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:

Darryl Williams
Complainant,
v.

Bally Total Fitness and Lounge
Respondent.

Case No.: 06-P-48

Date Mailed: January 26, 2009

TO:

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FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on January 21, 2009. the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

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

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FINAL RULING

I. INTRODUCTION

Complainant, Darryl Williams, claims that his health club, Bally Total Fitness, refused to let him leave the club five minutes after closing because of his race and that an employee addressed him with racial epithets when he tried to leave, while allowing two white members to leave. If this conduct had happened, it would violate the Chicago Human Rights Ordinance. See, e.g. *Andrews v. J.P.K. Enterprises, Inc.*, CCHR No. 03-P-107 (Dec. 1, 2003).

II. PROCEDURAL HISTORY

On August 23, 2006, Complainant filed his sworn Complaint with the Chicago Commission on Human Relations. The Complaint, in its entirety, reads as follows:

> On 8/15/06, I, Darryl Williams, a member of bally's total fitness was attempting to leave when I came to a locked steel gate. I found 2 white males and 1 white female cleaning up. I asked if they could find someone to open the gates or if they seen the manager. w/f Mary Bell (supv) said the manager is gone and we don't have the keys. I asked could she call someone. Mary Bell responded "The club closes at 11pm and you are just out of luck. She also said – If you people would listen and pay attention you won't be locked in. I asked her what do you mean you people. I'm the only one standing here. Cabron in Spanish. Pendejo (public har). Chainga tu madre (Fuck your mother). Nigger. Climb over the gate – fuckin monkey. Mary Bell refused to open gate. I call CPD 911. They called the manager and security in the building and Officer Basil Johnson responded at 11:20 pm – and he witness the gates locked. Officer Scatena #19035 Beat 1937 showed up at 11:25 pm. The gate was open by cleaning staff Mary Bell (Supv) White/Female When Officer Basil Johnson order/asked them to open the gates. Mary Bell (supv) w/f had the keys all of the time.

An administrative hearing was held on October 29, 2008. Complainant presented only himself as a witness. Respondent chose not to call any witnesses to the alleged incident – apparently relying solely on the uncontested fact that the person who allegedly discriminated was an independent contractor with the cleaning service hired by Bally's. That fact may not have saved Respondent had Complainant been a credible witness. The hearing officer determined that he was not.

III. FINDINGS OF FACT

Complainant, Darryl Williams, has been a member of the Bally's health club for over twenty-five years. (Tr. 12) Williams, who is African-American, has at various times claimed that different Bally's employees, at different facilities, treated him in a discriminatory manner because of his race. Each of the three incidents that resulted in a complaint being filed with the Chicago Commission on Human Relations has stemmed from Williams' apparent inability or unwillingness to leave the health club at closing time. (Exs. 7, 9, 10, 11, 14)[1]

This case involves an incident that took place on August 15, 2006. (Tr. 25) After using the club, Complainant went to change his clothes. He exited the locker room, according to his testimony, at 11:05 p.m. (Tr. 13) Bally's customary procedure for closing is to make an announcement every fifteen minutes during the last hour the club is open that members must exit by closing time. (Tr. 47) Closing time on August 15, 2006, was 11:00 p.m. Although Complainant initially testified that he had not been informed of the club's closing policy (Tr.12), that testimony was untrue. He admitted on cross-examination that he knew the club closed at 11:00 p.m., although he stated he doesn't always hear the announcement. (Tr. 30). And in September of 2005, he had a conversation with the club's General Manager, Denise Hunter, over another dispute where he claimed that an employee was rude to him, trying to force him to leave by 11:00 p.m. (Tr. 54)

The hearing officer found that Complainant's testimony regarding the incident that took place on August 15, 2006, was wrought with fabrication. Although his version of events as told at the administrative hearing was unrebutted by other testimony, Complainant's testimony was thoroughly impeached by his prior sworn Complaint filed with this Commission just eight days after the alleged incident. It may thus be legitimately rejected. *Bucktown Partners v. Johnson*, 110 Ill.App.3d 346, 353-55, 456 N.E.2d 703 (1983); *Jones v. Consolidated Coal Co.*, 174 Ill.App.3d 38 (5th Dist. 1988).

