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.

Arnold's Restaurant
Respondents.

Case No.: 08-P-24

Date of Ruling: August 18, 2010
Date Mailed: August 24, 2010

TO:

Matthew P. Weems
Law Office of Matthew P. Weems
180 N. Stetson St., Suite 3500
Chicago, IL 60610

Arnold DeMar, Owner
Arnold's Restaurant
4001 N. Broadway
Chicago, Illinois 60613

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on August 18, 2010, the Chicago Commission on Human Relations issued a ruling in favor of Complainant in the above-captioned matter, finding that Respondent violated the Chicago Human Rights Ordinance. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, the Commission orders Respondent:

1. To pay to Complainant compensatory damages in the amount of $500, plus interest on that amount from April 15, 2008, in accordance with Commission Regulation 240.700.

2. To pay a fine to the City of Chicago in the amount of $250.[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 order for injunctive relief stated in the enclosed ruling.

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[1]**COMPLIANCE INFORMATION:** Parties must comply with a final order after administrative hearing no later than 28 days from the date of mailing of the later of a Board of Commissioners' final order on liability or any final order on attorney fees and costs, unless another date is specified. See Reg. 250.210. Enforcement procedures for failure to comply are stated in Reg. 250.220.

Payments of damages and interest are to be made directly to Complainant. **Payments of fines** are to be made by check or money order payable to City of Chicago, delivered to the Commission at the above address, to the attention of the Deputy Commissioner for Adjudication and including a reference to this case name and number.

Interest on damages is calculated pursuant to Reg. 240.700, at the bank prime loan rate, as published by the Board of Governors of the Federal Reserve System in its publication entitled "Federal Reserve Statistical Release H.15 (519) Selected Interest Rates." The interest rate used shall be adjusted quarterly from the date of violation based on the rates in the Federal Reserve Statistical Release. Interest shall be calculated on a daily basis starting from the date of the violation and shall be compounded annually.

Pursuant to Commission Regulations 100(15) and 250.150, a party may obtain review of this order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law. However, because attorney fee proceedings are now pending, such a petition cannot be filed until after issuance of the Final Order concerning those fees.

Attorney Fee Procedure

Pursuant to Reg. 240.630, Complainant may now file with the Commission and serve on all other parties and the hearing officer a petition for attorney fees and/or costs as specified in Reg. 240.630(a). Any petition must be served and filed on or before **September 21, 2010**. Any response to such petition must be filed and served on or before **October 5, 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

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FINAL RULING ON LIABILITY

I. PROCEDURAL HISTORY

On April 24, 2008, Complainant Anthony Cotten filed a Complaint alleging that Respondent Arnold's Restaurant discriminated against him based on his disability (paraplegia) in violation of the Chicago Human Rights Ordinance, Ch. 2-160 Chicago Municipal Code, by failing to fully accommodate his disability on April 15, 2008. Specifically Complainant, who is confined to a wheelchair because of his disability, asserts that he was denied access to Respondent's restroom facilities because the doorways of the two restrooms were too narrow to allow him to enter in his wheelchair. Respondent filed a Response to the Complaint, and after completing its investigation the Commission found substantial evidence that Respondent violated the Ordinance as alleged.

By order dated May 14, 2009, the Commission appointed a hearing officer and set this matter for a pre-hearing conference on August 12, 2009. At the pre-hearing conference, Attorney Matthew P. Weems filed his appearance on behalf of Complainant and orally requested a period of discovery. Respondent appeared *pro se* and also requested a discovery period. A discovery period was allowed through September 16, 2009. By order dated September 30, 2009, the Commission set this case for an administrative hearing on October 27, 2009, and confirmed the agreed due date for pre-hearing memoranda as October 12, 2009.

The parties did not engage in discovery. On October 12, 2009, Complainant timely filed his pre-hearing memorandum. Respondent did not submit a pre-hearing memorandum.

At the administrative hearing on October 27, 2009, Complainant Anthony Cotten and Respondent's owner, Arnold DeMar, testified. No other testimony was presented. Both parties attempted to introduce documents into evidence, over the objections of the other party, which were not produced in a pre-hearing memorandum as required by CCHR Reg. 240.130(a)(2). Specifically, Complainant attempted to introduce into evidence a restaurant receipt purporting to prove that he was served at Respondent's restaurant on the date in question. Respondent objected on the basis that there was no proof that the receipt came from Respondent's restaurant. Respondent presented documents purporting to prove that it purchased a wheelchair and estimating the cost for remodeling its restrooms and adjacent areas to achieve wheelchair accessibility. Complainant objected to both on the basis of "undue surprise" in that said documents were not submitted prior to hearing in a pre-hearing memorandum, and on the basis that the construction estimate attached drawings that were not authenticated. The hearing officer accepted the documents of each party and reserved the right to

determine what weight, if any, to give each document.

II. APPLICABLE LEGAL STANDARDS

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

> No person that owns, leases, rents, operates, manages or in any manner controls a public accommodation shall withhold, deny, curtail, limit or discriminate concerning the full use of such public accommodation by any individual because of the individual's...disability.

