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:

Karl Warren, Corey Elbert, and Ebonii Warren
Complainant,
v.
Lofton & Lofton Management d/b/a McDonald's, Shaki Rodriguez, and Gordon Martin, Jr.
Respondents.

Case No.: 07-P-62/63/92

Date Mailed: July 24, 2009

TO:

Karl Warren, Ebonii Warren
3320 W. Beach, Apt. 1
Chicago, IL 60651

Corey Elbert
7031 S. Indiana
Chicago, IL 60651

Alan J. Farkas
Madsen, Farkas & Powen, LLC
20 S. Clark St., Suite 1050
Chicago, IL 60603

Gordon Martin, Jr.
9364 S. Stewart
Chicago, IL 60620

Atty. Sylvia Coulon
800 S Wells, #1406
Chicago, IL 60607

Atty. Sheila S. York
P.O. Box 440137
Chicago, IL 60644

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on July 15, 2009, the Chicago Commission on Human Relations issued a ruling in favor of Complainants in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, the Commission ORDERS Respondents to pay the following amounts:

1. Respondents Lofton and Lofton Management and Gordon Martin, Jr. are jointly and severally ordered to pay compensatory damages or $3,500 to Karl Warren and $1,500 to Corey Elbert,

2. Respondent Lofton and Lofton Management is ordered to pay compensatory damages of $1,000 to Ebonii Warren plus interest on that amount from June 16, 2007, in accordance with Commission Regulation 240.630.

3. Respondent Gordon Martin, Jr. is ordered to pay punitive damages of $1,500 to Karl Warren and $1,500 to Corel Elbert.

4. Respondent Lofton and Lofton Management is ordered to pay a fine to the City of $100.

5. Respondent Gordon Martin, Jr. is ordered to pay a fine to the City of $500.[1]

6. Complainants are also awarded their reasonable attorney fees and associated costs subject to the procedure described below.

Because the Commission ruled in favor of Respondent Shaki Rodriguez and against Complainants, all claims against Respondent Rodriguez are DISMISSED.

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

Attorney Fee Petition/s

Pursuant to Reg. 240.630, Complainants may now file with the Commission and serve on the other parties and the hearing officer a petition for attorney fees and/or costs, supported by argument and affidavit. Because the two attorneys who represented Complainants in this matter have been allowed to withdraw their appearances, both they and the Complainants themselves are receiving notice of this Order. Despite their withdrawals, Complainant's former attorneys may petition for an award of reasonable attorney fees for work on the case, and any Complainant may petition to recover fees and associated costs paid to a former attorney.

Any petition must be served and filed on or before **August 21, 2009**. Any response to such petition must be filed and served on or before **September 4, 2009**. In addition to filing two copies at the Commission and serving a copy of the hearing officer, any petition must be served on Respondents, Complainants individually, and Complainants' former attorney/s—any of whom may respond. Replies will be permitted only on leave of the hearing officer. A party or former attorney may move for an extension of time to file and serve any of the above items pursuant to the provisions of Reg. 210.320.

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

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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 the 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.

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Date of Ruling: July 15, 2009

FINAL RULING ON LIABILITY AND RELIEF

A. Procedural History

On June 18, 2007, Complainants Karl Warren and Corey Elbert filed Complaints alleging that Respondents Lofton & Lofton Management d/b/a McDonald's ("Lofton"), Shaki Rodriguez, and Gordon Martin, Jr. discriminated against them based on their sexual orientation in violation of the Chicago Human Rights Ordinance ("Ordinance") by depriving them of the full use of a public accommodation on June 16, 2007, while they were patronizing a McDonald's owned by Lofton. On August 17, 2007, Complainant Ebonii Warren filed a Complaint alleging that Respondent Lofton discriminated against her based on her sexual orientation and gender identity (transgender) in violation of the Ordinance by depriving her of the full use of a public accommodation during the same incident referenced by the Complaints of Karl Warren and Corey Elbert. Respondents Lofton and Rodriguez filed Verified Responses to the Complaints in which they denied discriminating against Complainants. Respondent Martin, however, did not file a Verified Response.