At the hearing, Complainant testified that as he was leaving the locker room, a person named Mary Bell walked up to him, stopping him about 25 feet away from the locker room, and started to speak to him directly. (Tr. 13, 20) Complainant stated that at the time of the encounter, the front gate to the club was open and two white club members walked past him and were allowed to exit. (Tr. 13, 31) Complainant testified that Bell then "gave orders" to two other employees to lock the gate. (Tr. 18) She then, according to Complainant, told Complainant he should have been out of the locker room, calling him a "nigger," "pendejo," and "carbon," and also telling him "chinga tu madre," which according to Complainant means "fuck your mother." (Tr. 16, 17) Complainant also testified

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[1] The two prior complaints against Bally filed by Williams with the Chicago Commission, along with two Investigative Summaries and a First Recommended Decision in favor of Respondent, were introduced into evidence by Respondent without objection. Illinois has adopted the rationale of Federal Rule of Evidence 404(b), which allows evidence of "litigiousness" only if there is evidence that the actions were fraudulently brought, or where there is evidence that the multiple acts are part of a single scheme or plan of fraud or were committed in pursuit of a common purpose. See *Brown v. Brown*, 62 Ill. App. 3d 328, 379 N.E. 1d 634 (2nd Dist. 1978). The Seventh Circuit Court of Appeals has held that although prior discrimination lawsuits are not admissible to show the propensity to file discrimination lawsuits or to show that because a plaintiff may have lied in the past he was likely to do so in this case, they may be admissible under the following circumstances: (1) the evidence must be directed toward establishing something at issue other than a party's propensity to commit the act charged; (2) the other act must be similar enough and close enough in time to be relevant to the matter at issue; (3) the evidence must be such that a trier of fact could find that the act occurred and the party in question committed it; and (4) the prejudicial effect of the evidence must not substantially outweigh its probative value. *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001); *Gastineau v. Fleet Mortgage Co.*, 137 F.3d 490, 494-95 (7th Cit. 1998). Applying the above standard, the hearing officer in his recommendation did not rely on Exhibits 7, 9, 10, 11, and 14 other than to establish that Williams was aware of the Bally closing policy, and the Commission has followed the same principle.

that Bell called him a "fucking monkey" and told him to "climb over the fucking gate." (Tr. 16)

According to Complainant's hearing testimony, he then called downstairs, asked about security, and demanded that they open the gate. Security then came up and told Bell to "open the gates and let him out." (Tr. 19)

Finally, in a transparent attempt to deal with the problem of agency previously raised by Respondent in a Motion to Dismiss, Complainant testified that Bell told him she was "the supervisor of the health club" and the supervisor "for Bally." (Tr. 30, 80)

The hearing officer rejected this testimony as not credible and indeed as perjurious. The hearing officer cited two reasons for his determination. First, Complainant's hearing testimony contradicts the sworn Complaint he filed on August 23, 2006. In that Complaint, he stated that when he tried to exit the club he *found the gate locked*, making no mention of any white customers being allowed to exit the club while he was talking with Bell or of Bell ordering the gate to be closed. He identifies Bell in his Complaint as "a white female cleaning up." He said he asked Bell if she could find someone to open the gate or if they had seen the manager. And he averred that when she refused he called 911 and they called the manager and security, and the police then ordered Bell to open the gate.

The second reason the hearing officer rejected Complainant's testimony as not credible was his demeanor when he testified. When asked by his counsel what racially-based statements Bell had made to him (Tr. 16), Complainant was initially unable to answer and had to review the Complaint he filed with the Commission. He then read the statements from the Complaint. Throughout his testimony concerning the incident, Complainant refused to make eye contact with the hearing officer.

It is uncontested that Mary Bell was a member of the cleaning staff employed by Central Building Services, Inc. (Tr. 48, Ex. 1) She was not an employee of Bally. Bally had no authority to hire or fire Bell. Bally did not pay Central's employees and exerted no day-to-day supervision over Bell or over Central's methods of cleaning. (Tr. 60) The contract between Central and Bally deals solely with cleaning. No authority is given to employees of Central Building Services to control the ingress or egress of members.