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

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

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

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

To prove a *prima facie* case of disability discrimination with respect to a public accommodation, a complainant must show that he or she (1) is a person with a disability within the meaning of the CHRO; (2) is a qualified individual who satisfied all non-discriminatory standards for service; and (3) did not have full use of the subject facility, service, or function as other members of the public did. *Maat v. String-A-Strand*, CCHR No. 05-P-05 at 4 (Feb. 20, 2008), citing *Doering v. Zum Deutchen Eck*, CCHR No. 94-PA-35 (Sept. 14, 1995, as reissued Sept. 29, 1995). For example, an individual may be deprived of the full use of a facility where he or she cannot readily enter the front entrance in a wheelchair because of the existence of a barrier. *Maat v. String-A-Strand*, *supra* at 5.

If a complainant establishes these elements by a preponderance of the evidence, a respondent may prove by a preponderance of the evidence that providing full use of its public accommodation would cause undue hardship. See CCHR Reg. 520.105 and *Maat v. El Novillo Steak House*, CCHR No. 05-P-31 at 3 (Aug. 16, 2006). However, even if that initial showing of undue hardship is made, a respondent must also establish that (1) it reasonably accommodated the complainant or (2) it could not even reasonably accommodate the complainant without undue hardship. *Id.*

The Commission has consistently applied these principles to claims that a person who uses a

wheelchair for mobility due to disability was not able to fully access and utilize a facility that is a public accommodation. In addition to the decisions cited above, see, e.g., *Hanson v. Association of Volleyball Professionals*, CCHR No. 97-PA-61 (Oct. 21, 1998); *Massingale v. Ford City Mall and Sears Roebuck and Co.*, CCHR No. 99-PA-11 (Sept. 14, 2000); *Winter v. Chicago Park District*, CCHR No. 97-PA-55 (Oct. 18, 2000); *Schell v. United Center*, CCHR No. 98-PA-30 (Mar. 20, 2002); *Smith v. Owner of Sullivan's et al.*, CCHR No. 03-P-107 (Dec. 1, 2003); *Luna v. SLA Uno, Inc., et al.*, CCHR No. 02-PA-70 (Mar. 29, 2005); *Maat v. Villareal Agencia de Viajes*, CCHR No. 05-P-28 (Aug. 16, 2006); *Cotten v. Taylor Street Food and Liquor*, CCHR No. 07-P-12 (July 16, 2008); *Cotten v. Eat-A-Pita*, CCHR No. 07-P-108 (May 20, 2009); *Cotten v. Lou Mitchell's*, CCHR No. 06-P-9 (Dec. 16, 2009); and *Cotten v. La Luce Restaurant, Inc.* CCHR No. 08-P-34 (April 21, 2010).

III. FINDINGS OF FACT

In determining the following facts, the hearing officer relied on the testimony of Complainant Anthony Cotten and Respondent Arnold DeMar as well as review of the Complaint and Response. The hearing officer did not rely on the documents the parties presented at the hearing.

1. Complainant, Anthony Cotten, is a T12 paraplegic who requires the use of a wheelchair for mobility. (TR. 9)

2. Respondent, Arnold's Restaurant, is located at 4001 N. Broadway. The restaurant is owned and operated by Arnold DeMar. (TR 27)

3. Complainant testified that on April 15, 2008, he entered Arnold's Restaurant to order food while awaiting a ride after attending a doctor's appointment across the street from the restaurant. He stated that he ordered a piece of pie, then decided to use the restroom. (TR 7) He stated that he attempted to enter the restroom that was directly behind the register but could not fit his wheelchair through the restroom door. He stated that he then told an employee, Maribel, that he could not enter the restroom with his wheelchair and asked if there was another restroom, and she showed him a second restroom (TR 8, 12). Complainant stated that he tried but also could not get his wheelchair through the door of the second restroom.

4. Complainant testified that the doors of both restrooms were not wide enough for him to enter in his wheelchair. He testified that his wheelchair is twenty-eight (28) inches wide. (TR 46) He stated that he told Maribel that he could not get into the bathroom, asked for his check, paid for his pie, and left the restaurant. (TR 8, 11, 12)

5. Respondent submitted an internally conflicting Response to the Complaint. The Response consists of three pages. Page 1 alleges a lack of sufficient knowledge to respond to Paragraphs 1 and 2 of the Complaint and denies discriminating against Complainant. Page 2 of the Response admits the allegations contained in Paragraph 2 and 3 of the Complaint and denies Paragraph 4 of the Complaint. Page 3 of the Response states "No Agreement" to Paragraphs 1, 2, and 4 of the Complaint, and states "Grandfathered in" with respect to Paragraph 3 of the Complaint. Page 3 of the Response also asserts "This is a small rest., 50 seats, and it is a struggle to operate by a profit."