On November 15, 2007, the Commission determined that there was substantial evidence that Respondents Lofton and Rodriguez violated the Ordinance with respect to the claims of sexual orientation and gender identity alleged in Complainants' Complaints. On that same date, the Commission also entered an Order of Default against Respondent Martin because he failed to file and serve a Verified Response as required by the Commission's Regulations and Orders. The Commission, pursuant to its Orders of February 13 and March 4, 2008, held its Pre-Hearing Conference on May 19, 2008. Although counsel for Respondents Lofton and Rodriguez attended the Pre-Hearing Conference, neither Respondent Martin nor Complainants (who were *pro se* at the time) appeared.

One day later, on May 20, 2008, Attorney Sylvia Coulon filed an appearance on Complainants' behalf and Complainants filed a motion to reschedule the Pre-Hearing Conference and the Administrative Hearing. By its Order dated June 10, 2008, the Commission denied Complainants' motion to hold a second Pre-Hearing Conference and rescheduled the Administrative Hearing for July 8 and 9, 2008. Upon motion by Respondents Lofton and

Rodriguez, the Commission once more rescheduled the Administrative Hearing for August 27, 2008.[1]

At the Administrative Hearing, the three Complainants testified in support of their claim that Respondents engaged in illegal discrimination by denying them the full use of one of Lofton's McDonald's restaurants (a public accommodation) based on their sexual orientation and—in the case of Complainant Ebonii Warren—gender identity. Respondents Lofton and Rodriguez called four witnesses (Shaki Rodriguez, LaTonya Reynolds, Emma Digby-Boyd, and Ronnie Lofton) and presented documents in support of their position that they did not discriminate against Complainants. Respondents Lofton and Rodriguez also assert that only Respondent Martin (who did not appear for the Administrative Hearing) is liable for the discriminatory conduct at issue. The parties, with the exception of Respondent Martin, filed post-trial briefs.

On March 9, 2009, the Administrative Hearing Officer issued his Recommended Ruling on Liability and Relief. The Recommended Ruling proposed findings (1) in favor of Complainants Karl Warren and Corey Elberton on their claims of sexual orientation discrimination against Respondents Lofton and Martin, (2) in favor of Complainant Ebonii Warren on her claim of sexual orientation and gender identity discrimination against Respondent Lofton, and (3) against Complainants and in favor of Respondent Rodriguez on Complainants' claims against her. On April 6, 2009, Respondent Lofton timely filed objections to the Recommended Ruling in which it asserted that it has no liability to Complainants for a number of reasons. Nonetheless, for the reasons stated below, the Commission overrules Lofton's objections and adopts the liability findings made in the Recommended Ruling.

B. Findings of Fact

I. The Parties

1. Complainant Karl Warren is a gay man who resides on the northwest side of the City of Chicago. Transcript ("Tr.") at 11-12. Mr. Warren, who does not work outside of his home, resides with his transgendered daughter Complainant Ebonii Warren. Tr. 11-12.

2. Complainant Ebonii Warren is a transgendered female who was born male but who now lives life as a female at all times. Tr. 33-34. Ms. Warren began to make her transition at age fifteen and she has had a full sex change operation. Tr. 33-34. Ms. Warren lives with her father, Mr. Warren, who adopted her at age 16. Tr. 33. Ms. Warren works as a social worker for the Howard Brown Youth Center. Tr. 33. In this capacity, she does case management for gay, lesbian, bisexual, and trangendered youth who are homeless and who may be at high risk for HIV and AIDS. Tr. 33.

[1] By its Order dated July 30, 2008, the Commission also denied Complainants' motion for leave to add additional parties and amend the Complaint regarding additional claims and allegations.

3. Complainant Corey Elbert is a gay man who resides on the south side of the City of Chicago. Tr. 42-43. Mr. Elbert has been best friends with Ms. Warren since he was a teenager and he met Mr. Warren through Ms. Warren. Tr. 42. Mr. Elbert works as a material handler for the World's Finest Chocolate Factory. Tr. 42-43.

