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:

Christina Mendez
Complainant,
v.

El Rey del Taco & Burrito
Respondent.

Case No.: 09-E-16

Date of Ruling: October 20, 2010
Date Mailed: October 27, 2010

TO:
Christina Mendez
5546 S. Troy St.
Chicago, IL 60629

Timothy M. Grace
Gottreich & Grace
200 W. Superior, Suite 210
Chicago, IL 60654

FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on October 20, 2010, the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek a 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.

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

City of Chicago
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740 N. Sedgwick, 3rd Floor, Chicago, IL 60610
(312) 744-4111 [Voice], (312) 744-1081 [Facsimile], (312) 744-1088 [TTY]

IN THE MATTER OF:

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FINAL RULING ON LIABILITY AND RELIEF

I. INTRODUCTION

On February 18, 2009, the complainant, Christina Mendez[1], filed a complaint of race and ancestry[2] discrimination in violation of the Chicago Human Rights Ordinance against El Rey del Taco & Burrito, a restaurant business. Complainant alleged that she was treated differently in the application process for a waitress job because she is Puerto Rican. After an investigation, the Commission on Human Relations found substantial evidence of an ordinance violation. An administrative hearing was held on June 23, 2010. Ms. Mendez, appearing *pro se*, testified and presented the testimony of her son. Respondent presented the testimony of the owner-manager of El Rey del Taco & Burrito along with the testimony of two employees who were working at the restaurant on the day Ms. Mendez allegedly came there and sought employment.

On July 27, 2010, the hearing officer issued his Amended Recommended Decision and Order, setting a deadline of August 31, 2010, for the filing of any objections to the recommended finding of no liability. No objections were received.

II. FINDINGS OF FACT

1. Raymond Macias, Jr. is the owner and manager of El Rey del Taco & Burrito, a small family restaurant. (T.43) He is responsible for the day-to-day operations of the restaurant. (T. 48) Mr. Macias is a contractor by trade who grew up in the neighborhood, Brighton Park, where the restaurant is located. Mr. Macias spent three years and much of his savings getting the building in good enough shape to open his restaurant. (T. 46) The restaurant is located across the street from Kelly High School.

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[1] The caption of the complaint in the within case names the complainant, "Christian", rather than her real name, "Christina." That error has followed the complainant in all pleadings to the issuance of the hearing officer's recommended decision, despite the fact that she signed the complaint Christina. The hearing officer *sua sponte* amended the caption to substitute the complainant's true first name. The Commission now further amends the caption to state the correct name of the Respondent restaurant.

[2] The hearing officer in his recommended decision described Complainant's claim as one of national origin discrimination. In fact, her Complaint alleged race and ancestry discrimination. The Commission's Order Finding Substantial Evidence found substantial evidence national origin and ancestry discrimination. The Commission treats claims of discrimination because an individual is Puerto Rican primarily as claims of ancestry discrimination. See, e.g. Figueroa v. Fell, CCHR No. 97-H-5 (Oct. 21, 1998). Regardless of these discrepancies, the analysis of this case is the same.

2. Mr. Macias was solely responsible for the hiring of employees at the restaurant. (T. 48) He testified, credibly, about the process that was used to hire waiters and waitresses. He testified that he opened his restaurant in November 2008 and personally did all the hiring. His process was to sit down with the applicants, ask them if they had any experience, and ask if they were bilingual. (T. 48) At first, people just came into the restaurant and asked if he was hiring. When he first opened the restaurant, he used applications. (T. 49) However, he ran out of applications in the first two weeks he was open. (T. 52)

3. In February 2009, Mr. Macias placed a sign in the window of the restaurant seeking a waiter or waitress. (T. 49) He instructed his staff that if he was not present in the restaurant, they should get the name and telephone number of the applicant on a guest check stub and give it to him for follow-up. (T. 52) He has no recollection of having been given the name of Ms. Mendez. (T. 50)

