

City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60610
(312) 744-4111 (Voice), (312) 744-1081 (Fax) (312) 744-1088 (TTY/TDD)

IN THE MATTER OF)
)
George Blakemore, Bishop T.T. Turner,)
Minister D. Edw Shepard, and Web Evans,)
COMPLAINANTS)
and) CCHR Nos. 06-P-12,13,14,15,24
)
Bitritto Enterprises, Inc. d/b/a Cold Stone) Date of Order: March 21, 2007
Creamery #0430, and Casie Ernst, Manager) Date Mailed: March 27, 2007
RESPONDENTS)

FINAL ORDER ON LIABILITY AND RELIEF

TO: Costantino Taccogna, Agent Bitritto Enterprises, Inc. 8459 W. Windsor, #2 Chicago, IL 60656	Mecca Thompson Attorney for George Blakemore 79 W. Monroe St., Suite 1314 Chicago, IL 60603
Teresa Castanon Taccogna, Owner Cold Stone Creamery 1533 N. Wells Chicago, IL 60610	Web Evans 7616 S. Cottage Grove Chicago, IL 60619
Casie Ernst, Manager Cold Stone Creamery 1533 N. Wells Chicago, IL 60610	Minister D. Edw Shepard P.O. Box 7739 Chicago, IL 60680
	Bishop T. T. Turner 1213 W. 59 th Street Chicago, IL 60629

YOU ARE HEREBY NOTIFIED that, on March 21, 2007, the Chicago Commission on Human Relations issued a ruling in favor of Complainants George Blakemore, Minister D. Edw Shepard, and Web Evans in the above-captioned matter. The Commission ordered Respondents to do the following:

1. Pay to George Blakemore a total of \$2,000 in emotional distress damages, with \$500 to be paid by Bitritto Enterprises, Inc., and \$1,500 to be paid by Casie Ernst.
2. Pay to George Blakemore pre- and post-judgment interest on the foregoing damages pursuant to Reg. 240.700, dated from March 3, 2006 as to the \$500 to be paid by Bitritto Enterprises, Inc. and the first \$500 to be paid by Casie Ernst, and from March 28, 2006 as to the remaining \$1,000 to be paid by Casie Ernst.
3. Pay to Minister D. Edw Shepard \$1,000 in emotional distress damages, with \$500 to be paid by Bitritto Enterprises, Inc. and \$500 by Casie Ernst.
4. Pay to Minister D. Edw Shepard pre- and post-judgment interest on the foregoing damages as provided in Reg. 240.700, dated from March 3, 2006.

5. Pay to Web Evans \$1,000 in emotional distress damages, with \$500 to be paid by Bitritto Enterprises, Inc. and \$500 by Casie Ernst.
6. Pay to Web Evans pre- and post-judgment interest on the foregoing damages as provided in Reg. 240.700, dated from March 3, 2006.
7. Bitritto Enterprises, Inc. to pay a total fine of \$300.
8. Casie Ernst to pay a total fine of \$400.
9. Bitritto Enterprises, Inc. to notify the Commission, George Blakemore, Minister D. Edw Shepard, and Web Evans in writing of the last address it has for Respondent Casie Ernst, as well as any telephone number.

The Complaint of Bishop T.T. Turner (CCHR No. 06-P-13) was dismissed by the Hearing Officer on October 26, 2006, for failure to appear in a timely fashion at the administrative hearing and failure to cooperate with the Commission.

The findings of fact and specific terms of the ruling are enclosed. Compliance with this Final Order shall occur no later than 31 days from the later of the date of this order or the date of any Final Order concerning attorney fees.¹ Reg. 250.210.

Pursuant to Commission Regulations 100(14) and 250.150, to seek review of this order, parties 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 fees proceedings in this matter are now pending at the Commission, then such a petition cannot be filed until after the issuance of the Final Order concerning those fees.

Pursuant to Reg. 240.630, Complainant is ordered to file with the Commission and serve on the other parties and the Hearing Officer his statement of fees and/or costs, supported by argument and affidavits, no later than 24 days after the date of mailing of this Ruling to the parties, that is, on or before **April 20, 2007**. Any response to such statement shall be filed with the Commission and served on the other parties and the Hearing Officer within 14 days of the filing of the statement. Any reply brief by Blakemore shall be filed and served no more than 10 days after the filing of any response. A party may request additional time to file and serve any of the above items pursuant to the provisions of Reg. 270.130.

CHICAGO COMMISSION ON HUMAN RELATIONS
Clarence N. Wood, Chair/Commissioner

¹Payments 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 the case name and number. Payments of damages and interest are to be made directly to the Complainant. See Reg. 250.220 for information on seeking enforcement of an award of relief.

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FINAL RULING ON LIABILITY AND RELIEF

I. PROCEDURAL HISTORY AND PROCEDURAL RULINGS

a. The Complaint, Default Order and Hearings Scheduled

Complainants filed Complaints against Respondents on March 3, 2006, alleging that they were discriminated against by Respondents in a public accommodation. The Commission ordered the Respondents to file Verified Responses to the Complaints. On April 6, 2006, Complainant Blakemore filed an additional Complaint (CCHR No. 06-P-24) alleging retaliation by the Respondents for filing his original Complaint, during a subsequent visit to the establishment. When the Respondents failed without good cause shown to file and serve Verified Responses to the Complaints in CCHR Nos. 06-P-12 to 15 as required by CCHR Reg. 210.210, the Commission issued a Notice of Potential Default on April 13, 2006, and mailed it to the Respondents. When the Respondents also failed without good cause shown to file and serve Verified Responses to the retaliation complaint in CCHR No. 06-P-24, the Commission issued a Notice of Potential Default on May 10, 2006 and mailed it to the Respondents. When the Respondents further failed to respond to the Notices of Potential Default, the Commission issued an Order of Default for all Complaints on July 15, 2006.

By their failure to respond to the Notices of Potential Default, the Respondents were deemed to have admitted the allegations of the Complaints on both the discriminatory action and the retaliatory action and to have waived any defenses to the allegations of those Complaints, including defenses concerning the Complaints' sufficiency. CCHR Reg. 215.240.