4. Respondent Lofton & Lofton Management ("Lofton") is a sixteen year-old business that owns and operates McDonald's restaurants. Tr. 135. Lofton operates McDonald's restaurants located at 4048 West Madison Street, 3200 West Roosevelt Road, 23 North Western Avenue, and 5015 West Madison Street on the west side of the City of Chicago. Exhibit 11 (Lofton/Maximum Security Agreement) at 1. Lofton, in turn, is owned by Ronnie Lofton who also serves as Lofton's president and CEO. Tr. 135.

5. Lofton provides its employees with orientation training that includes training regarding the company's zero tolerance for discrimination based on any protected basis. Tr. 65, 92-93, 138. In addition, Lofton provides its employees with a copy of the anti-discrimination policy contained in McDonald's Operations and Training Manual. Tr. 140-41. McDonald's anti-discrimination policy explicitly prohibits its employees from engaging in discrimination and harassment based on sexual orientation or any other protected basis, and the policy protects all persons (including customers). *See* Exhibit 9 (McDonald's anti-discrimination policy). Finally, Lofton distributes to its employees Lofton's Crew Personnel Policies which make it clear that the use of "abusive language" is grounds for termination. Tr. 141; Exhibit 10 (Lofton's crew and personnel policies), at 1.

6. On June 16, 2007, Respondent Shaki Rodriguez was employed as a manager at the Lofton McDonald's restaurant that is located at 4048 West Madison Street. Tr. 78, 66. Ms. Rodriguez reported to the store manager LaTonya Reynolds and would oversee the crew and run the store when Ms. Reynolds was gone. Tr. 78, 83. Ms. Rodriguez, who was hired in mid-2006, received Lofton's orientation training before she started work although she missed part of the anti-discrimination training due to illness. Tr. 63-64, 84. Ms. Rodriguez resigned her employment at Lofton effective August 31, 2007. Tr. 81.

7. Lofton has enforced its anti-discrimination policies when its employees have been intolerant. Tr. 139. Lofton has terminated employees who used "offensive language" towards others and one employee was "terminated immediately" after he used a derogatory name relating to another person's sexual persuasion. Tr. 93-94, 140; see also Tr. 66.

8. Lofton expected its supervisory employees to intervene and correct any of its employees who violated Lofton's policies. Tr. 87, 103.

9. Lofton employs a diverse workforce that includes Hispanics, African-Americans, and Caucasians. Tr. 138. As Mr. Lofton testified, the company's work force is made up of "all different races, nationalities, genders...homosexuals, as well as straight people." Tr. 138. Lofton's gay and lesbian employees are not forced to conceal their sexual orientation, and some are quite open about the matter. Tr. 65, 93, 139.

10. The Lofton McDonald's at 4048 West Madison Street has a diverse clientele that includes gays, cross-dressers, and transgendered persons. Tr. 66-67. Store policy requires that all customers be treated equally. Tr. 67.

11. As of June 16, 2007, Lofton was a party to a Security Agreement ("Agreement") with Maximum Security & Investigation Agency, Inc. ("Maximum"), a security agency that provides security services for businesses, apartment buildings, and restaurants. Tr. 120, 111, 133; Exhibit 11 (Lofton/Maximum Security Agreement).

12. The relationship between Lofton and Maximum was defined by their Agreement. Tr. 122. Among other things, the Agreement specified that Maximum was to:

(a) provide security services pursuant to post orders that were to be developed in consultation with Lofton and were subject to Lofton's approval (Exhibit 11, ¶9; Tr. 117-18; Exhibit 5 (Post Orders);

(b) provide the specified security services through security officers who are Maximum employees at Lofton's McDonald's restaurants (Exhibit 11, ¶¶1, 10, 14);

(c) provide a supervisory person who was responsible for the general administration of Maximum's security officers at all times (Exhibit 11, ¶¶11, 14);

(d) enforce those policies and procedures of Lofton of which it had been apprised and that pertain to the maintenance of good order and undertake and perform such other duties as directed by Lofton (Exhibit 11, ¶8; Exhibit 5, at 1-3);

(e) perform its work in compliance with all applicable laws, ordinances, codes, and regulations (Exhibit 11, ¶7);

(f) serve as an independent contractor and not as an employee of Lofton (Exhibit 11, ¶¶7, 21);

