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.
Top Notch Beefburger, Inc. d/b/a Top Notch Beefburger Shop
Respondents.

Case No.: 09-P-31

Date of Ruling: February 16, 2011
Date Mailed: March 3, 2011

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

Diran Soulian, Owner
Top Notch Beefburger Shop
2116 W. 95th Street
Chicago, 60643

Richard F. Loritz, Registered Agent
Top Notch Beefburger, Inc.
1100 Ravinia Place
Orland Park, IL 60462

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on February 16, 2011, 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 May 1, 2009, in accordance with Commission Regulation 240.700.

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

3. To pay Complainant's reasonable attorney fees and associated costs as determined pursuant

[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.

to the procedure described below.

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

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 **April 1, 2011**. Any response to such petition must be filed and served on or before **March 18, 2011**. Replies will be permitted only on leave of the hearing officer. A party may move for an extension of time to file and serve any of the above items pursuant to the provisions of Reg. 210.320. The Commission will rule according to the procedure in Reg. 240.630 (b) and (c).

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

City of Chicago
COMMISSION ON HUMAN RELATIONS
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IN THE MATTER OF:	
Anthony Cotten **Complainant,** **v.** Top Notch Beefburger, Inc. d/b/a Top Notch Beefburger Shop **Respondent.**	**Case No.:** 09-P-31 **Date of Ruling:** February 16, 2011

FINAL RULING ON LIABILITY AND RELIEF

I. PROCEDURAL HISTORY

Complainant Anthony Cotten filed this Complaint on May 6, 2009, alleging that Respondent Top Notch Beefburger Shop[1] discriminated against him based on his disability (paraplegia requiring use of a wheelchair for mobility) in violation of the Chicago Human Rights Ordinance ("CHRO"), Chapter 2-160 of the Chicago Municipal Code. Specifically, Complainant alleges that Respondent's customer restrooms were not wheelchair accessible when he attempted to use them while patronizing the restaurant on May 1, 2009.

Respondent filed a Response to the Complaint on June 24, 2009, verified by Diran Soulian as owner. Soulian asserted that the women's restroom was available and accessible on the date in question, that he knew of no previous complaints about accessibility by the two or three wheelchair users per year who have patronized the restaurant, and that "downtown inspectors" inspect the restaurant twice a year and look inside the restrooms.

After an investigation, the Commission entered an Order Finding Substantial Evidence of violation of the CHRO on September 24, 2009.[2] Subsequently, on February 26, 2010, the Commission issued an Order Appointing Hearing Officer and Commencing Hearing Process which scheduled a mandatory pre-hearing conference for April 29, 2010. On March 12, 2010, the hearing officer issued an additional order noting the state of the pre-hearing conference and reaffirming that attendance was mandatory. None of these documents were returned to the Commission or the hearing officer as undeliverable.

Complainant through his counsel served on Respondent a Request for Production of Documents as authorized by CCHR Reg. 240.407. The Request for Production, with certification of service on Respondent, was filed with the Commission on March 22, 2010. On

[1] The City of Chicago's online database of business licensees lists the restaurant operator as Top Notch Beefburger, Inc., with Diran Soulian named as both president and secretary. The online corporation database of the Illinois Secretary of State lists the president of Top Notch Beefburger, Inc., as Diran Soulian and the secretary as Lois Soulian.

[2] Attached to the Order Finding Substantial Evidence was a letter from the Commission stating that, due to budgetary constraints, the hearing process could not begin until 2010. The letter stressed that the case was not dismissed but rather remained pending before the Commission and would go forward as soon as funds were available.

April 19, 2010, Complainant filed and served a Motion to Compel stating that Respondent had not respondent to the Request for Production.

The pre-hearing conference was held as scheduled on April 29, 2010. Complainant attended but Respondent did not. The hearing officer issued a Notice of Potential Default to Respondent for failure to attend the pre-hearing conference. When no response to this Notice was received, the hearing officer issued an Order of Default.[3] As a result of the Order of Default, Respondent is deemed to have admitted the allegations of the Complaint and to have waived any defenses concerning the Complaint's sufficiency.