The Commission held a Pre-Hearing Conference in this case on October 12, 2006, at 9:30 a.m. in the Commission's offices. Respondent Casie Ernst, manager of the Cold Stone Creamery store, did not appear, nor has there been any response from Ms. Ernst to any Commission order. Complainant Bishop T. T. Turner was late to this Pre-Hearing Conference. Complainant Turner

stated at the time that he did not get notice of the Pre-Hearing Conference; he had moved and had not kept the Commission informed of his new address as required by CCHR Reg. No. 235.110.¹ Complainant Turner appeared at the Pre-Hearing Conference because the other Complainants had informed him of the date. The Notice of the Pre-Hearing Conference date and other procedural matters sent to Complainant Turner had been returned to the Hearing Officer marked “forward time expired, return to sender.”

At the Pre-Hearing Conference, the Complainants were notified of the date of the administrative hearing and the fact that all parties were to appear promptly for the hearing. The parties were also informed that the hearing ordered in this case was to be held only for the purpose of allowing the Complainants to establish their *prima facie* case and appropriate relief, including injunctive relief, damages, fines, and any attorneys fees and/or costs. CCHR Reg. 215.240. All factual allegations of the Complaints subsequent to an Order of Default must be taken as true; Complainants were still required to establish a *prima facie* case in order for the Commission to award damages. *Horn v. A-Aero 24 Hour Locksmith et al.*, CCHR 99-PA-32 (July 19, 2000).

On the date of the hearing, Complainants Blakemore, Shepard, and Evans as well as the owners of Respondent Bitritto Enterprises, Inc., doing business as Cold Stone Creamery #0430 (hereinafter referred to as “Cold Stone Creamery #0430”), arrived in a timely fashion at or before 9:30 a.m.. Respondent Casie Ernst, store manager of Cold Stone Creamery #0430, did not appear, nor did she notify the Commission of any just cause for her failure to appear. In response to an inquiry by the Hearing Officer, Complainant Blakemore stated that Complainant Turner would arrive by 10:00 a.m., but he did not do so; this is discussed below. Tr., 5.²

b . Complainant Blakemore’s Motion for Continuance

Complainant Blakemore arrived at the hearing with an attorney whom he had retained the day before, Mecca Thompson. Complainant Blakemore’s attorney sought a continuance in order to prepare for the hearing. The Hearing Officer denied this continuance, noting that Complainant Blakemore had known about the date of the hearing since an order setting the hearing date was sent by the Commission on July 7, 2006. Tr., 3-5. Complainant Blakemore had further been informed about the date of the hearing by the Hearing Officer by order dated July 17, 2006. When asked what were the extraordinary circumstances that would support a motion for continuance on the morning a hearing was to commence, Complainant Blakemore’s sole answer was “finance.” Tr., 4. No further evidence was offered.

Pursuant to the discretion granted to the Hearing Officer in CCHR Reg. No. 240.391, the

¹“A Complainant has the responsibility to promptly provide the Commission with notice of any change in address or prolonged absence from a current address so that he or she can be located when necessary at any time while the Complainant’s case is pending before the Commission. . . .”

²All references to the official transcript will be labeled “Tr., x.” All references to the Complaint will be labeled “C. ¶x.”

Hearing Officer denied the motion to continue the hearing as not being reasonable under the circumstances, but did allow Complainant Blakemore's attorney to have time to attempt to settle this matter and to review the case file to determine if there were any documents not previously given to her by her client. The Commission has continued cases where a complainant has shown he was diligent in seeking counsel, but no such evidence was offered in this case. See *Scott v. Noble Horse*, CCHR No. 92-E-153 (Sep. 22, 1993) (continuance allowed where complainant had been diligent in seeking counsel); *Ferguson v. EWS Tailoring & Fashion Academy et al.*, CCHR 98-E-147 (June 3, 1999) (continuance denied where motion filed less than 7 days before the hearing, "extraordinary circumstances" not shown, and counsel's inability to devote sufficient effort to case does not constitute good cause to delay hearing). See also *Blakemore v. Starbucks Coffee Co.*, CCHR No. 97-PA-99 (Feb. 24, 1999) (Board upheld Hearing Officer's denial of Complainant's request for a continuance of the hearing, as Complainant did not make the request until the day of the hearing, as he had not shown due diligence to find an attorney, and as sanctions already imposed meant having an attorney would not have been meaningful).

Complainant Blakemore's motion for a continuance was denied. The hearing reconvened when Complainant Blakemore's attorney stated that they were unable to settle the case and she had reviewed the case file. The hearing began again at approximately 10:30 a.m. Complainant Turner had not appeared.

c. Dismissal of the Complaint of Bishop T.T. Turner

At 11:30 a.m. on the date of the hearing, Complainant Turner appeared at the hearing talking on his cell phone as he entered the hearing room. The Hearing Officer asked him to turn off his cell phone and to explain why he was two hours late to the scheduled hearing that he had been informed about at the Pre-Hearing Conference. Tr., 33. Complainant Turner responded in an aggressive manner that he had not received any documents from the Hearing Officer, who reminded him that he had been personally informed about the time of the hearing at the Pre-Hearing Conference and had been admonished to be on time. Tr., 34-35. Complainant Turner responded, "I was on the road all night driving to get here. Now I don't need no hassle about my being here." Tr., 35.

The Hearing Officer noted that Complainant Turner had his cell phone with him, as it was with him as he walked into the hearing room and had been with him during the Pre-Hearing Conference. Tr., 36. The Hearing Officer noted that Complainant Turner had not called to notify the Commission that he was going to be late. Based on Complainant Turner's lateness, his lack of extraordinary circumstances to justify that lateness, his disrespect shown to the process and the Hearing Officer, and his previous incidents of disrespect for the Commission's procedures and rules, the Hearing Officer dismissed Complainant Turner's complaint. Tr., 37-47.