Section 2-120-510(I) of the Chicago Municipal Code requires the Commission to adopt the findings of fact recommended by a hearing officer if they are not contrary to the evidence presented at the hearing. See also Reg. 240.620(a) and *Stovall v. Metroplex* et al., CCHR No. 94-H-87 (Oct. 16, 1996), holding that the Commission will not re-weigh a hearing officer's recommendation as to witness credibility unless it is against the manifest weight of the evidence.

Complainant through his counsel exercised his right to submit objections to the hearing officer's recommended ruling. The objections asserted that Complainant's testimony was credible, unrebutted by Respondent, and consistent with the allegations of the Complaint. However, the objections did not address the inconsistencies pointed out by the hearing officer; instead they focused on Complainant's allegations that Bell told him she did not have keys to open the gate (when it turned out she did have keys) and that Bell called him names including "nigger." Even if these particular statements in the Complaint may have been consistent with Complainant's testimony at the hearing (after Complainant refreshed his recollection by reading the Complaint, as pointed out above), the Commission is not persuaded that the hearing officer's findings about Complainant's credibility are contrary to the evidence, particularly as to the credibility of his testimony that the gate

was *open* as he approached it; that Bell walked up to him as he approached the gate, stopped him, started speaking to him directly, allowed two white club members to exit while confronting Complaint, and only then ordered the gate closed so that Complainant could not exit. This self-serving testimony contradicts Complainant's own statements in his sworn Complaint that when attempting to leave he "came to a locked steel gate," asked Bell and the two white males who were "cleaning up" to help him find someone to open the gate, but was then refused assistance and subjected to the alleged invective by Bell, all with no mention of observing any white patrons being allowed to leave before the gate was locked. The Commission agrees with the hearing officer that if Complainant had observed white patrons being allowed to leave, with Bell ordering the gate closed only after she began confronting him, he is highly unlikely to have omitted such important facts from the otherwise-detailed race discrimination Complaint he filed at the Commission only eight days after the incident occurred.

IV. CONCLUSIONS OF LAW

Section 2-160-070 of the Chicago Human Rights Ordinance states:

> No person that owns, lease, rent, operates, manages, or in any manner controls a public accommodation shall withhold, deny, curtail, limit or discriminate concerning the full use of such public accommodation by any individual because of the individual's race.... Chicago Muni. Code §2-160-070. See also Reg. 520.100.

Commission Regulation 520.150 further provides that harassment violates the Chicago Human Rights Ordinance. Such harassment is defined as slurs or other verbal or physical conduct relating to an individual's membership in a protected class when the conduct has the purpose or effect or creating an intimidating, hostile, or offensive environment or otherwise adversely affects an individual's full use of the public accommodation.

The owner of a public accommodation has a duty not to discriminate in violation of the Human Rights Ordinance and may be held liable for the discriminatory acts of its agent. *Andrews v. J.P.K. Enterprises, Inc., supra*; *Kalecki v. Johnson and Jake's Pub*, CCHR No. 93-E-173 (Jan. 31, 1994). Whether a particular individual is an agent is a question of fact. *Daniels v. Corrigan*, 382 Ill.App.3d 66, 866 N.E.2d 1193 (1st Dist. 2008). The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal. *Id.* No single factor determines what the relationship is between parties in a given case. Factors to be considered include the right to control the manner in which the work is done, the method of payment, the right to discharge, the skills required in the work to be done, and who provides the tools, materials, or equipment. *Yellow Cab Co. v. Industrial Comm'n*, 238 Ill.App.3d 650, 652, 606 N.E.2d 523 (1992).

Whether or not Bell was a Bally employee, Complainant understood that she was a member of the cleaning crew. However, it is not necessary to resolve whether or not Mary Bell was an agent of Bally with respect to the alleged incident, because Complainant's claim of race discrimination still fails due to lack of credible evidence.

The hearing officer rejected Complainant's testimony about the incident in question as not credible. The hearing officer noted that Complainant was unable to testify from his own memory about the alleged racial slurs Bell directed toward him, that Complainant failed to make eye contact with the hearing officer during his testimony, that his testimony about the white patrons allowed to

exit while he was being prevented from doing so was never mentioned in the sworn Complaint filed shortly after the incident, and that Complainant's testimony at the hearing directly contradicted the sworn Complaint concerning key facts about what occurred. In particular, the hearing officer found Complainant's testimony that he observed two white club members walk past him and exit the club before Bell ordered the gate closed to be simply not believable. Nor did the hearing officer believe Complainant's testimony that he was bombarded out of the blue by racial invectives from a cleaning person whom he had never met or spoken to before.