(g) serve by Lofton's appointment as Lofton's "special agent" with authority to sign criminal complaints for any offenses its officers may witness that fall within existing prosecution policy (Exhibit 11, ¶20);

(h) provide written reports to Lofton regarding all unusual incidents or occurrences (Exhibit 11, ¶8; Exhibit 5, at 2);

(i) investigate any allegations of misconduct against Maximum's security officers and provide Lofton with a written report regarding each such investigation (Exhibit 11, ¶17)

(j) indemnify Lofton from and against any losses, costs, claims, damages, expenses (including attorney's fees), and liabilities arising as a result of any claims for personal injuries (Exhibit 11, ¶3);

(k) obtain insurance coverage in form and content that is satisfactory to Lofton (Exhibit 11, ¶4);

(l) provide results of the drug screening tests for the security officers to Lofton for its review (Exhibit 11, ¶24);

(m) furnish the security officers with uniforms and attire that are subject to Lofton's approval (Exhibit 11, ¶23); and

(n) prohibit its unarmed security officers from carrying firearms on Lofton's property unless written authorization was provided by Lofton (Exhibit 11, ¶25).

13. Maximum's post orders for its security guards at Lofton's restaurants (which Lofton approved and worked with Maximum to develop, Tr. 117-18) provided that the duties of its security guards included "monitor[ing] persons entering and exiting the restaurant" and "not allow[ing] unauthorized persons into the restaurant." Exhibit 5, at 2. The post orders defined "unauthorized persons" to include "[a]nyone who is not on the property for business purposes" and "[l]oiterers". Exhibit 5, at 2.

14. Lofton reserved the right under the Agreement to request an increase or decrease in the number of security officers assigned by Maximum at its restaurants, to alter the hours of coverage, and to specify the location of the security coverage. Exhibit 11, ¶10. The Agreement also provided Lofton with the right to reject without cause—but consistent with anti-discrimination laws—any Maximum security officer assigned to its McDonald's restaurants. Exhibit 11, ¶15. Nonetheless, the security officers (including Respondent Martin) were Maximum's employees and Maximum was responsible for providing work-related instructions to them. Exhibit 11, ¶¶10, 14, 21; Exhibit 2 (Respondent Martin's Maximum personnel file); Tr. 115-17, 122. Furthermore, representatives from both Maximum and Lofton understood that only Maximum -- and not Lofton -- had the right to discipline Maximum's security officers. Tr. 129-130 (testimony from Emma Digby Boyd, Maximum's president); Tr. 74-75, 76-77 (testimony of Respondent Rodriguez).

15. Maximum's company philosophy is to be courteous, diligent, and respectful to all persons regardless of their race, gender, or membership in a protected class and the company has a "low tolerance for discrimination." Tr. 113-14. This philosophy is embodied in Maximum's Policy and Procedure Manual. Tr. 113-14; Exhibit 1 (Maximum's Policy and Procedure Manual), §§17, 46. Maximum provides a copy of its Manual to all of its employees. Tr. 114-15. Maximum's post orders which governed its work at the Lofton McDonald's restaurants likewise required that Maximum's security officers treat all customers in a pleasant, courteous, and professional manner. Tr. 117-18. Maximum's supervisory personnel reiterated this policy to the security officers during their orientation. Tr. 118.

16. Respondent Gordon Martin applied for a security officer position with Maximum in May 2006. See Exhibit 2 (Respondent Martin's Maximum personnel file). Respondent Martin, who was a Cook County correctional officer at the time he submitted his application, was hired by Maximum after he passed his background and drug tests. Tr. 115-16. Maximum fired Mr. Martin on June 19, 2007, because of his derogatory comments during the incident that

prompted this Complaint. Tr. 124-25; Exhibit 4 (exit interview report regarding Respondent Martin).

II. The Events of June 16, 2007

17. On the afternoon of June 16, 2007, the three Complainants were shopping on West Madison Street when Ms. Warren decided that she wanted an ice cream sundae and the three went to the Lofton-owned McDonald's located at 4048 West Madison Street. Tr. 12. Complainants had never been to that McDonald's before. Tr. 12, 34.