6. Respondent testified that he has owned and operated Arnold's Restaurant at the same location for more than 35 years. He stated that numerous people using wheelchairs have patronized his restaurant and have not complained of the restrooms being inaccessible. He stated that he is unaware

of whether any such patrons have attempted to use the restroom. (TR 27, 28) He stated that he believed that he was "grandfathered in" with respect to complying with accessibility standards for his restrooms. (TR 31)

7. Respondent testified that, after receiving the Complaint, he obtained two estimates for making his restrooms accessible according to the Americans with Disabilities Act or the "City Code." He stated the estimates were for total remodels of the restrooms, including widening of the doors. He stated that he did not obtain estimates that were specific just to the widening of the doors. (TR 33) He explained that he obtained estimates for the entire remodeling of the bathrooms because he thought that was required of him by this Commission. (TR 32)

8. Respondent testified at hearing that it would be impossible to widen the entrance doors to the restroom facilities without tearing out a bearing wall affecting two floors, plus moving equipment on both sides and in front of the restrooms and an electrical box, which would result in an undue burden regarding cost. (TR 33-34, 39-40)

9. Respondent submitted an estimate from Kostontino Construction Company, Inc., dated April 16, 2009, stating a cost estimate of $62,166.76 to demolish and build new ADA compliant toilet rooms, modify existing counter to accommodate wider aisle to the new toilets, and remove and replace existing flooring throughout the restaurant area except the kitchen and/or grill area. (Respondent's Exhibit 2,)

10. Respondent testified that subsequent to the complaint filed in this matter, he purchased a wheelchair that is eighteen inches wide which fits through the doors of both restrooms. He stated that he did not think that a wheelchair "as big" as Complainant's would fit through the entrance doors of the restroom. He stated that he would be willing to supply the wheelchair for use by any patron who is wheelchair bound and in need of the use of the restrooms. (TR 32, 41, 42)

IV. CONCLUSIONS OF LAW AND ANALYSIS

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

Complainant has proved that he is a person with a disability within the meaning of the Chicago Human Rights Ordinance. Respondent objected to the introduction of Complainant's Exhibit A, purporting to be a statement from a physician regarding the Complainant's condition. The hearing officer gave no weight to the document as there was no foundation establishing that the document is a business record. The Commission also has not considered the statement for the reason given by the hearing officer and the additional reason that Complainant failed to disclose the document as a possible exhibit in his pre-hearing memorandum.

Nevertheless, the sworn Complaint alleges that Complainant is a paraplegic (Compl. Par. 1), plus Complainant testified at the administrative hearing that he is a T12 paraplegic who requires the use of a wheelchair for mobility. There was no evidence submitted at the hearing to indicate that Complainant is able to move about without a wheelchair. The Complaint and Complainant's uncontroverted testimony are sufficient to establish that Complainant is a paraplegic and needs to use a wheelchair for mobility. See *Cotten v. Eat-A-Pita, supra.*

Complainant has proved that he sought to use a public accommodation within the meaning of the CHRO. Specifically, Complainant testified that he attempted to use Respondent's restrooms

while eating at Respondent's restaurant. He was able to identify by name an employee of the restaurant. Respondent objected to the introduction by Complainant of a restaurant receipt purporting to show that Complainant paid for an item of food at Respondent's restaurant. The hearing officer gave no weight to the receipt, as it contains no information regarding the identity of the establishment from which it was received. The Commission as well has not considered the document. However, Complainant's testimony regarding his visit to the restaurant and attempt to use its restroom facilities was not controverted, and the hearing officer found it credible and sufficient to establish that he sought to use the restroom facilities as a patron of the restaurant. Therefore, Complainant has proved he is a qualified person with a disability within the meaning of the CHRO, who attempted to use a restroom facility which was part of a restaurant open to the general public and available to restaurant patrons. *Cotten v. Lou Mitchell's, supra.*

Finally, the Complainant has proved that the restaurant's restroom entrance doors were not fully accessible to him as a wheelchair user. Specifically, Complainant testified that his wheelchair is twenty-eight inches wide and that he tried but could not fit through the doors of either of the restrooms. Although Respondent offered testimony that a smaller, eighteen inch wheelchair can fit through the doors of the restrooms, Respondent was not sure if a larger wheelchair, such as Complainant's, would fit. There was no credible evidence offered regarding the standard size of a wheelchair. Nor was there evidence submitted regarding the width of Respondent's restroom entrance doors. However, the hearing officer takes administrative notice pursuant to Reg. 420.190 that the Illinois Accessibility Code ("IAC") and the American National Standards Institute ("ANSI") require the width of the entrance to restroom facilities to be a minimum of thirty-two inches. *See* Ill.Acc.Code Section 400.310(n)(3). Complainant's testimony that his wheelchair is twenty-eight inches wide and that he was unable to fit through the entrance of the restrooms is credible and sufficient to establish that a barrier existed which prevented his full use of the public accommodation as those terms are defined by the CHRO.

In view of the above, the Commission finds that Complainant has proved a *prima facie* case that Respondent violated the CHRO and CCHR Reg. 520.105.

2. Respondent sufficiently pleaded but failed to prove by objective evidence that it was an undue hardship to make at least one restroom entrance wheelchair accessible.