Complainant Turner and the Hearing Officer had a lengthy discussion about her decision, a discussion that was heated, loud, and occasionally profane on the part of Complainant Turner. Tr., 37-47. Toward the end of this discussion, Complainant Turner asked again why his case was being dismissed. In response to the Hearing Officer's statement that his case was being dismissed because

he was two hours late without any evidence of good cause, Complainant Turner stated, “This is Chicago, baby.” Tr., 43. Citing Chicago traffic as an excuse when all other parties had come promptly to the hearing is not a sufficient excuse, particularly when viewed in the context that Complainant Turner had not cooperated with the Commission’s Regulations by failing to inform the Commission of his current address, being late to the previous Pre-Hearing Conference, and not seeking to notify the Commission personally that he was unavoidably detained for the hearing.

Reg. 240.398 (“Failure to Appear”) of the Commission’s Rules and Regulations provides that if a party fails to attend a hearing and the failure is not excused for good cause, the Hearing Officer may enter an Order dismissing the Complaint for failing to cooperate. Citing heavy traffic as a reason for being two hours late cannot by any definition be good cause, particularly where the Complainant did not attempt to contact the Commission despite having a cell phone. Reg. 235.120(b) (“Failure to Cooperate”) provides that after the commencement of a hearing a hearing officer may *sua sponte* dismiss a complainant’s case for failure to cooperate. Arriving two hours late without any good excuse – especially when this Complainant had a history of failing to abide by Commission rules – is clearly failure to cooperate and shows a remarkable disrespect for the Commission, his fellow Complainants, the Respondents, and the Commission’s process. Showing that kind of disrespect to the Regulations and the Commission participants has been held to be an adequate reason for dismissing a case. *Blakemore v. AMC-GCT, Inc.*, CCHR No. 03-P-14 (Apr. 21, 2006). See also *Karlin v. Chicago Board of Education, et al.*, CCHR No. 95-E-62 (Dec. 8, 2000) (in declining to dismiss case, CHR cites prior decisions which hold that dismissal is a “severe sanction which should not be entered in a punitive manner, especially where the underlying omission was due to error, not disregard for the Commission’s procedures”).

Complainant Turner’s case is dismissed. In response to the motion of Complainant Blakemore’s counsel, Complainant Turner was allowed to stay in the hearing to act as a witness. Tr. 39-40.

d. Motion by Complainant Blakemore to Add a Respondent

Commission Reg. 210.120 (“Filing of Complaint”) provides that it is a complainant’s responsibility to identify the individuals and/or other entities the complainant wishes to name as respondents. These entities include including corporations and agents. See Commission Reg. 100 (25). The corporate franchisor was not named as a respondent by Complainant Blakemore in his initial complaint. C.

After he had filed his Complaint with the Commission, Complainant Blakemore orally contacted the Commission and sought to have the Commission add the corporate franchisor to the proceedings. Commission Reg. 210.160 (d) provides that a request to add a respondent before the hearing must be in writing; requests at the hearing may be made orally unless the Hearing Officer requires it to be in writing. Complainant Blakemore never filed a written motion to amend his complaint to add an additional party, as is required by Commission regulations. Prior to the Hearing Officer being appointed, Complainant Blakemore’s oral request to add the corporate franchisor was

denied by the Commission as Complainant Blakemore had not followed Commission regulations.³

At the hearing, Complainant Blakemore's counsel sought to preserve for appeal Complainant Blakemore's position that the corporate franchisor should be a named party.⁴ Tr., 8. Neither Complainant Blakemore nor his attorney presented any evidence of the corporate relationship between any corporation and the Respondent Cold Stone Creamery #0430. One of the owners of Cold Stone Creamery #0430 testified that they were a franchisee. Tr.,70. The Respondent described the relationship as follows:

Cold Stone Creamery [the franchisor] creates the idea, the concept of the ice cream that we serve and then individuals have the opportunity to invest in a business that they give you all the plans to, how to process, and move forward with business.

Tr., p. 70.

The owner of Respondent Cold Stone Creamery #0430 also testified that he sent a copy of the complaint to and contacted the corporate franchisor, who informed him that the corporation was not named and the matter was between the owners of Respondent Cold Stone Creamery #0430 and the Complainants. Tr., 69-71. That is the sum total of any evidence of the relationship of the Respondent Cold Stone Creamery #0430 with any corporation. Complainant Blakemore's attorney did not ask any additional questions to establish the kind of relationship the Respondent Cold Stone Creamery #0430 had with its corporate franchisee.

There is a "certain degree of control is inherent in any franchise agreement." *Mann v. Prudential Real Estate Affiliates, Inc.*, 1990 WL 205286, *3 (Ill. 1990). However, the "clear trend in case law . . . is that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes." *Kerl v. Rasmusen*, 273 Wis.2d 106, 126-127 (Wis. 2004) and cases cited therein. In *Slates v. Int'l House of Pancakes, Inc.*, 90 Ill.App.3d 716 (Ill. 1980), no agency relationship was found between the franchisor and franchisee, despite the fact that the franchisor maintained control over the items and products to be sold, training and supervision of franchisees, store managers and advertising and the appearance of the store, its employees, and food preparation. *Id.* at 727.

At least one federal court has considered whether a franchise agreement provides for sufficient control by the franchisor to be held liable under a federal accommodations statute. The court in *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995) considered whether a franchisor which had control over such things as accounting, personnel uniforms and use of

³Complainant Blakemore has filed numerous complaints with the Commission and should be well aware of the regulations and the requirements to review and follow them.

⁴At no time did Complainant Blakemore's attorney specifically move to add the corporate franchisor as a Respondent; her sole request was to "preserve that for appeal." Tr., 8.

trademarks could be held liable under the Americans with Disabilities Act.⁵ The court found that the relevant inquiry must be whether the franchisor had control over the particular aspect of the franchisee's business that gave rise to the alleged discriminatory actions. *Id.* In this case the issue is whether Complainant Blakemore has provided proof that the franchisor exercised sufficient control over the manager, personnel training or personnel policies and that these actions caused the alleged harm.

