of $1.00.

2. To pay Complainant's reasonable attorney fees and costs as determined pursuant to the procedures described above.

3. To pay to the City of Chicago a fine of $100, receipt of which is acknowledged as an offset to the reduced fine for failure to attend a pre-hearing conference.

4. To comply with the orders for injunctive relief stated herein.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: 

Dana V. Starks, Chair and Commissioner
Entered: December 16, 2009