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

> Undue hardship will be proven if the financial costs or administrative changes that are demonstrably attributable to the accommodation of the needs of persons with disabilities would be prohibitively expensive or would unduly affect the nature of the public accommodation.
>
> Factors to be considered include, but are not limited to:
>
> (a) the nature and cost of the accommodation;
>
> (b) the overall financial resources of the public accommodation, including resources of any parent organization;
>
> (c) the effect on expenses and resources, or the impact otherwise of such

accommodation on the operation of the public accommodation; and

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

Although Respondent's Response is not artfully drawn and is internally conflicting, it clearly states that he operates a small restaurant which is struggling to make a profit. Arnold DeMar then testified at the hearing that it would be impossible to widen the entrance doors to the restroom facilities without tearing out a bearing wall affecting two floors, and moving equipment on both sides and in front of the restrooms as well as an electrical box, which would result in an undue burden with respect to cost.

Complainant objected to Respondent's testimony regarding undue hardship and the introduction of Respondent's Exhibit 2, the estimate received from Kostontino Construction Company. Complainant's objections cited undue surprise, in that Respondent did not submit a pre-hearing memorandum disclosing and appending the proposed exhibit. Complainant also objected that the diagrams attached to the exhibit are not authenticated, in that they do not indicate the address of the restaurant on each page or otherwise identify the facility to which they refer.

The hearing officer agreed with Complainant that the diagrams do not contain any information regarding the location they purport to represent. The hearing officer correctly noted that pursuant to Reg. 240.314 she was not bound by the strict rules of evidence applicable to courts. Additionally, the hearing officer noted that exclusion of evidence not presented in a pre-hearing memorandum shall be ordered only on a showing that the other party was surprised and placed at a disadvantage by the failure to disclose. Reg. 240.130(b).

The Commission agrees with the hearing officer that Complainant had reasonable notice via the Response that Respondent was asserting the affirmative defense of undue hardship to make the restaurant's restroom entrances fully wheelchair accessible. Under these circumstances, Respondent's affirmative defense of undue hardship was sufficiently pleaded.

The hearing officer also concluded that Complainant's claim of surprise regarding the introduction of Respondent's Exhibit 2 was unfounded. She considered the estimate relevant for the limited purpose of determining what actions were taken by Respondent to determine how and to what extent he could address what he understood to be his obligations. The Commission qualifies this determination to the extent that the exhibit may not serve as evidence of undue hardship as a defense to liability, finding it material that Respondent did not disclose Exhibit 2 by pre-hearing memorandum. Reg. 240.130 is explicit regarding a party's obligation to submit a pre-hearing memorandum which includes copies of all documents the parties intend to introduce into evidence. Regarding this responsibility, the hearing officer's explicit order reinforced the Commission's Standing Order on hearing procedures, which accompanied the Commission's initial order setting up the hearing process. Respondent provided no good cause for its failure to file and serve a pre-hearing memorandum. Complainant thus had no pre-hearing notice of this possible documentary evidence and no opportunity to prepare to respond to it.[1] This placed Complainant at a disadvantage in meeting the evidence at the administrative hearing; and for that reason the exhibit must be excluded from consideration as proof of undue hardship. In any event, the admissibility or weight of Exhibit 2 is only tangential to the outcome of Respondent's undue hardship defense, because

[1] Moreover, the exhibit is dated a year after the incident which formed the basis for the Complaint and was not listed in the Commission's Investigation Summary as a document obtained during the investigation process.

Respondent did not prove by objective evidence that it was unable to pay this or any other estimated cost to make at least one restroom entrance fully accessible at a width of at least 32 inches.

Ultimately, Respondent did not prove by objective evidence that it was an undue hardship to make the entrance to make at least one of its restroom entrances fully accessible to patrons who use wheelchairs. The hearing officer found that owner Arnold DeMar credibly testified at the hearing that it would be impossible to widen the entrances to the restroom facilities without tearing out a bearing wall affecting two floors, along with moving equipment on both sides and in front and an electrical box, all of which would result in a prohibitively high cost for Respondent. DeMar also testified that he has operated the restaurant at the same location for more than 35 years, is well-acquainted with the internal structure and operations of the restaurant, and consulted with construction companies to determine the work to be done, including the widening of the restroom entrance doors. Respondent's testimony regarding his understanding of the substantial nature of the work involved to widen the restroom entrance doors and that the cost of such work would present an undue hardship was found credible. His likely understanding of the building's condition in view of his long tenure at the location is also recognized. As the hearing officer noted, his testimony was not that it is physically impossible to alter a restroom entrance because of a load-bearing wall, but that there would be a cost to do it which he considered prohibitive.[2]

But more importantly, despite this testimonial evidence and even if the Commission were to accept the authenticity of Respondent's exhibit based on Arnold DeMar's testimony that he sought and obtained it from the named contractor, the estimated cost of physical changes addresses only one of the necessary elements of the objective evidence needed to establish undue hardship based on prohibitive cost. At the hearing, Respondent produced no objective evidence whatever that this or any other amount necessary to accommodate a wheelchair user was prohibitively expensive for the business—such as a certified financial statement or even copies of recent tax returns. The vague, conclusory assertion that this is a small business which struggles to operate at a profit is far from sufficient to meet the proof standards of Reg. 520.130, particularly the standards stated in Subsections (b) and (c) of that regulation. *Cotten v. Eat-A-Pita, supra; Cotten v. Addiction Sports Bar & Lounge,* CCHR No. 08-P-68 (Oct. 21, 2009); and *Cotten v. La Luce Restaurant, supra.*