Not only did Complainant Blakemore fail to provide any evidence that the franchisor had any control over the everyday operations, finances or personnel of Respondent Cold Stone Creamery #0430, but also he failed to provide any evidence of a causal connection between the discriminatory acts and that control. There is no basis upon which to rule that the corporate franchisor had any responsibility for the actions of the Respondent Cold Stone Creamery #0430 or its personnel. All of the allegations in Complainant Blakemore's complaint are against one employee, the manager. It is the Complainant's responsibility to bring information about the corporation's control or responsibility to the attention of the Commission at the investigation stage in writing or orally during the hearing, and the Complainant failed to do so at any stage of this process.

At the hearing, the attorney for Complainant Blakemore sought to preserve this issue for appeal but made no proffer of evidence in support of this request. Therefore, Complainant Blakemore's motion to add the corporate franchisor is denied.

e. Objections Filed by Complainant Blakemore to the First Recommended Decision are Without Merit

The First Recommended Decision Regarding Liability and Damages was issued by the Hearing Officer on December 21, 2006; copies were sent to all Complainants and Respondents. The only Objections to the First Recommended Decision were filed by Complainant Blakemore *pro se*. Complainant Blakemore's attorney filed no Objections on his behalf.

As Complainant Blakemore was represented by counsel, his Objections filed *pro se* were not properly filed without notice that he was no longer represented by counsel. Commission Reg. 270.130 and Commission Reg. 270.340. Although the Commission has no obligation to address these issues, the issues will be addressed so that Complainant Blakemore will understand why – even if they had been filed by his counsel – they would have been denied.

First, Complainant Blakemore argues that the owners of the Respondent Cold Stone Creamery have no right to testify because this was a hearing on default. Objections, p. 1. As will

⁵The ADA public accommodations statute and the Chicago Human Relations Regulation are noticeably similar. CCHR Reg. 520.100 states that "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 the public accommodation . . ." ADA Section 302, 42 U.S.C. §12182, states that no person shall be denied full and equal enjoyment of a public accommodation "by any person who owns, leases (or leases to), or operates a place of public accommodation."

be more fully explained later in this opinion, an order of default entered against a respondent means that the facts alleged in the complaint would be taken as true – and they were – and that the respondent cannot object to the sufficiency of the complaint. If a complaint alleged sufficient facts to establish a *prima facie* case, any hearing must be held solely to determine the remedies available to the complainants, including damages. *Id.* The amount and type of remedies remains the subject of the hearing, and on that matter, both the complainants and respondents can be, and in this case were, heard.

It remains a complainant's burden to establish the extent of damages. *Blakemore v. General Parking*, CCHR No. 99-PA-120 (February 21, 2001). The testimony offered at the hearing by the owners of the Respondent Cold Stone Creamery was about their personal beliefs, management style, policies to prevent this kind of discrimination, conversations with the manager after the events in question, and the franchise relationship; this testimony was taken into account in determining remedies. The owners of the Respondent Cold Stone Creamery did not testify about the events in question as described in the Complaint; they were not present for those events. *Id.* Nor have they contested the Order of Default or the recommended finding of a *prima facie* case of race discrimination. Therefore, Complainant Blakemore's objections to this testimony by the owners of the Respondent Cold Stone Creamery are overruled.

Second, Complainant Blakemore objects to the determination by the Hearing Officer that Respondent Casie Ernst had knowledge of the hearing. Objection, page 2-3. This determination was based on the testimony of the owners of the Cold Stone Creamery store. Complainant Blakemore argues that he should have received notice that the Commission was contemplating a Dismissal of Respondent Ernst. He is mistaken. Respondent Ernst was not dismissed as a Respondent; to the contrary, she has been found liable. Her failure to attend the hearing does not mean that she is not liable. See CCHR Reg. 210.270, which provides that one an individual respondent has knowledge of a complaint, the respondent has a continuing obligation to notify the Commission of any change of address or telephone number; if the respondent fails to update this contact information, it cannot later rely on its failure to receive any order, notice, or other document as a defense. Complainant Blakemore's objections as to Respondent Ernst are thus overruled.

Third, Complainant Blakemore objects to the determination that punitive damages will not be assessed because this was one isolated instance, the manager has been dismissed, and the owners have instituted better management practices. Again, this objection is based in large part on Complainant Blakemore's incorrect argument that respondents cannot testify at a hearing based on default. For the reasons stated above, that objection is overruled.

Fourth, Complainant Blakemore once again asserts he should have been given a continuance, citing his failure to have money for an attorney earlier as an "extraordinary circumstance." For the reasons stated above, that objection is overruled.

Finally, Complainant Blakemore objects to the amount of damages awarded. Objections, page 3. For the reasons cited below, this Objection is also overruled.

II. FINDINGS OF FACT

1. On March 3, 2006, around 3:00 p.m., Complainants George Blakemore, D. Edward Shepard, and Web Evans went to Cold Stone Creamery #0430 to purchase ice cream. C., ¶2⁶ All of the Complainants are African-American.
2. Complainant Bishop T. T. Turner accompanied the Complainants to Cold Stone Creamery #0430 to purchase ice cream on March 3, 2006. Complainant Turner is African-American. C.
3. Cold Stone Creamery #0430, located at 1533 North Wells Steet, Chicago, Illinois, is a business that sells ice cream to the public. Tr., 22.. There was a waiting line for the ice cream on March 3, 2006. Tr., 22.
4. While Complainants waited in line, they observed the manager, Casie Ernst (hereinafter "manager"), who was female and white, give coupons to white customers who were behind the Complainants in line. The manager offered no coupons to Complainants. C. 3, Tr. 22-23, 30-31.
5. The Complainants asked the manager why she gave the white customers coupons but did not give them coupons. The manager told them it was in her discretion to give coupons to those who were waiting. The Complainants said they were also waiting. C. 3, Tr. 23, 57. Complainant Blakemore felt that the manager was handling the coupons as if they were secrets. Tr. 56-57. He thought the manager was being mean-spirited. Tr. 57.
6. A few minutes after the discussion about coupons, the manager returned from the back of the store and gave the Complainants coupons. C. 4, Tr. 26.
7. Complainant Turner arrived later than the other three Complainants. He also had to wait in line. He also had to ask the manager for a coupon. The manager gave him a coupon. C. 5.
8. After getting their ice cream, the Complainants took a seat to eat the ice cream. The manager approached them, told them they made her feel uncomfortable, and told them to leave and never come back. The manager further said that if they did not leave immediately, she would call the police. C. 6, Tr. 25, 30, 49.
9. After the manager said she would call the police, the Complainants waited 15 to 20 minutes, but no police came. Tr. 24.⁷ Complainant Turner wanted the manager to call the police and had to be calmed down by his fellow Complainants. Tr. 51. Complainant Turner wanted to see what the

⁶ All of the Complaints filed were identical in language, except for Complainant Turner's Complaint.