4. Respondent presented the testimony of two employees, Nancy Abarca and Olimpia De La Torre. Ms. Abarca is a 17-year-old high school student who has worked for El Rey del Taco & Burrito since it has opened. (T 33) She currently works at the restaurant full time and was working as a waitress on the day that Ms. Mendez states she entered the restaurant. (T. 34) Ms. Abarca testified that she was told by Ray (Macias) that if anyone came in the restaurant in response to the ad which was in the window and he was not present, she should just ask for the information, the phone number and the name, and tell the person that she was going to give it to the manager and then put the information (on a piece of paper) in the register. (T. 35) Ray never told her to screen any applicants, nor did she have the authority to do so. (T. 36) Ms. Abarca testified that she had never seen Ms. Mendez before. (T. 36)

5. Ms. Del La Torre worked as a waitress for El Rey del Taco & Burrito from November 2008 until September 2009. (T. 38, 39) She also worked at the restaurant on February 16, 2009. (T. 40) Her testimony was similar to that of Ms. Abaraca's. She did not recall ever meeting Christina Mendez.

6. There was no testimony in the record establishing the ancestry or national origin of Mr. Macias, Ms. Abarca or Ms. De LaTorre.

7. Complainant's testimony was sparse. On February 16, 2009, she passed by the restaurant and saw a sign saying that they were asking for waitresses. (T. 10) She went home and called the restaurant. Ms. Mendez testified that she was told that "I should go for an application." She went to the restaurant approximately 15 minutes later and "the girl there said that there were no – that there was no long applications, that I should write my name on a piece of paper." (T 10-11) Ms. Mendez testified that she sat down to eat and "a little while they gave the application to other people who did enter, and I saw that." (T. 11) Ms. Mendez testified that she believed she was not given an application because of her accent. (T. 11)

8. The hearing officer found that Ms. Mendez was of the mistaken impression that she needed to fill out an application. While she may have been told that she needed to come to the restaurant to "apply," he credited the testimony of Respondent's three witnesses that by February 16, 2009, the restaurant did not have written applications.

9. On cross examination, Ms. Mendez testified that nothing was ever said to her about her ancestry, nor did she make any mention of being Puerto Rican. Her conversation with the waitress, in Spanish, was pleasant. Her claim of disparate treatment is based entirely on the

fact that she believes she saw two girls enter the restaurant and one of them, who appeared to Ms. Mendez to be of Mexican ancestry, filled out a piece of paper while sitting at a table. (T. 17, 19) Ms. Mendez did not see the document, although she stated that she could only see that "it was an application." (T. 19)

10. Ms. Mendez subsequently told an investigator from the Commission, and her son, that she believed she had been discriminated against either because she is not young and slim or because she is Puerto Rican. (T. 22, 24)

III. CONCLUSIONS OF LAW

The Chicago Human Rights Ordinance makes it unlawful to "directly or indirectly discriminate against any individual in...hiring...or other term or condition of employment because of the individual's...ancestry...." Section 2-160-030, Chicago Municipal Code. In the instant case, the Complainant contends that she was treated differently (and presumably adversely) because her accent revealed that she is Puerto Rican.[3]

In any case before the Commission, a complainant has the burden of proving by a preponderance of the evidence that the respondent has violated the ordinance under which the claim was filed. See, *Wehbe v. Contacts & Specs et al.*, CCHR No. 93-E-232 (Nov. 20, 1996); *Matthews v. Hinkley & Schmidt*, CCHR No. 98-E-206 (Jan. 17, 2001); and numerous other decisions. By "preponderance of the evidence", we mean that the item to be proved is more likely true than not true. *Wehbe, supra.*; see also *People v. Close*, 389 Ill.App.3d 228, (3rd Dist. 2009).

A complainant has two methods of proving discrimination: either by direct evidence or by indirect or circumstantial evidence, seeking to draw inferences from the actions of the respondent. *Webhe* and *Matthews, supra.*; *Richardson v. Chicago Area Council of Boy Scouts of America*, CCHR No. 92-E-80 (Feb. 21, 1996); and numerous other decisions.[4]

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[3] It is important to remember that the Complainant has not claimed that she was not hired for a job as a waitress because she is Puerto Rican while a non-Puerto Rican was hired. Indeed, we have no idea from the evidence in the record whether anyone was hired or what his or her ancestry might be.