[2] DeMar conceded that he did not obtain an estimate regarding the cost to simply widen one or both restroom entrance doors. He explained that he sought more extensive estimates believing that was needed to come into compliance with the Americans with Disabilities Act and the Chicago Human Rights Ordinance. He is correct and wise to look beyond the scope of this particular Complaint, which concerns only the width of the restroom entrances, and take steps toward providing a wheelchair accessible restroom facility to the extent possible without undue hardship, as a means of coming into compliance with applicable laws and avoiding future complaints. However, for purposes of adjudicating this Complaint, the Commission looks only to the narrow issue of the wheelchair accessibility of the restroom entrances and whether it was an undue hardship for Respondent to alter at least one such entrance to meet the general standard of a 32 inch width. The Commission will not adjudicate on the facts of this case whether Respondent needs to take additional steps to make the interior facilities of at least one unisex restroom fully wheelchair accessible according to generally accepted technical standards. That is beyond the scope of this Complaint. The Commission nevertheless encourages Respondent to continue pursuing the goal to maximize restroom access for customers who use wheelchairs.

3. Respondent failed to offer Complainant any reasonable accommodation to mitigate the lack of fully accessible restroom facilities.

Assuming that Respondent had proved the affirmative defense of undue hardship, pursuant to Reg. 520.105, Respondent would still need to provide a reasonable accommodation which mitigated the lack of access to the restaurant's restroom facilities, or prove that even this level of accommodation is an undue hardship.

Complainant testified the he informed Respondent's employee, Maribel, that he could not enter Respondent's restrooms. There was no evidence presented to refute this testimony or to establish that any alternative accommodation was offered to the Complainant. Nor was any evidence presented indicating that Respondent has provided training or information to its employees regarding possible alternative reasonable accommodations for patrons who use wheelchairs and need to utilize restroom facilities.

Respondent testified that subsequent to the filing of this Complaint, he purchased an eighteen-inch-wide wheelchair that he thought could be used to enter the restrooms. Of course this proposed accommodation was not available to Complainant on the date in question and so does not relieve Respondent of liability in this case. Moreover, it is doubtful that such an alternative accommodation could be deemed reasonable for a restaurant situation.[3] To utilize a narrower wheelchair, a person would need to transfer or be transferred into it. Presumably this would need to be done in a public space in view of others. Such a proposed accommodation has similarities to an offer to carry or lift a wheelchair user over a barrier. The Commission has interpreted the CHRO as no allowing such carrying or lifting as either a full or reasonable accommodation. See *Cotten v. Lou Mitchell's* and *Cotten v. La Luce Restaurant, supra.*

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

Respondent initially argued and apparently believed that its building was "grandfathered" and thus exempt from compliance with any accessibility requirements. This is of course incorrect. The accessibility requirements for public accommodations under the Chicago Human Rights Ordinance have been described in this ruling and the legal authority for them has been set forth. It is true that the accessibility requirements of Chapter 18-11 of the Municipal Code (known as the Chicago Accessibility Code and a part of the Building Code) have more limited application to an "existing" building, and these policies might be characterized as being "grandfathered" for purposes of the Building Code. But no similar exemption exists in the Chicago Human Rights Ordinance (Chapter 2-160 of the Municipal Code) although the age and structure of a building may be relevant to the proof of an undue hardship defense. See, e.g. *Cotten v. Lou Mitchell's, supra.*, where the Commission found that a respondent restaurant proved it was an undue hardship to make permanent alterations to create a wheelchair accessible restroom based on factors which included the age and configuration of the building. See also the discussion in *Cotten v. La Luce Restaurant, supra.* However, age alone is not dispositive of the issue of undue hardship; it remains an affirmative defense a respondent must prove by objective evidence.

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[3] Despite these doubts, the Commission is willing to consider in future decisions any legal authority a party may be able to provide which supports the offer to transfer to a narrower wheelchair as an acceptable reasonable accommodation. The Commission has described in its orders for injunctive relief in this and other cases what it considers to be reasonable accommodations for a restaurant or similar public accommodation.

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

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

During cross-examination, Respondent emphasized that Complainant has filed numerous similar complaints of public accommodation discrimination with this Commission. Complainant acknowledges this fact.[4]

The hearing officer correctly found this information irrelevant to the outcome of this case or to Complainant's credibility. As noted in *Blakemore v. Kinko's*, CCHR No. 01-PA-77 (Dec. 6, 2001), the fact that a complainant has filed other cases at the Commission has no bearing on whether the instant complaint has legal merit; the Commission must and does review each complaint on its own merits. See Section 2-120-510(e) *et seq.*, Chicago Muni. Code. The Commission may not and does not regard a complainant's allegations or testimony as inherently incredible merely because that complainant may have filed other complaints, nor is a complaint subject to dismissal for that reason. *Cotten v. La Luce Restaurant, supra.* Members of the public have the right to file complaints at the Commission on Human Relations alleging violations of the Chicago Human Rights Ordinance or the Chicago Fair Housing Ordinance. The Commission is required to conduct a neutral investigation and adjudication of each complaint based on its established procedures. See §2-120-510(e) and (f), Chicago Muni. Code.