A hearing officer and the Board of Commissioners may disregard the testimony of a witness in its entirety if they determine the witness was not telling the truth. *Bray v. Sandpiper Too et al.*, CCHR No. 94-E-43 (Jan. 10, 1996); *Crenshaw v. Harvey*, CCHR No. 95-H-82 (May 21, 1997); *McGee v. Cichon*, CCHR No. 96-H-26 (Dec. 30, 1997); *Wiles v. The Woodlawn Org. et al.*, CCHR No. 96-H-1 (Mar. 17, 1999); *Poole v. Perry & Assoc.*, CCHR No. 02-E-161 (Feb. 16, 2006). Moreover, findings of lack of credibility may be based on the criteria used by the hearing officer. In *Anderson v. Stavropoulous*, CCHR No. 98-H-14 (Feb. 16, 2000), the Commission also found a complainant's testimony not credible because his story changed from the time he filed the Complaint to the hearing. Similarly, in *Doxy v. Chicago Public Library*, CCHR No. 99-PA-31 (Apr. 18, 2001), the Commission took into account the inconsistencies in a complainant's own testimony to find that he was not credible. In *McGee* and *Poole*, supra., and many other rulings, the hearing officer and the Commission have taken into account the demeanor of a witness in finding testimony not credible.

Accordingly, Complainant has not sustained his burden of proving by a preponderance of credible evidence that he was subjected to race discrimination in violation of the Chicago Human Rights Ordinance.

V. SANCTIONS

Commission Regulation 210.410 provides in relevant part, "Every pleading, motion, other document, or oral statement submitted by a party or attorney in a case is deemed to certify to the best of the person's information, knowledge, and belief that after reasonable inquiry: (a) That its allegations and other factual contentions have evidentiary support or, if so identified, are likely to have evidentiary support after reasonable opportunity for investigation or discovery.

Reg. 210.420 provides that upon determining that Reg. 210.410 has been violated, the Commission or hearing officer may exclude the evidence in question, may issue an order of dismissal or default, and may impose monetary sanctions pursuant to Subpart 235.

Pursuant to these regulations, the hearing officer made a finding that the testimony of Complainant at the administrative hearing was false and without evidentiary support for the reasons set forth above. The Commission agrees with the hearing officer that such obviously contrived testimony, directly impeached by the Complainant's own sworn complaint, should not go unpunished. Such false testimony is, in itself, grounds for dismissal of this Complaint and supports the hearing officer's recommended fine of $500 as a sanction, pursuant to Reg. 235.420. The maximum fine is appropriate not only because of the seriousness of false testimony, but also because the City of Chicago has incurred extensive costs in Commission staff time as well as contractual payments to the conciliator, hearing officer, and court reporter for the adjudication of this case.[2]

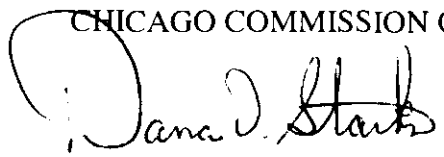
[2]Reg. 235.420 provides as follows: "The Commission may impose a fine up to $500 for each incident of procedural noncompliance, which shall be payable no later than 28 days after issuance of the order imposing the fine if no other

VI. CONCLUSIONS

Complainant did not meet his burden of demonstrating by a preponderance of credible evidence that he was subjected to race discrimination. Thus his claim of violation of the Chicago Human Rights Ordinance fails. Accordingly, Complainant is not entitled to any damages or other relief, because he has failed to prove a violation of the Human Rights Ordinance. In addition, Complainant based his claim on false testimony.

For the reasons stated above, the Complaint in this matter is DISMISSED and Complainant is fined in the amount of $500.

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Dana V. Starks, Chair and Commissioner
Entered: January 21, 2009

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date is specified. For continuing noncompliance including failure to pay the initial fine or costs to a party when due, the Commission may impose additional fines of up to $100 per day until the earlier of full compliance or entry of the final order in the case. In setting the amount of the fine, the Commission may take into consideration, among other factors, the costs to the Commission due to the noncompliance including costs for a mediator, hearing officer, interpreter, or court reporter."