⁷ There were various allegations that some of the Complainants "heard" that the police had been told that tables were turned over and that Complainants were trying to destroy the facility. Tr. 25. No one stated where this information came from and thus it does not have sufficient credibility to support a finding of fact.

police were going to do because he felt that generally police beat African-Americans for nothing; he asserted that someone could have been killed. Tr. 51-52. Hearing this testimony at the hearing, Complainant Blakemore became very emotional about the situation and had to leave the hearing room. Tr. 52.

10. The Complainants felt embarrassed and humiliated after the manager denied them full access to the facility. C. 6. They did not receive a refund for their ice cream. Tr. 26, 32, 50-51.

11. Complainant Shepard was a police officer for 33 years; he is now retired. He is also an ordained minister; he has been practicing since 1983. Tr. 21.

12. Complainant Evans is also a minister. He has operated a co-op store for about 35 years. He has established an organization to get more people, particularly African Americans, into business; he teaches people how to operate successful businesses. He has been a speaker for the Small Business Administration telling people how to operate successful businesses. Complainant Evans also works with a pastor's conference, of about 200 ministers, which meets weekly to discuss how to make the communities in which they live better communities. Tr. 27-29.

13. Complainant Evans noted that the owners of the business were not involved in the situation he complained of; it was the employee-manager. Tr. 33. He has been in business for 33 years and recognizes that sometimes his employees do things he does not approve of. Tr. 32. He believes that an employer should be responsible. Tr. 33.

14. None of the Complainants are teenagers or young adults; Complainant Evans is 93 years old. Tr. 50. Complainants Turner and Blakemore spoke at great length about the fact that they felt threatened by the threat of calling the police and talked about African Americans being jailed for nothing. Tr.48-51.

15. Complainant Blakemore is a vendor. Tr. 32. He is very sensitive and cautious about racial discrimination. Tr. 57. He is very observant about the way African Americans are treated in the presence of white people. Tr. 57. He was very uncomfortable when the manager threatened to call the police because of the history of treatment of African Americans by police officers. He cited the history of African Americans being lynched and noted that police always believe white women over African American males, citing the experience of Emmett Till. Tr. 59-67.

16. Complainant Blakemore returned to the Respondent Cold Stone Creamery #0430 on March 28, 2006, or about three weeks after the original events. He was by himself. C. 1. The manager said that he was not to enter the premises and threatened to call the police. C. 2, Tr. 61-62. Complainant Blakemore left the premises and filed his Complaint alleging retaliation. C. 1-4.

17. At the hearing, Complainant Blakemore also complained that the Hearing Officer was a white woman and stated that she denied a continuance and dismissed Complainant Turner's case because she is racist. Tr. 60, 61.

18. Complainant Shepard said that he and Complainant Blakemore had often gone to the Cold Stone Creamery #0430 prior to this incident and loved the store and the ice cream. Tr. 84-85. He felt that the problem was with the manager; he did not know what the source of her problem was. Tr. 85. Complainant Blakemore had recommended going to Cold Stone Creamery #0430. Tr. 22.

19. Cold Stone Creamery #0430 is owned and operated by Bitritto Enterprises, Inc., whose owners are Constantino Taccogna and Theresa Tacconga, who are husband and wife. Tr. 72. Constantino Taccogna is an immigrant to this country; Theresa Tacconga is Hispanic. Tr. 74-75.

20. When the Complaints were sent by the Chicago Commission on Human Relations to Cold Stone Creamery #0430, they were received by the manager. The manager did not notify the Taccognas that Complaints had been filed. Tr. 72-73. The manager did not show the Complaints to the Taccognas until after the Order of Default was entered. Tr. 73. When the Taccognas became aware of the situation, they terminated the manager's employment. Tr. 72. She no longer works for their organization. Tr. 72.

21. The Taccognas talked with the manager about the Complaints and showed her the Complaints. Tr. 73. The Taccognas also left telephone messages about the scheduled hearings, but the manager did not returned their phone calls. Tr. 73.

22. The Taccognas do not tolerate the kind of behavior the Complainants complained happened in their establishment. They have policies on how to treat people equally. Tr. 74-76, 79.

23. Cold Stone Creamery #0430 is a franchise operation. Tr. 70. The corporate franchisor of Cold Stone Creamery #0430 created the concept of the ice cream and gives franchisees the plans for the ice cream and how to run the business. Tr. 70.

24. Commission records show that it mailed Respondent Notification packets to Respondents on or about March 10, 2006. The mailings included copies of the Complaints numbered 06-P-12, 06-P-13, 06-P-14, and 06-P-15. Two copies were sent, to each of the following addresses:

Cold Stone Creamery	Cold Stone Creamery
c/o Owner or Manager	c/o Stacy, Manager
1533 N. Wells	1533 N. Wells
Chicago, IL 60610	Chicago, IL 60610

III. CONCLUSIONS OF LAW

1. The Chicago Human Rights Ordinance prohibits discrimination in public accommodations on the basis of race. The Chicago Human Rights Ordinance, Section 2-160-070, states in 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 race

2. Each Complainant was a member of a class protected under the Chicago Human Rights Ordinance against discriminatory practices in public accommodations. CHRO, Section 2-160-070.