18. Mr. Warren and Ms. Warren entered the McDonald's first while Mr. Elbert (who was wearing "a tight shirt with some Chanel signs on it and some capri pants") remained outside to complete a phone call. Tr. 13, 43, 47. Mr. Warren took a seat in the dining room area while Ms. Warren went to the counter to buy ice cream. Tr. 35, 40. The restaurant was not crowded at the time. Tr. 13. There was were three to four other people in the lobby and perhaps one other person who was placing an order. Tr. 43.

19. Ms. Rodriguez arrived for her manager shift at the McDonald's at 4:00 p.m. on June 16, 2007. Tr. 68. When the Warrens first entered the McDonald's, Ms. Rodriguez was sitting at a table in the dining room doing scheduling paperwork. Tr. 68-69. Ms. Rodriguez was sitting with Mr. Martin, who was the uniformed Maximum security officer assigned to the McDonald's at that time. Tr. 68-69; Exhibit 5, at 2. Ms. Rodriguez observed Complainants as they approached the restaurant and she understood that the three were together. Tr. 70.

20. The witnesses provided somewhat divergent testimony regarding what Respondents Rodriguez and Martin said and did next.

a. Ms. Rodriguez testified that (i) she told Mr. Martin—who was right next to her—to go ask Mr. Warren if he was going to buy anything because Lofton did not allow a person to sit in the restaurant without making a purchase; (ii) Mr. Martin referenced Mr. Elbert and stated to her, "Look at that guy with the girl shirt and the capris on"; (iii) she did not say anything or indicate in any non-verbal way that she agreed with Mr. Martin's comments; (iv) she could not believe that Mr. Martin made the comments, which caused her to feel uncomfortable, amazed, and ashamed; and (e) she did not hear Mr. Martin make any other derogatory comments. Tr. 71-75.

b. Mr. Warren (who was the only Complainant present for the initial portion of the confrontation) testified that (i) Ms. Rodriguez, Mr. Martin, and two young boys were sitting together when Mr. Martin made derogatory comments towards Mr. Elbert to the effect of "Look at him with that girl T shirt on and those capris with his faggot ass"; (ii) Ms. Rodriguez responded to Mr. Martin by saying "OK, don't he?"; and (iii) he assumed Mr. Martin was a McDonald's employee. Tr. 13, 21, 26, 30-31. Mr. Elbert then entered the restaurant and observed that Mr. Warren had "a look on his face," and that Ms. Rodriguez and Mr. Martin were looking at him from head to toe with a focus on his toes (which were polished). Tr. 44-45, 47, 60-61. Mr. Elbert further testified that Mr. Martin stated, "Look at his toes, they are done" and Ms. Rodriguez responded by saying "yeah." Tr. 45.

c. As Ms. Warren (who had gone to the bathroom after purchasing the ice cream) approached, Mr. Elbert testified that Mr. Martin told Ms. Rodriguez (with reference to the three Complainants), "That is a fag, fag, and that's a man." Tr. 46. Mr. Warren further testified that Mr. Martin stated, "Look at her big feet, look at her neck, she must be a man" with reference to Ms. Warren. Tr. 14. As Ms. Warren left the bathroom, she heard a "commotion" involving Mr. Warren's defense of the fact that they were homosexual and transgender and his assertion that Respondents had no right to say what they were saying. Tr. 35-36. Ms. Warren further testified that Mr. Martin was "aggressive," that he was "saying a lot of the stuff," and that Ms. Rodriguez said nothing. Tr. 36.

21. The Commission's findings regarding the words spoken and the actions taken by Respondents Rodriguez and Martin turn on the credibility of the respective witnesses. In determining the credibility of a witness, the Commission considers a number of factors including (a) the witness' demeanor; (b) the clarity, certainty, and plausibility of the testimony; (c) whether the testimony has been impeached or contradicted by other testimony or documentary evidence; (d) whether the testimony has been corroborated by other testimony and documentary evidence; and (e) the witness' interest or disinterest in the outcome of the proceedings. See, e.g., *Hodges v. Hua and Chao,* CCHR No. 06-H-11 at 4 (May 21, 2008)(citing cases). Moreover, the fact that the testimony of a witness is not credible as to one point "does not necessarily discredit the remainder of his testimony." See *Fox v. Hinojosa,* CCHR Case No. 99-H-116, at 10 (June 16, 1994); *Chimpoulis & Richardson v. J & O Corp. et al.,* CCHR Case No. 97-E-123/127 at 22 n.29 (Sept. 20, 2000)("It is not improper, nor a sign of bias, for the fact-finder to determine a witness is credible on some issues, and not credible on others").