An administrative hearing was scheduled for August 12, 2010, and subsequently rescheduled to October 13, 2010, beginning at 9:30 a.m. All of these dates were set in orders issued by the hearing officer and sent to Respondent. None of these documents were returned to the Commission or the hearing officer as undeliverable.

Respondent appeared at the administrative hearing held on October 13, 2010, but Respondent did not appear and did not seek a continuance or in any other way inform the Commission that it was unable to attend. At the hearing, Complainant requested damages of $3,500, based on unnamed comparable decisions about restroom accessibility issued by the Commission. Complainant also sought injunctive relief requiring Respondent to make a restroom at Top Notch Beefburger wheelchair accessible. The hearing concluded by 10:30 a.m.; Respondent still had not appeared.

The hearing officer issued a recommended ruling in favor of Complainant on January 7, 2011. Complainant did not file objections. Respondent filed a one-page, unsigned letter (noting that a copy was sent to Complainant's counsel) which seems intended to serve as objections. The letter was dated February 4, 2011, the date when objections were due, but was apparently mailed on that date. It was not received by the Commission until February 7, 2011. This does not meet the timely filing requirements of CCHR Reg. 270.220(b), which clearly states, "Documents are deemed filed when received at the Commission, not when sent." Nevertheless, Respondent's comments in the letter were reviewed by the Commission.[4]

II. FINDINGS OF FACT[5]

1. Complainant Anthony Cotten is a person with a disability (paraplegia) who uses a wheelchair for mobility. (C par. 1) No testimony further describing Complainant's disability was offered.

2. On May 1, 2009, Complainant went with his uncle to Top Notch Beefburger, a restaurant located at in the 2100 block of 95th Street in Chicago. (C 2, Tr 8, and Exh A)[6]

[3] The Notice of Potential Default stated that Complainant's Motion to Compel would be resolved following resolution of the potential default. The issuance and effect of the Order of Default have rendered the Motion to Compel moot.

[4] A defaulted respondent may be heard on the issue of relief to be awarded. CCHR Reg. 235.320.

[5] The Findings of Fact are based on the Complaint or the hearing transcript. "C" refers to the Complaint; the paragraph number of the Complaint follows. "Tr" refers to the transcript; the page from the transcript follows. "Exh" refers to an exhibit; the exhibit number or letter follows.

[6] The Complaint listed the address of Top Notch Beefburger as 9115 W. 95th Street. Owner Diran Soulian listed the address as 9116 W. 95th Street in the response he verified. The City of Chicago's online database of licensed

Complainant had heard that the restaurant offered good food and specifically traveled to it to eat. (Tr 7)

3. While at Respondent's restaurant, Complainant had to use the bathroom. Complainant asked a woman who worked at the restaurant for the location of the bathroom. She pointed it out to him. (C 3, Tr 5)

4. Complainant went to the bathroom but was unable to enter it and close the door behind him. He asked the woman working at the restaurant if there was an accessible bathroom and she said there was not.[7] Still needing to use a bathroom, Complainant ordered his food to go and left the restaurant with his uncle to use an accessible bathroom at a nearby facility. (C 3, Tr 5)

5. Complainant "wasn't too happy about" leaving the restaurant because he could not "enjoy his meal." (Tr 5) His uncle was not "happy" either because he was eating. (Tr. 6, 9) Complainant said he would not call his emotions "strong" but he felt the experience was "humiliating": "It was just real saddening and depressing that [the restaurant did] not have a bathroom accessible for people...in wheelchairs." (Tr. 9)

6. Complainant has been treated for depression before; however, he did not state that he was currently in treatment or that he was currently depressed. (Tr. 9) The source of his depression was from "being in a wheelchair" and "living a life in a wheelchair." (Tr. 9-10) He travels for his business and pleasure and cannot get into places that are not accessible. (Tr. 10) He has suffered embarrassment when he could not get to a bathroom in time and has soiled himself. Complainant did not indicate when this had happened last. He testified that he was "fearful" it might happen at Top Notch Beefburger after his counsel posited that as a possibility in questioning Complainant. Complainant did not soil himself on the occasion when he visited Top Notch Beefburger. (Tr 10) Based on this testimony and Complainant's demeanor, the hearing officer found that the continuing challenges imposed by the physical inaccessibility of public accommodations Complainant sought to access have had a distressful effect o his quality of life, although Complainant's description of that effect was somewhat inarticulate.