3. Each Respondent failed to file a Verified Response to any of the Complaints. As a result of their failure to file a Verified Response, and after notice of the consequences of that failure, an Order of Default was entered against each Respondent on July 15, 2006.

4. Due to the entry of the Order of Default, the Commission is bound to find that Respondents have admitted all of the *facts* alleged in Complainant's complaint. See *Horn v. A-Aero 24 Hour Locksmith et al.*, CCHR No. 99-PA-00 (July 19, 2000); *Soria v. Kern*, CCHR No. 95-H-113 (July 18, 1996); *Starrett v. Duda*, CCHR No. 93-H-6 (Apr. 20, 1996); *Rottman v. Spanola*, CCHR No. 93-H-21 (Mar. 8, 1996). Also by virtue to the Order of Default, Respondents were not entitled to object to the sufficiency of the Complaints' allegations. CCHR Reg. 215.240 ("A Respondent against whom an Order of Default has been issued shall be deemed to have admitted the allegations of the Complaint and to have waived its defense(s) to the allegations, including defenses concerning the Complaint's sufficiency.")

5. In a default case, if the facts alleged in the complaint are sufficient to show a *prima facie* case, no further proof of liability is necessary. *Godard v. McConnell*, 97-H-64 (January 17, 2001). A complainant may establish a *prima facie* case by two methods, the direct method or by inferences drawn from the facts proven in the case.

6. Under the direct evidence method, a complainant may meet the burden of proof by a preponderance of the evidence by establishing with credible evidence that the respondent directly stated or otherwise indicated that the complainant was being refused service or offered different service due to a complainant being to being a member of a protected class, in this case the complainant's race. See *Perez v. Kmart Auto Service, et al.*, 95-PA-19/28 (Nov. 20, 1996). There is no such evidence in this case.

7. If a complainant cannot provide direct evidence of discriminatory intent, the complainant must rely on inferences to be drawn from the actions of the respondent. The Commission has adopted the *McDonnell Douglas* test formulated by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). The complainant must establish a *prima facie* case of discrimination; the respondent then has the burden of articulating a non-discriminatory basis for the actions with regard to complainant; and then the burden shifts to the complainant to establish that the basis put forth by respondent is pretextual. See *Perez v. Kmart Auto Service, et al.*, 95-PA-19/28 (Nov. 20, 1996). A complainant must establish the following factors in a *prima facie* case of public accommodations discrimination based on being African-American: (1) that complainant is African-American; (2) that complainant sought to use and enjoy the public accommodation; (3) that the full use of the public accommodation was withheld, denied, curtailed, or limited in some way or that he was otherwise discriminated against concerning the use of the public accommodation; and (4) that

other individuals who are not African-American were treated more favorably.

8. Complainants George Blakemore, Web Evans and D. Edw Shepard have met their burden of establishing a *prima facie* case in their Complaints about the original actions. They are all African American; all sought to purchase and eat ice cream at the Respondents' establishment; all were treated differently with regard to coupons being dispensed by the manager; all had their ability to use and enjoy the facility (sit and eat their ice cream) curtailed by threats to call the police by the manager; and white patrons in the same establishment were not subjected to the same treatment. All these Complainants further asserted that they were interested in enjoying their ice cream at a table and were not allowed to do so. Because these facts are also stated in their Complaints and the Respondents defaulted, these facts must be taken as true.

9. As to Complainant Blakemore's retaliation claim, Chicago Municipal Code Section 2-160-100 provides as follows: "No person shall retaliate against any individual because that individual in good faith has made a charge, testified, assisted or participated in an investigation, proceeding or hearing under this chapter." In order to establish a violation of retaliation, it is a complainant's burden to show that he engaged in activity protected by the Ordinance provision cited above (in the Chicago Human Rights Ordinance), that the respondent took an adverse action against the complainant, and that there is a nexus between the two actions. *Diaz v. Prairie Builders*, CCHR No. 91-E-204 (October 21, 1992).

10. Although the Hearing Officer concluded that Complainant Blakemore had not established a *prima facie* case of retaliation, the Commission disagrees and concludes that there is sufficient evidence of a *prima facie* case to support his retaliation claim in CCHR No. 06-P-24. In that Complaint, Complainant Blakemore stated that he went back to Cold Stone Creamery #0430 on March 28, 2006 and that the manager told him he could no longer patronize the establishment and she would call the police if he attempted to enter. C. ¶¶1 and 2. Complainant then "*contends* that this is retaliation because on December 12, 2005, I filed a complaint against Cold Stone Creamery and Keenan Camp, and on March 3, 2006 I filed another complaint against Cold Stone Creamery and the Manager, Stacy." C. ¶3 (emphasis added). The Hearing Officer concluded that there was no evidence in Complainant Blakemore's Complaint or in his testimony that the manager, Casie Ernst, knew of the existence of either complaint cited by Complainant Blakemore. However, the record in this case does contain evidence which supports an inference from these Complaint allegations that the Ernst knew of the filing of Complainant's complaint in CCHR No. 06-P-12.

11. Specifically, the Respondent Notification documents for CCHR No. 06-P-12 (as well as 06-P-13, 14, and 15) were mailed to the Cold Stone Creamery store at its correct address of 1533 N. Wells St. in Chicago. One set was addressed to the attention of the "Owner or Manager" of the store and the second was addressed to "Stacy, Manager." (Finding of Fact #24) The store owners testified at the hearing that the store manager, Casie Ernst, received and was aware of the Complaints filed by all four Complainants. (Finding of Fact #20) Commission Regulation 270.210 provides that service by mail is deemed complete three days after mailing unless it is proved that the addressee did not actually receive the service on that day. In this case, that means that the store manager is deemed

to have received notice of the filing of the first four Complaints on or about March 13, 2006. (Finding of Fact #24) Complainant Blakemore alleges in CCHR No. 06-P-24 that he returned to the store and experienced the alleged retaliatory incident on or about March 28, 2006. That is more than sufficient time to support an inference that, when Ernst took the alleged action toward Complainant Blakemore, she was aware of his filing of the Complaint in CCHR No. 06-P-12. Thus there is sufficient evidence of a nexus between Blakemore's filing of a Complaint at the Commission and the actions of the Ernst on March 28, 2006, to support a *prima facie* case that retaliation played a part in her actions.⁸