22. With these principles in mind, the Commission makes the following findings with respect to the actions and words of Respondents Rodriguez and Martin:

a. The Commission credits Mr. Warren's testimony that Mr. Martin (with reference to Mr. Elbert) said to Ms. Rodriguez, "Look at him with that girl T shirt on and those capris with his faggot ass." Tr. 13. Mr. Warren's testimony is consistent with the allegations within his Complaint, which he executed only two days after the incident. Exhibit 14 (Karl Warren Complaint). The Commission does not credit Ms. Rodriguez's testimony that Mr. Martin referred only to Mr. Elbert's shirt and capris and did not use an anti-gay slur. It is implausible that a reference to Mr. Elbert's attire—without more—would have caused Ms. Rodriguez to feel the discomfort, amazement, and shame that she credibly testified to. Tr. 72, 75.

b. Although Ms. Rodriguez admittedly directed Mr. Martin to approach Mr. Warren (*supra* at 10), the Commission credits Ms. Rodriguez's testimony that she said nothing in response to Mr. Martin's anti-gay comments. Tr. 72. The Administrative Hearing Officer observed Ms. Rodriguez at the Administrative Hearing and found her expressions of distaste and revulsion at Mr. Martin's comments to be genuine. This aspect of Ms. Rodriguez's testimony coupled with the fact that Ms. Rodriguez has two sisters and a cousin who are either lesbian or bi-sexual renders it implausible that she would make a comment ("OK, don't he?") that—as Complainants suggest—would indicate her endorsement of Mr. Martin's anti-gay slur. See, e.g., *Doxy v. City of Chicago Public Library,* CCHR Case No. 99-PA-31, at 10 (April 18, 2001)(holding that defense witnesses' testimony "that they had relatives who were gay may be

taken into consideration in determining whether or not they requested [complainant] to leave the Library because of his sexual orientation"); Tr. 75, 67-68.

c. The Commission finds that Respondents Martin and Rodriguez looked at Mr. Elbert when he entered the restaurant and that they noticed his outfit and the fact that his toenails were polished. Tr. 44-45, 47. The Commission, however, does not credit Mr. Elbert's testimony that Mr. Martin said, "Look at his toes, they are done" and that Ms. Rodriguez responded by saying "yeah." Tr. 45. Mr. Elbert's testimony on this score is undercut by the lack of corroboration by the testimony of any other witness and the fact that he did not include a reference to these comments in his Complaint and background form. Tr. 54, 56-57; see *Fox*, at 4 n.8 (Failure to include slur in complaint and Commission forms supports a finding that the slur was not actually used by respondent).

d. The Commission finds that Respondent Martin referenced the three Complainants and made a statement to the effect that Mr. Warren and Mr. Elbert were "fags" and that Mr. Warren is a man. Tr. 46. Mr. Elbert's testimony on this score is corroborated by "Background Forms" that both he and Mr. Warren completed at the time they filed their Complaints. Exhibit 16 (Elbert background form); Exhibit 17 (K. Warren Background Form). On the other hand, the Commission does not credit Mr. Warren's testimony that Mr. Martin made reference to Ms. Warren's "big feet" and "neck." There is no reference to this alleged testimony in either the Complainants' Complaints or the their "Background Forms." Tr. 23, 26, 54, 57; see *Fox* at 4 n.8.

e. The Commission rejects Mr. Warren's testimony that there were two boys sitting at the table with Mr. Martin and Ms. Rodriguez at the time the incident took place. No other witness testified to the presence of these boys. Moreover, there is no apparent reason why Mr. Martin and Ms. Rodriguez (both of whom were working) would be sitting with two young boys.