V. REMEDIES

As relief in this matter, Complainant has sought emotional distress damages of $5,000, punitive damages of $1,000, injunctive relief, and attorney fees.

1. Emotional Distress Damages and Interest

Emotional distress damages are awarded to prevailing complainants who prove that they suffered emotional distress due to the discrimination found in the case. The size of the award is determined by (1) the egregiousness of the respondent's behavior and (2) the complainant's reaction to the discriminatory conduct. *Cotten v. Eat-A-Pita, supra.* A complainant's testimony can be sufficient to establish emotional distress without expert testimony or medical evidence. Complainant's demeanor while testifying of emotional distress may be considered. *Hanson v. Association of Volleyball Professionals,* CCHR 97-PA-61 (Oct. 21, 1998); *Cotten v. La Luce*

4 The complaints filed by this and other complainants are also a matter of public record.

Restaurant, supra.

Emotional distress damage awards of $1,000 or more have generally been made by the Commission where there is sufficiently strong evidence of hostile treatment of the complainant and/or of conduct which was lengthy or severe. See, e.g., *Maat v. String-A-Strand*, CCHR No. 05-P-5 (Feb. 20, 2008), awarding $1,500 where a respondent not only failed to provide a wheelchair accessible entry but also treated Complainant in a hostile manner and caused her physical pain when jostled while being pushed by the store owner and her personal aide over the step at the entrance.

Emotional distress awards of less than $1,000 have been made by the Commission when the evidence of emotional distress is minimal. In *Cotten v. Eat-A-Pita, supra.*, for example, the Commission awarded this Complainant $500 where his testimony as to emotional distress upon encountering a flight of stairs preventing his entrance into a restaurant was limited and conclusory, simply stating, "I felt humiliated. I felt embarrassed. I felt like a second-class citizen," and where the encounter was brief. The Commission also awarded $500 in a similar case involving an entrance barrier, *Cotten v. 162 N. Franklin, LLC d/b/a Eppy's Deli and Café*, CCHR No. 08-P-35 (Sept. 16, 2009). By contrast, in *Cotten v. La Luce Restaurant, supra.*, this Commission awarded $800 where Complainant's testimony at the hearing demonstrated continued distress due to experiencing an entrance barrier at a restaurant to which he had specifically traveled at the invitation of a companion, as well as embarrassment at inconveniencing his companion and continued reluctance and distress about going out socially and possibly encountering such situations. See also *Cotten v. Addiction Sports Bar & Lounge, supra*, and *Cotten v. CCI Industries, Inc.*, CCHR No. 07-P-109 (Dec. 16, 2009), in which the Commission awarded Complainant only $1 in emotional distress damages, finding that he had failed to prove any substantial emotional distress.

In the instant case, Complainant testified that he left his doctor's appointment at a clinic directly across the street and stopped in Respondent's restaurant to get a "bite to eat" while waiting for his ride. He stated that after ordering a piece of pie, he decided to use the restroom. When he couldn't access the men's room, he asked for and was directed by staff to a second restroom which he also could not access. He stated that the two restrooms were not far apart from each other (TR 21). He stated that he told the same staff person he could not access the second restroom, asked for his bill, and left to find a restroom elsewhere prior to arrival of his ride. There was no evidence that Complainant was subjected to any rude, hostile, or demeaning behavior by Respondent's personnel. There was no evidence that Complainant experienced difficulty finding another restroom or was exposed to poor conditions such as inclement weather while doing so.

Complainant offered testimony that, due to his condition, if he does not use a restroom approximately every three to four hours, he is prone to bladder infections (TR 12-14). However, Complainant did not testify that the experience complained of in this case caused him to exceed that time limit or that he suffered any such infection or other physical injury due to the experience.

Complainant testified that he was embarrassed and humiliated by being unable to access the restrooms. He also stated he felt deprived of the opportunity to enjoy his pie inside the restaurant, having to take it to go instead, so that he could locate an accessible restroom. He specifically stated that he has not been stopped from going out by this experience. However, he stated that as a result of the experience he felt a need to call ahead to places he plans to visit in order to ascertain the accessibility of their restrooms. (TR 15, 16). Complainant's testimony regarding the underlying incident and his emotional response thereto was observed by the hearing officer to be calm, straightforward, and unemotional.

In view of the above, Complainant's request for $5,000 in emotional distress damages is not supported by the evidence or Commission precedent. Complainant was not subjected to any rude or egregious behavior. His testimony regarding his emotional distress was limited and not indicative of any continuing distress.

However, it is certain that any wheelchair user would experience some distress in being unable to access the restrooms of a restaurant he or she is patronizing. Restrooms for patrons of dine-in food service establishments are generally required and certainly expected by the public. Anyone, with or without a disability, would be shocked to find that a restroom was not available to him or her at such a business. The City policy expressed in both the Building Code and the CHRO is that wheelchair accessible restrooms are to be provided by restaurants—a requirement limited only by the opportunity to establish undue hardship and then provide reasonable alternative accommodations. The federal Americans with Disabilities Act embodies a similar public policy and also applies to a small restaurant business such as Respondent's.