12. The Commission has held that, in general, a principal may be held liable for the acts of its agents under the Chicago Human Rights Ordinance and has a non-delegable duty not to discriminate. *Kalecki v. Jake's Pub & Johnson*, CCHR No. 93-E-173 (Jan. 31, 1994); *Doxy v. Chicago Public Library*, CCHR No. 99-PA-31 (Apr. 18, 2001). Ernst as store manager was an agent of the business at least with respect to ensuring the provision of customer service free from discrimination or retaliation. To that extent, she had the ability to affect the legal relationships of the business which owned and operated the store. See *Gallegos v. Baird & Warner et al.*, CCHR No. 01-H-21 (Jan. 18, 2002). Nevertheless, the Commission views Ernst as most directly responsible for the retaliation, given that she knew about the Complaints arising out of the incidents on March 3, 2006, while the business owners did not because she failed to inform them; thus the Commission believes Ernst should be assessed higher penalties in light of her personal conduct.

13. In summary, Complainants Blakemore, Shepard and Evans have established *prima facie* cases of race discrimination in connection with the incidents of March 3, 2006 and Respondents are found to have violated Section 2-160-170 of the Chicago Human Rights Ordinance as to those actions. Complainant Blakemore has established a *prima facie* case of retaliation in connection with the actions on March 28, 2006. Complainant Turner's complaint has been dismissed as discussed above.

IV. Remedies

a. Actual Damages

In order for Complainants to be awarded damages, they must prove by a preponderance of the evidence that the actions of Respondents caused the Complainants some compensable damages. None of the Complainants presented any evidence of actual damages other than for emotional distress.

All of the Complainants testified about the hurt and humiliation they experienced due to the

⁸Complainant Blakemore had filed an earlier Complaint against this Cold Stone Creamery store, CCHR No. 05-P-126, on December 12, 2005. The record in that case shows that the Respondent Notification was mailed to the store on December 14, 2005. That Complaint concerned the actions of another employee, described as a clerk, and the case was closed on August 10, 2006. The Commission does not base its finding of retaliation on whether or not manager Casie Ernst was aware of this Complaint, but only on her awareness of the Complaint Blakemore filed against her as CCHR No. 06-P-12.

discriminatory conduct. All testified about their history of experiencing racism and the fears that calls for police would evoke. This was compelling testimony. However, none of the Complainants testified about loss of sleep, inability to eat, nightmares, loss of weight or any other physical or mental manifestations that the incident caused. None testified about trips to medical professionals or therapists. See *Godard v. McConnell*, CCHR No. 97-H-64 (Jan. 17, 2001).

In *Blakemore v. Inter-Parking, Inc.*, cited above, the Commission addressed a similar situation. As the Commission stated:

The Commission has repeatedly held that respondents “must take complainants as they find them, be they particularly vulnerable or particularly resilient.” E.g., *Barnett and T.E.M.R Jackson Rental & Jackson*, CCHR No. 97-H-2000 (Dec. 6, 2000); *Winter v. Chicago Park Dist.*, CCHR No. 97-PA-55 (Oct. 18, 2000), citing *Sheppard v. Jacobs*, CCHR No. 94-H-162 (July 16, 1997); *Soria v. Kern*, CCHR No. 95-H-13 (July 17, 1996) and *Koshaba v. Kontalonis*, CCHR No. 92-H-171 (Mar. 16, 1994). However, the Commission must still determine whether the emotional trauma complained of was proximately caused by the illegal conduct. This is a question of fact to be decided on the totality of the evidence.

The Complainants in this case testified, as did Complainant in *Blakemore v. Inter-Parking, Inc.*, about their perception of the difficulties of being an African-American male in contemporary American society. In the *Inter-Parking* case, the Commission found that the trauma was a cumulative trauma caused not merely by one isolated incident. In this case, there was extensive testimony that the threat to call the police evoked strong emotions. If the Complainants felt extremely threatened as they testified, however, it is not credible that they would have stayed to wait for the police to arrive as they testified they did. I observed that these were articulate and proud men who were very capable of verbally defending themselves. In addition, if Complainant Blakemore was so traumatized by this event, it is confounding that he would return to the Respondents’ place of business by himself a little more than three weeks later.

This analysis is similar to the analysis in *Blakemore v. Inter-Parking, Inc.*, in which the Complainant was awarded \$1,000 in damages for being ordered off a parking lot in front of white patrons. The Commission agrees with the Hearing Officer that an award of \$1,000 each for Complainant Blakemore, Complainant Shepard, and Complainant Evans is appropriate as emotional distress damages for the race discrimination of March 3, 2006. Complainant Blakemore is awarded an additional \$1,000 in emotional distress damages for the retaliation of March 28, 2006, based on the same analysis. No award shall be made to Complainant Turner, as his case was dismissed at hearing for the reasons stated above.

All of the discriminatory or retaliatory actions complained of were by the manager, Casie Ernst. The manager did not give coupons, demanded that the Complainants leave, and threatened to call the police. She also did not inform the owners that she had received complaints filed against her and the Cold Stone Creamery #0430. She did not participate in the proceedings despite having knowledge of them.

The Complainants recognized this, by stating that the manager was at fault. However, both the Complainants and the Respondent owners recognized that owners have liability. The Hearing Officer recommended that the emotional distress damages for the actions of March 3, 2006 be apportioned at 75% assessed against Ms. Ernst and 25% assessed against Cold Stone Creamery #0430. The Commission recognizes that the store owners did not directly engage in the discriminatory conduct, but nevertheless believes that they should bear more substantial responsibility for the discrimination which occurred and so apportions these damages at 50% against each named Respondent. The business Respondent is also urged to assess whether its procedures and training of its employees are adequate to protect against further incidents of this kind. However, the additional emotional distress damages for the retaliation of March 28, 2006 are assessed 100% against Respondent Ernst, as the Commission regards her as most directly culpable for the retaliatory incident.

b. Punitive Damages

Punitive damages should be awarded where a respondent's actions are willful and wanton, malicious and/or taken in reckless disregard for the rights of the complainant. See *Blakemore v. Inter-Parking, Inc.*, CCHR No. 99-PA-120 at 9 and cases cited therein. In *Blakemore v. Inter-Parking*, the complainant complained of a single instance of a parking attendant yelling at him to get off the lot. The Commission in that case found that punitive damages were not required, as the encounter took only a few minutes and the respondent had been punished by having an order of default entered against it.