7. Complainant did not testify that he had any professional treatment or after-effects as a result of the inability to access a bathroom at Top Notch Beefburger.

8. Complainant is not an expert in accessibility modification and could not recall whether Respondent "could have made modifications to widen the bathroom."

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businesses shows the street address of Top Notch Beefburger as 9114-16 W. 95th Street, consistent with that provided by Soulian. Although the Commission continued to send documents to 9115 W. 95th Street, none were ever returned as undeliverable. In fact, Soulian submitted a letter responsive to the hearing officer's recommended ruling, indicating that he received it as mailed. Thus it appears that Respondent has received the Commission's mailings despite the discrepancy in the street number.

[7] Complainant stated in his Complaint that the employee told him he could use the women's bathroom but it wasn't accessible either. (C 3)

III. APPLICABLE LEGAL STANDARDS

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

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

Section 2-160-020(c) of the CHRO and CCHR Reg. 100(11) define "disability" in part as "a determinable physical or mental characteristic which may result from disease, injury, congenital condition of birth, or functional disorder...."

Subpart 500 of the Commission's regulations further defines the obligations of persons who control a public accommodation. CCHR 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 practical realities of making that possible. CCHR 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 accommodation 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.

CCHR Reg. 520.120 defines "reasonable accommodations" as applied to a public accommodation as "accommodations...which provide persons with a disability access to the same services, in the same manner as are provided to persons without a disability."

CCHR Reg. 520.130 sets forth what a public accommodation must prove in order to establish the affirmative defense of undue hardship:

> 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.

To prove undue hardship there must be objective evidence of financial costs, administrative changes, or projected costs or changes which would result from accommodating the needs of persons with disabilities. CCHR Reg. 520.130(a) Examples of factors to be considered in determining whether a proposed disability accommodation would impose an undue hardship include the nature and cost of the proposed disability accommodation, the overall

financial resources of the provider of the public accommodation including the resources of any parent organization, the impact of the proposed disability accommodation on the operation of the public accommodation, and the type of operations conducted by the public accommodation.

To prove a *prima facie* case of disability discrimination based on the full use standard, a complainant must show that (1) he is a person with a disability within the meaning of the CHRO, (2) he is a qualified individual in that he satisfied all non-discriminatory standards for service, and (3) he did not have full use of the public accommodation as other customers did. *Maat v. String-A-Strand*, CCHR No. 05-P-5 (Feb. 20, 2008), citing *Doering v. Zum Deutchen Eck*, CCHR No. 94-PA-35 (Sept. 14, 2995, as reissued Sept. 29, 1995). An individual may be deprived of the full use of a public accommodation where he or she cannot readily utilize a bathroom available to other customers. *Winter v. Chicago Park District*, CCHR No. 97-PA-55 (Oct. 18, 2000).

If a complainant establishes these *prima facie* case 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 based on the criteria described above. See CCHR Reg. 520.105 and *Maat v. El Novillo Steak House*, CCHR No. 05-P-31 (Aug. 16, 2006). However, even if that initial showing of undue hardship is made, a respondent must also establish that (1) it reasonably accommodated the complainant or (2) it could not reasonably accommodate the complainant without undue hardship. *Id.*