Additionally, although Complainant did not allege difficulty in finding another restroom, it is noted that the necessity of leaving the restaurant to do so could reasonably add to any distress of the incident. In view of the above, the hearing officer recommended an award of $800 for emotional distress as appropriate to the facts of this case in view of prior Commission awards.

The Commission agrees with the hearing officer's factual findings and reasoning but finds that on this evidence an award of emotional distress damages of $500 is more appropriate. The level of emotional distress established in this case is closer to that of *Cotten v. Eat-A-Pita* than of *Cotten v. La Luce Restaurant*, although more substantial than the evidence which warranted only a nominal award in the two cases noted above.

As recommended by the hearing officer and routinely included in Commission relief awards, the Commission also awards to Complainant pre- and post-judgment interest on these damages at the prime rate, adjusted quarterly and compounded annually from the date of the violation be awarded pursuant to Section 2-120-510(1), Chicago Muni. Code and CCHR Reg. 240.700.

2. Punitive Damages

Complainant requests punitive damages of $1,000. Punitive damages may be awarded where a respondent has acted willfully or wantonly or where a respondent's actions were motivated by ill will or malice. *Castro v. Georgeopoulos,* CCHR No 91-FHO-6-5591 (Dec. 18, 1991). Such damages are awarded to deter and punish actions that are in reckless disregard of a complainant's protected rights. *Akangbe v. 1428 W. Fargo Condo. Assn.,* CCHR No. 91-FHO-7-5595.

Punitive damages are not warranted in this case. There was no evidence that Respondent's staff acted in any way with ill will or malice toward Complainant. Respondent testified that wheelchair users have generally patronized his restaurant and he was not aware until the filing of this complaint that the entrance to his restrooms may have been inaccessible in violation of the applicable law. Although Respondent was uninformed regarding his obligations and must now take responsibility for this failure to know and comply with the CHRO (which, like the similar federal Americans with Disabilities Act, has been in effect for the past 20 years), there is no evidence that this failure of compliance rose to the level of reckless disregard for the rights of people with disabilities or was motivated by ill will or malice toward them. Further, although perhaps inartfully and unhappily, Respondent has participated in the Commission's adjudication process and made

some efforts since the filing of this Complaint to come into compliance with applicable laws regarding accessibility.

3. Fine

Pursuant to Reg. 2-160-120, the Commission "shall" impose a fine between $100 and $500 for each offense after a finding of violation of the CHRO. The maximum fine of $500 has been assessed in instances where the respondent failed to document any undue hardship for the lack of accessibility and/or failed during the pendency of the case to take measures to improve the restaurant's accessibility. *Cotten v. Eat-A-Pita* and *Cotten v. La Luce Restaurant, supra.*

In this case, Respondent, after the filing of the Complaint, made efforts to inquire about measures to achieve accessibility and document undue hardship and went so far as to purchase a narrow wheelchair in an attempt to provide a reasonable accommodation for wheelchair users. Although, as discussed above and hereafter, these attempts were misguided and insufficient, nevertheless it is apparent that Respondent sincerely attempted to improve accessibility. As such, though having been found to be in violation of the CHRO, a fine of $250 was recommended by the hearing officer, rather than the maximum penalty. The Commission agrees and imposes a fine of $250 for this violation.

4. Injunctive Relief

Complainant seeks injunctive relief and such relief is authorized by Section 2-12-510(1) of the Chicago Municipal Code. The Commission is authorized to enter such relief in order to remedy past violations of the CHRO and prevent future violations. *Maat v. String-A-Strand, supra.*

Although Respondent should by now be on notice of his obligations to comply with all appropriate accessibility standards for the restaurant's restrooms, the scope of the Complaint and therefore this case is limited to the accessibility of the entrance doors to the restrooms. Therefore, the injunctive orders described below are likewise limited.

It is recognized that in complying with the injunctive order, Respondent may be able to establish by objective evidence that it is an undue hardship for it to create a fully accessible restroom entrance at this time. However, that does not relieve Respondent of the obligation to provide reasonable accommodations which can be accomplished without undue hardship.

Although the hearing officer recommended that Respondent be specifically required to arrange for use of an alternative, fully accessible restroom at a nearby location if claiming undue hardship to create a fully accessible restroom entrance, the Commission has modified that recommendation somewhat to take into account that Respondent may not be able to identify a fully accessible restroom at another facility that is either already open to the general public or that is under the control of an individual or business willing to allow use by Respondent's patrons. Nevertheless, the Commission agrees with the hearing officer that this is the next best alternative if Respondent is unable to provide a fully accessible restroom facility. Such an arrangement was found to be an acceptable reasonable accommodation in *Cotten v. Lou Mitchell's, supra.* Thus Respondent must, if claiming that full accessibility is an undue hardship, be prepared to show that it made reasonable efforts to arrange for use of a nearby accessible restroom or to identify one which is already open to the general public. Accordingly, the Commission finds warranted the Order of Injunctive Relief set forth below.