[4] The hearing officer correctly noted that prior decisions of the Commission have analyzed disparate treatment claims by utilizing the "*McDonnell Douglas*" shifting burden methodology borrowed from federal case law. See, e.g., *Thomas v. Chicago Department of Public Health*, CCHR No. 97-E-221 (July 18, 2001); *Klimer v. Haymarket/Maryville* et. , CCHR No. 91-E-117 (June 16, 2003); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). But the hearing officer treated the *McDonnell Douglas* analysis as inapplicable after a trial on the merits, quoting *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1054 (7 Cir. 1990): "After a trial on the merits, however, the question of whether Hybert adequately made out the elements of a *prima facie* case falls away, and the operative issue is simply whether, viewing the evidence in its totality, Hybert sufficiently proved that age was a determining factor in Hearst's decision to terminate him." Despite this federal decision, the Commission does not find it necessary to overturn its long-standing use of the *McDonnell Douglas* method to evaluate evidence obtained in an administrative hearing. Nevertheless, the Commission recognizes that the *McDonnell Douglas* method is not necessarily the only possible approach to analyzing discrimination claims based on circumstantial rather than direct evidence; it remains necessary to consider the totality of the evidence. See, e.g., *Blakemore v. Dominick's Finer Foods*, CCHR No. 01-P-51 (Oct. 18, 2006), finding that the evidence established a *prima facie* case of race discrimination regarding use of a public accommodation even if not based precisely on the *McDonnell Douglas* formula.

Here, Complainant has not attempted to present any direct evidence that the waitress she encountered refused to give her an application because the waitress knew that Complainant was Puerto Rican. The question we must ask, then, is whether Complainant has produced evidence from which we can infer that it is more likely true than not true that she was not given an application form because of her recognizable Puerto Rican accent. The Commission agrees the hearing officer that Complainant has not met this burden of proof. Complainant has come forward with nothing more than mere speculation to support her claim that she was treated differently in the application process because she is Puerto Rican. See, e.g., *Karazanos v. Navistar Int'l Trans. Corp.*, 948 F.2d 332, 337 (1991), noting that a plaintiff's gut feeling and speculation was not proof of discrimination. Here, Complainant has not even proved that any non-Puerto-Rican applicant was treated differently than she was treated under similar circumstances.

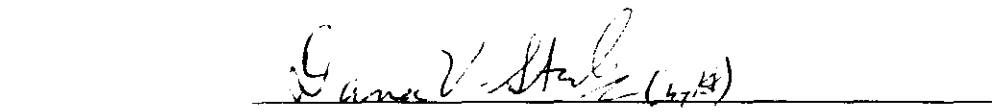
The hearing officer found credible the testimony of Respondent's two waitresses on duty on the day in question, as well as the testimony of owner-manager Macias about the job application process. Their testimony was that Respondent did not use written application forms and did not even have any on hand. Rather, the application procedure was exactly what Complainant herself described as having occurred: that restaurant staff were to take the interested person's name and telephone number if Macias, the owner, was not present. Whatever may have occurred regarding a woman coming to the restaurant and filling out a form, there was insufficient credible evidence to prove that she was applying for the position Complainant was seeking. Overall, the evidence presented at the administrative hearing does not establish that Complainant was refused an application or otherwise discouraged from applying for the available waitress position because she is Puerto Rican.

For these reasons, Complainant has failed to meet her burden of proof that she was treated adversely in the application process because she is Puerto Rican.

IV. CONCLUSION

Accordingly, the Commission finds in favor of Respondent and specifically finds that Complainant has not proved her allegations of discrimination by Respondent. Accordingly, this Complaint is DISMISSED.

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Dana V. Starks, Chair and Commissioner
Entered: October 20, 2010