The Commission has consistently applied these principles to claims that a person who uses a wheelchair for mobility due to disability was not able to fully access and utilize a facility that is a public accommodation. See, e.g., the above-cited decisions and *Hanson v. Association of Volleyball Professionals*, CCHR No. 97-PA-2 (Oct. 21, 1998); *Cotten v. Taylor Street Food and Liquor*, CCHR No. 07-P-12 (July 16, 2008); *Cotten v. Eat-A-Pita*, CCHR No. 07-P-108 (May 20, 2009); *Cotten v. 162 N. Franklin LLC d/b/a Eppy's Dely and Café*, CCHR No. 08-P-35 (Sept. 16, 2009); *Cotten v. Addiction Sports Bar and Lounge*, CCHR No. 08-P-68 (Oct. 21, 2009); *Cotten v. Lou Mitchell's*, CCHR No. 06-P-9 (Dec. 16, 2009); *Cotten v. CCI Industries, Inc.*, CCHR No. 07-P-109 (Dec. 16, 2009); *Cotten v. La Luce Restaurant, Inc.*, CCHR No. 08-P-34 (Apr. 21, 2010); and *Cotten v. Arnold's Restaurant*, CCHR No. 08-P-24 (Aug. 18, 2010).

IV. CONCLUSIONS OF LAW

Complainant has established his *prima facie* case of disability discrimination. He is a person with a disability or "determinable physical characteristic" as defined by the CHRO and its regulations. He is a qualified individual in that he was willing to pay and did pay for his food and thus was a patron of Respondent's restaurant, which was a public accommodation open to serve the general public. Yet he did not have full use of the public accommodation as others did, that is, he could not use the bathrooms intended for customers because they were not wheelchair accessible.

Because of the Order of Default, Respondent is now barred from presenting a defense of undue hardship or any other defense to the Complaint. Were it not for the Order of Default, Respondent would have had the opportunity to prove that it was an undue hardship to make its restrooms fully accessible to people with disabilities, and then to prove that it had reasonably accommodated Complainant by other methods or that it was an undue hardship even to provide

this lesser level of disability accommodation.[8] For example, in *Cotten v. Lou Mitchell's, supra*, a restaurant proved that is was an undue hardship for it to prove a wheelchair accessible restroom on its premises and proved that it had reasonable accommodations in place as an alternative.

Therefore, Complainant has proved that Respondent Top Notch Beefburger Shop violated the Chicago Human Rights Ordinance, specifically §2-160-070, Chicago Municipal Code.

V. REMEDIES

Upon determining that a violation of the Chicago Human Rights Ordinance (or Chicago Fair Housing Ordinance) has occurred, the Commission may order relief as set forth in §2-120-510(l) of the Chicago Municipal Code. Specifically, the Commission is authorized:

> [T]o order such relief as may be appropriate under the circumstances determined in the hearing. Relief may include but is not limited to an order: to cease the illegal conduct complained of; to pay actual damages, as reasonably determined by the Commission, for injury or loss suffered by the complainant;...to admit the complaint to a public accommodation; to extend to the complainant the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of the respondent; to pay to the complainant all or a portion of the costs, including reasonable attorney fees, expert witness fees, witness fees and duplicating costs incurred in pursuing the complaint before the commission or at any stage of judicial review; to take such action as may be necessary to make the individual complainant while, including, but not limited to, awards of interest on the complainant's actual damages...from the date of the civil rights violation. These remedies shall be cumulative, and in addition to any fines imposed for violation of provisions of Chapter 2-160....

A. Emotional Distress Damages

Although Complainant's counsel did not specify the nature of the $3,500 in damages he sought for Complainant, in this case Complainant may only receive damages for emotional distress because he did not establish that he had incurred any out-of-pocket pecuniary loss or expense as a result of the discrimination.

Complainant has a substantial history of filing and often winning cases at the Commission on Human Relations. See, e.g., *Cotten v. Taylor Street Food and Liquor, Cotten v.*

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[8] Respondent's owner stated in the initial Response to the Complaint that "downtown inspectors" came twice each year and inspected the premises. The Commission takes this to mean that the restaurant was inspected by the City of Chicago's Department of Public Health or perhaps the Department of Buildings, under provisions of other City ordinances. However, compliance with other City ordinances or passing inspections by personnel not associated with the Commission on Human Relations will not in itself provide a defense to liability under the Chicago Human Rights Ordinance—a separate law not enforced by other City departments. Businesses operating in the City of Chicago must comply with all applicable ordinances.