Similarly, in this case, the Complainants endured one isolated instance. The Respondents also have an order of default entered against them. There is no evidence that the Respondent Cold Stone Creamery has a pattern and practice of such discrimination. In fact, the Complainants had stated they had been there on multiple occasions without incident prior to March 3, 2006. In addition, the manager has been dismissed and is no longer in a position to take any discriminatory action at that store. For these reasons, no punitive damages will be awarded.

c. Fines

Section 2-160-120 of the Ordinance provides for a minimum fine of \$100 and a maximum fine of \$500. Again, this is not a situation that requires large fines to assure such actions will not be taken again. A fine of \$100 is imposed against Respondent Bitritto Enterprises, Inc., d/b/a Cold Stone Creamery #0430 and a fine of \$200 is imposed against Respondent Ernst in light of both the initial race discrimination of March 3, 2006 and her retaliatory actions of March 28, 2006.

d. Interest

In order to make complainants whole, the Chicago Human Rights Ordinance provides for the payment of interest for certain damages. Pursuant to Commission Regulation 240.700, pre- and

post-judgment interest on the emotional distress damages is hereby be awarded at the prime rate, adjusted quarterly, compounded annually. The starting date for the \$1,000 awards to each Complainant for the race discrimination is March 3, 2006. The starting date of the additional award of \$1,000 assessed against Respondent Ernst for the retaliation is March 28, 2006.

e. Attorney Fees and Costs

Section 2-120-510(l) of the Chicago Human Rights Ordinance empowers the Commission to award attorney fees to Complainant Blakemore, who was represented by counsel at the administrative hearing. Accordingly, he is awarded his attorney fees and associated costs subject to the procedures explained below.

f. Injunctive Relief

Chicago Municipal Code Section 2-120-150(l) authorizes injunctive relief as necessary to make prevailing complainants whole. Pursuant thereto, the Commission further orders Respondent Bitritto Enterprises, Inc. to notify the Commission and each prevailing Complainant in writing of the last address it has for Respondent Casie Ernst, as well as any telephone number. This remedy is proper to provide Complainants with information they are likely to need in order to enforce the Commission's other awards of relief.

V. CONCLUSION

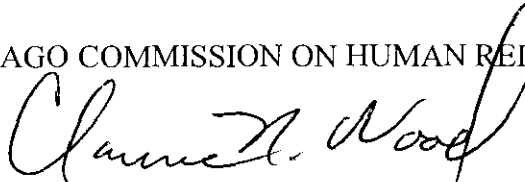
Complainants George Blakemore, Web Evans and Minister D. Edward Shepard have established by a preponderance of the evidence that Respondents Bitritto Enterprises (doing business as Cold Stone Creamery #0430) and Casie Ernst discriminated against them on the basis of race in the use and enjoyment of a public accommodation. In addition, Complainant George Blakemore has established by a preponderance of the evidence that Respondent Casie Ernst retaliated against him for the filing a Commission Complaint by her actions on March 28, 2006. Therefore, the Commission finds in favor of these Complainants and against these Respondents and orders relief in accordance with the discussion herein. Such relief is summarized as follows:

1. George Blakemore is awarded a total of \$2,000 in emotional distress damages, with \$500 to be paid by Bitritto Enterprises, Inc., and \$1,500 to be paid by Casie Ernst.
2. Blakemore is awarded pre- and post-judgment interest on these damages pursuant to Reg. 240.700, dated from March 3, 2006 as to the \$500 to be paid by Bitritto Enterprises, Inc. and the first \$500 to be paid by Casie Ernst; and from March 28, 2006 as to the remaining \$1,000 to be paid by Casie Ernst.
3. Minister D. Edw Shepard and Web Evans are each awarded \$1,000 in emotional distress damages for race discrimination, with \$500 to be paid by Bitritto Enterprises, Inc. and \$500 by Casie Ernst.

4. Shepard and Evans are each awarded pre- and post-judgment interest on their above damages as provided in Reg. 240.700, dated from March 3, 2006.
5. Bitritto Enterprises, Inc. is ordered to pay a total fine of \$300, at \$100 as to each of the three prevailing Complainants.
6. Casie Ernst is ordered to pay a total fine of \$400, at \$100 as to each of the prevailing Complainants plus an additional \$100 in light of the retaliation.
7. Bitritto Enterprises, Inc. is ordered to notify the Commission, George Blakemore, Minister D. Edw Shepard, and Web Evans in writing of the last address it has for Respondent Casie Ernst, as well as any telephone number.
8. George Blakemore is awarded his attorney fees and associated costs. Pursuant to Reg. 240.630, he is ordered to file with the Commission and serve on the other parties and the Hearing Officer any statement of fees and/or costs, supported by argument and affidavits, no later than 24 days after the date of mailing of this Ruling to the parties. Any response to such statement shall be filed with the Commission and served on the other parties and the Hearing Officer within 14 days of the filing of the statement. Any reply brief by Blakemore shall be filed and served no more than 10 days after the filing of any response. A party may request additional time to file and serve any of the above items pursuant to the provisions of Reg. 270.130.

Complainant Bishop T.T. Turner failed to cooperate with the Commission and failed to appear in a timely fashion at the administrative hearing. Therefore, his Complaint is dismissed.

CHICAGO COMMISSION ON HUMAN RELATIONS

A handwritten signature in black ink, appearing to read "Clarence N. Wood", written over the printed name below.

By: Clarence N. Wood, Chair/Commissioner