Order of Injunctive Relief: The Commission on Human Relations directs Respondent Arnold's Restaurant to take the following actions to remedy its past violation of the Chicago Human Rights Ordinance and prevent future violations:

1. **Provide a wheelchair accessible entrance to at least one (unisex) restroom if able to do so without undue hardship.** If able to do so without undue hardship (as defined in CCHR Reg. 520,130), on or before *six months from the date of mailing of the Final Ruling on Liability and Relief*, Respondent must file with the Commission and serve on Complainant (through his attorney of record if applicable) documentary evidence that Respondent has made permanent alterations sufficient to make the entrance to at least one restroom in the restaurant 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 restroom entrances is being made accessible, there must be conspicuous signage at any non-accessible entrance directing the public to the accessible one and restaurant personnel must be trained to inform restaurant patrons of its location.

2. **Provide objective documentary evidence of any undue hardship.** If unable to provide a permanent accessible restroom entrance or any reasonable accommodation in lieu of a fully accessible entrance due to undue hardship (as defined by CCHR Reg. 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*,[5] a signed certification of Respondent or a qualified professional (for example an architect) which sets forth in detail the factual basis for the claimed undue hardship.

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

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

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

[5] Resources for free or low cost technical assistance may be available through the City of Chicago's Mayor's Office for People with Disabilities and the Great Lakes ADA Center, also located in Chicago.

case or as otherwise required by law.

3. Make reasonable accommodations if undue hardship is claimed. If claiming undue hardship to make a restroom 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 at least the following steps to provide reasonable accommodations (within the meaning of Reg. 520.120):

a. Make reasonable efforts to arrange for patrons of Respondent's restaurant who use wheelchairs to have access to a fully accessible restroom in at least one other location within reasonable proximity of Respondent's restaurant. For example, Respondent may identify a nearby accessible restroom which is open to the general public or make arrangements with another business willing to allow Respondent's customers who are wheelchair users to utilize its accessible restroom. If unable to identify or arrange for use of an alternative accessible restroom, 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), a signed certification documenting the date and details as to each person contacted or other step taken in an effort to do so. For any alternative restroom identified, Respondent must also:

   i. Provide conspicuous interior and exterior signage at Respondent's restaurant notifying patrons (a) that it has no wheelchair accessible restroom on the premises but one is located in the alternative facility, (b) providing directions to the alternative restroom, and (c) offering an escort by Respondent's personnel (as possible without undue hardship) to enable wheelchair users to locate and access the restroom.

   ii. Ensure that Respondent's personnel are trained and supervised (a) to inform patrons of the location of the alternative accessible restroom and availability of an escort to it, and (b) to provide prompt, courteous escort to the alternative location upon request (as possible without undue hardship).

b. If unable to identify an alternative restroom, Respondent must provide conspicuous interior and exterior signage at the restaurant notifying patrons that it has no wheelchair accessible restroom on the premises, sufficient to enable patrons to choose whether they wish to patronize the restaurant under such circumstances. In addition, Respondent's personnel must be trained and supervised to notify each wheelchair user who enters its premises as a potential dine-in customer, prior to taking an order, that there is no wheelchair accessible restroom on the premises.

c. Respondent must 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 delivery service, for example.

d. Respondent must provide notice of the reasonable accommodations being provided in lieu of a permanent accessible restroom entrance by filing with the Commission and serving on Complainant (through Complainant's attorney of record if applicable) 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.

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

5. Attorney Fees

The hearing officer recommended that reasonable attorney fees and associated costs be awarded to Complainant. The Commission routinely awards such fees and costs to prevailing parties pursuant to its authority under Section 2-120-510(l), Chicago Municipal Code, and CCHR Regs. 240.610(a) and 240.620. See, e.g., *Jenkins v. Artists' Restaurant,* CCHR No. 90-PA-14 (Aug. 14, 1991); and *Hanson, supra.*

Pursuant to the procedures set forth in CCHR Reg. 240.630, Complainant may serve and file a petition for attorney's fees and/or costs, supported by arguments and affidavits, no later than 28 days from the mailing of this Final Ruling on Liability and Relief. The supporting documentation shall include the following:

1. A statement showing the number of hours for which compensation is sought in segments of no more than one-quarter hour, itemized according to the date performed, the work performed, and the individual who performed the work;

2. A statement of the hourly rate customarily charged by each individual for whom compensation is sought;

3. Documentation of costs for which reimbursement is sought.

VI CONCLUSION

The Board of Commissioners finds Respondent Arnold's Restaurant liable for public accommodation discrimination in violation of Chapter 2-160 of the Chicago Municipal Code and orders the following relief:

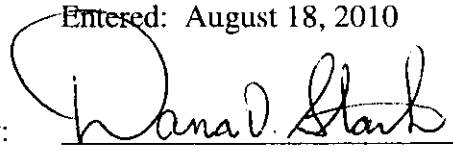
1. Payment to Complainant of emotional distress damages in the amount of $500 plus pre-and post-judgment interest from the date of violation on April 15, 2008.

2. Pay to the City of Chicago of a fine of $250.00;

3. Compliance with the order for injunctive relief set forth above.

4. Payment of Complainant's reasonable attorney fees and associated costs as determined by further order of the Commission pursuant to the procedures outlined in Reg. 250.630.

CHICAGO COMMISSION ON HUMAN RELATIONS
Entered: August 18, 2010

By: 

Dana V. Starks, Chair and Commissioner