In particular, no other City of Chicago department can determine whether a public accommodation meets the requirements of reasonable accommodation under the Chicago Human Rights Ordinance. In enforcing the Chicago Human Rights Ordinance, the Commission on Human Relations does not conduct regular inspections of restaurants or other public accommodations. Rather it receives, investigates, and adjudicates discrimination complaints filed by members or the public (and may initiate complaints itself) under the process set forth in Chapter 2-120 (e) through (m) of the Chicago Municipal Code and Part 200 of the Commission's regulations.

Eat-A-Pita, Cotten v. 162 N. Franklin LLC d/b/a Eppy's Deli and Café, Cotten v. Addiction Sports Bar and Lounge, Cotten v. CCI Industries Inc., Cotten v. La Luce Restaurant, and Cotten v. Arnold's Restaurant, all cited *supra*. An analysis of some of Complainant's more recent cases supports a conclusion that the request of $3,500 for emotional distress damages based on the evidence presented at the hearing is unwarranted.

In recommending an award of $500 for emotional distress in this case, the hearing officer reviewed four recent cases supporting much more modest awards of damages for emotional distress than the $3,500 requested. In *Cotten v. La Luce Restaurant Inc., supra.*, a case in which Complainant proved he was denied access to a restaurant due to stairs at the entrance, Complainant testified at the hearing that he was "humiliated, embarrassed" at not being able to get into the restaurant, particularly after agreeing to go with a friend at the friend's recommendation. Complainant sought $1,000 in damages for emotional distress. In agreeing with the hearing officer's recommendation of an $800 award of emotional distress damages, the Commission noted:

> It was the hearing officer's impression that Respondent's cross examination elicited a genuine emotional response from Complainant that was a more direct reflection of the damage incurred than his actual testimony, although the hearing officer found that credible as well.

In *Cotten v. Eat-A-Pita, supra.*, a case in which Complainant proved he was denied access to a small restaurant due to entrance stairs, Complainant had asked for $1,000 in damages for emotional distress but was awarded $500. In that case, Complainant had testified that he felt "humiliated," "embarrassed," and "like a second class citizen" as a result of his inability to enter the restaurant. The Commission conducted an extensive review of prior decisions in which less than $1,000 in emotional distress damages was awarded and concluded that, based on the nature and length of the incident, an award of $500 was justified.

In *Cotten v. Addiction Sports Bar and Lounge, supra*, another case involving an inaccessible entrance, Complainant requested $1,000 for emotional distress but was awarded only $1.00. He had testified he felt "depressed," "humiliated," "embarrassed," and "like a second class citizen because the fact that people were also inside enjoying, having lunch and I couldn't get inside to enjoy this establishment at this time." However, the hearing officer was not convinced by Complainant's testimony or demeanor during his testimony that he "suffered any measurable emotional distress as a result of the incident."

In *Cotten v. CCI Industries Inc., supra*, Complainant was again awarded only $1.00 in emotional distress damages. He had proved that he was unable to access the respondent's sales showroom due to a flight of stairs. He testified that he felt "humiliated" and "embarrassed" and had seen a psychiatrist for these feelings he gets when he cannot access a facility, although he did not establish that he had obtained medical attention regarding the violation proved in the case. He testified that he was seeking $1,000 in emotional distress damages because "that's what the Commission rules." The Commission noted in this decision, however, that "an emotional distress damages award must be based on proof and is not intended as a reward or fee for winning a case." Rather, the Commission "evaluates both the duration and the severity of the underlying discriminatory conduct and the effect of the conduct on the Complainant."

The hearing officer in this case noted that Complainant's testimony in the instant case was remarkably similar to that of the four previous cases—namely general statements that Complainant was "humiliated" and the experience was "saddening" and "depressing," with non-

specific references to having sought professional help for depression but no details about when he sought these services and what prompted it. However, the hearing officer found that the facts of this case warrant a modest award of $500 for emotional distress—more than the $1.00 awarded in two of the cited cases but well below the $3,500 sought.

In recommending $500, the hearing officer took into account Complainant's concern about soiling himself in a public place due to lack of access to a restroom in the type of public accommodation—a dine-in restaurant—where customers expect access to a restroom. Although the hearing officer found Complainant not particularly articulate about this possibility, nevertheless Complainant's fear of this public humiliation did cause him to leave Respondent's restaurant and take his food to another location. The hearing officer also noted Complainant's very obvious frustration with finding yet another location inaccessible to him over twenty years after enactment of the Chicago Human Rights Ordinance.[9]

The Commission agrees with these distinguishing factors pointed out by the hearing officer. Respondent in its letter responsive to the Recommended Ruling proposed that the emotional distress damages should be $1.00 as in the cases against Addiction Sports Bar and Lounge and CCI Industries, Inc., cited above. However, in this case Complainant proved that he experienced a more substantial level of emotional distress given the nature of the violation as well as the effect it had on him. These facts are more comparable to those of the cases where at least $500 was awarded, including those against Eat-A-Pita and La Luce Restaurant as well as those involving Eppy's Deli and Café and Arnold's Restaurant, all cited *supra*. The Commission considers it a serious violation for an eat-in restaurant to fail to provide a wheelchair accessible restroom for customers and then allow them to order food without informing them of the problem or arranging for access to a nearby restroom. The distress of a wheelchair user confronted with such a situation is foreseeable and understandable. Accordingly, the Commission adopts the hearing officer's recommendation and orders payment of $500 in damages for emotional distress resulting from the ordinance violation.

B. Punitive Damages

Complainant did not seek punitive damages and the hearing officer did not recommend such an award. Punitive damages are appropriate when the actions of a respondent are the product of evil intent or of reckless or callous indifference to the rights of others. See *Diaz v. Wykurz et al.*, CCHR No. 07-H-28 (Dec. 16, 2009). Here, Complainant was not personally mistreated while at the restaurant; rather, Respondent's staff tried to be helpful under the circumstances. While Respondent clearly violated the Human Rights Ordinance, in light of the other relief ordered, an additional award of punitive damages is not necessary to punish and deter this type of violation or to make Complainant whole.

C. Interest on Damages

Section 2-130-510(l) of the Chicago Municipal Code allows an additional award of interest on damages ordered to remedy violations of the Chicago Human Rights Ordinance. Pursuant to CCHR Reg. 240.700, the Commission routinely awards pre- and post-judgment interest at the prime rate, adjusted quarterly from the date of violation, and compounded annually. Accordingly, the hearing officer recommended and the Commission orders payment of

[9] Moreover, the federal Americans with Disabilities Act, which imposes similar accessibility requirements on operators of public accommodations, has now been in effect for twenty years. 42 U.S.C. Sec. 12181 *et seq.*

pre- and post-judgment interest on the emotional distress damages awarded in this cases, beginning on May 1, 2009, the date of the violation.

D. Fine

Pursuant to Section 2-160-120 of the Chicago Municipal Code, the Commission may impose a fine of not less than $100 and not more than $500 if a respondent is found to have violate the Chicago Human Rights Ordinance. The hearing officer recommended a fine of $200. The Commission believes, however, that the maximum fine of $500 is warranted in this case. The maximum fine has been assessed in instances where a 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.* Here, Respondent failed to participate in the administrative hearing process, requiring default proceedings, and failed to present any mitigating circumstances or evidence of efforts to comply with the Human Rights Ordinance. Compare *Cotten v. Arnold's Restaurant, supra.* Accordingly, the Commission orders Respondent to pay the maximum fine of $500.

E. Injunctive Relief

Complainant seeks injunctive relief requiring Respondent to make a restroom at Top Notch Beefburger accessible to people with disabilities. Injunctive relief is explicitly authorized by Section 2-120-510(l) of the Chicago Municipal Code. Commission case law also makes it clear that the Commission is authorized to enter an order of injunctive relief to remedy past violations of the CHRO and prevent future violations. See, e.g., *Maat v. String-A-Strand, supra,* citing *Frazier v. Midlakes Management LLC*, CCHR No. 03-H-41 (Sept. 15, 2003); and *Cotten v. Arnold's Restaurant, supra.*

Respondent had the opportunity to plead and prove that it was an undue hardship to make a restroom fully accessible as contemplated by CCHR Reg. 520.130, but Respondent did not do so and indeed did not pursue any defense. Nor has Respondent shown that it has made any effort to provide either full accessibility or reasonable accommodations since the filing of this Complaint. Therefore, as recommended by the hearing officer, the Commission enters the order of injunctive relief set forth below.

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 at this time. However, that does not relieve Respondent of the obligation to provide reasonable accommodations which can be accomplished without undue hardship.

Order of Injunctive Relief: The Commission on Human Relations directs Respondent Top Notch Beefburger Shop to take the following actions to remedy its past violation of the Chicago Human Rights Ordinance and prevent future violations:

1. **Provide wheelchair accessible restrooms or 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 at least one unisex 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 restrooms is being made accessible, there must be conspicuous signage at any non-accessible restroom directing the public to the accessible one and restaurant personnel must be trained to inform restaurant patrons of its location. The accessible restroom must be substantially equivalent to other customer restrooms.

2. **Provide objective documentary evidence of any undue hardship.** If unable to provide a permanent accessible restroom or any reasonable accommodation in lieu of a fully accessible restroom 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*,[10] 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 case or as otherwise required by law.*

3. **Make reasonable accommodations if undue hardship is claimed.** If claiming undue hardship to make at least one restroom 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. 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 measures may include documented agreements to

[10] 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.

allow customers to use restroom facilities at other nearby locations. If that is not feasible, other such steps may include carryout or delivery service, for example.

b. If unable to identify a restroom at a nearby facility which can be made available to Respondent's customers, Respondent must *provide conspicuous interior and exterior signage* at the restaurant notifying potential customers that it has no wheelchair accessible restroom on the premises, sufficient to allow people to choose whether they wish to patronize the restaurant under such circumstances.

c. Respondent must *ensure that its staff are trained and supervised* to provide equivalent service and/or reasonable accommodations to wheelchair users consistent with Respondent's plan for compliance with the Chicago Human Rights Ordinance. In particular, 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 and, as applicable, that an accessible restroom is available for their use at a nearby facility or that carry-out or delivery service is available.

d. Respondent must *provide notice of the reasonable accommodations being provided* in lieu of a permanent accessible restroom 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.

e. If claiming that it is an undue hardship to provide *any* reasonable accommodation to enable a wheelchair to utilize the customer restrooms of the public accommodation in question (pursuant to CCHR Reg. 520.105), Respondent must file with the Commission and serve on Complainant (through Complainant's attorney of record if applicable) documentary evidence of the undue hardship as described in CCHR Reg. 520.130.

4. Extension of time. Respondent may seek a short extension of time to meet any deadline set with regard to this order for injunctive relief, by filing and serving a motion pursuant to the procedures set forth in Regs. 210.310 and 210.320. (The hearing officer need not be served.) The motion must establish good cause for the extension. The Compliance Committee of the Commission shall rule on the motion by mail.

5. Effective period. This 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).

F. Attorney Fees and Costs

Section 2-120-510(l) of the Chicago Municipal Code allows the Commission to order a respondent to pay all or part of a prevailing complainant's reasonable attorney fees and associated costs. Indeed, the Commission has routinely found that prevailing complainants are entitled to such an order, and the hearing officer recommends it in this case. *Hall v. Becovic,*

CCHR No. 94-H-39 (Jan. 10, 1996), aff'd *Becovic v. City of Chicago et al.*, 296 Ill. App. 3d 236, 694 N.E.2d 1044 (1st Dist. 1998); *Soria v. Kern*, *supra* at 19.

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

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

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

3. Documentation of costs for which reimbursement is sought.

VII. CONCLUSION

The Commission finds Respondent Top Notch Beefburger Shop liable for disability discrimination in violation of the Chicago Human Rights Ordinance and orders the following relief:

1. Payment to the City of Chicago of a fine of $500;

2. Payment to Complainant of emotional distress damages in the amount of $500;

3. Payment of interest on the foregoing damages from the date of violation on May 1, 2009;

4. Compliance with the order for injunctive relief as described above;

5. Payment of Complainant's reasonable attorney fees and costs as determined by further order of the Commission pursuant to the procedures outlined above.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: Dana V. Starks, Chair and Commissioner
Entered: February 16, 2011