23. After Mr. Martin made his anti-gay comments, Mr. Elbert stated that he was "going to ask do they discriminate." Tr. 73. Mr. Elbert also asked a McDonald's employee named Sabrina what Ms. Rodriguez's name was and Sabrina provided Ms. Rodriguez' name to Mr. Elbert. Tr. 73. While this exchange was taking place, Mr. Martin said to Ms. Rodriguez, "I don't know why they are asking your name because I am the one that said it, and I will tell them that I said it." Tr. 73.

24. Mr. Warren asked Ms. Warren to get a receipt for her ice cream purchase so that they could complain of what happened that day and Complainants left the restaurant after Ms. Warren obtained a receipt. Tr. 17, 37. Complainants felt they were forced to leave because of the discriminatory harassment to which they were subjected and the commotion that was taking place. Tr. 17, 37, 47. After they left the restaurant, Complainants went about their day and later went to get something to eat at another establishment. Tr. 50. For her part, Ms. Rodriguez carried on and worked the remainder of her shift after the incident with Complainants ended. Tr. 73.

III. Post-June 16, 2007 Events

25. LaTonya Reynolds, the store manager at the McDonald's in question, was notified by the office manager regarding "a customer complaint [that] had come in of the

security officer making sexual comments to one of the customers that came inside the restaurant." Tr. 94-95. Mr. Lofton was also notified of the complaint and he understood that "the officer had made a derogatory comment toward[s] an individual in reference to their sexual persuasion, and that [Lofton's] manager did nothing to stop it." Tr. 142.

26. Mr. Lofton determined that Lofton's contract with Maximum should be terminated because of Mr. Martin's derogatory statements and he subsequently sent a termination letter to Maximum's President, Emma Digby Boyd. Tr. 143, 123-24; Exhibit 12 (termination letter). Ms. Digby Boyd, in turn, terminated Mr. Martin's employment. Tr. 124.

27. Mr. Lofton also directed Ms. Reynolds and Mr. Brown (who managed all of the Lofton McDonald's restaurants) to investigate the circumstances of Complainants' complaint. Tr. 142.

28. Ms. Reynolds interviewed Ms. Rodriguez, who acknowledged that Mr. Martin had made comments about the customer's clothes. Tr. 96-97. Ms. Rodriguez also explained that she did not say anything to Mr. Martin because she did not believe that she had the authority to intervene and stop him since he was not a Lofton employee. Tr. 77, 97. Ms. Reynolds disagreed and gave Ms. Rodriguez a written reprimand because she felt that McDonald's policy required Ms. Rodriguez to intervene and stop Mr. Martin (whom she testified was under Ms. Rodriguez's supervision). Tr. 103-04, 78-79, 87, 103-04; Exhibit 8 (reprimand for "poor customer relations" and Ms. Rodriguez's failure to intervene when "sexuality remarks were made by the security officer").

29. Mr. Lofton subsequently met with Ms. Rodriguez regarding the incident and he asked her why she did not step in and send Mr. Martin home. Tr. 80, 137. Ms. Rodriguez explained once more that she did not take any action after Mr. Martin made his comments because did not feel that she had the authority to do so. Tr. 143, 80. Mr. Lofton told Ms. Rodriguez that he expected her to say something to Mr. Martin in that situation even if she did not feel that she had the authority to do so. Tr. 80. Nonetheless, Mr. Lofton did not believe that Ms. Rodriguez's inaction constituted misconduct or warranted her termination despite Lofton's zero tolerance policy. Tr. 143, 145.

30. Lofton demoted Ms. Rodriguez back to a crew position and transferred her to its McDonald's restaurant located at 3200 West Roosevelt. Tr. 80.[2] Ms. Rodriguez eventually resigned her position because she did not feel that she could perform effectively. Tr. 81, 144-45.

C. Conclusions of Law

1. Respondent Lofton & Lofton Management d/b/a McDonald's is a public accommodation within the meaning of §2-160-020(j) of the Human Rights Ordinance and Regulation 510.110(d).

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[2] The Commission credits Ms. Rodriguez's testimony over the conflicting testimony of Mr. Lofton—who stated that Ms. Rodriguez voluntarily relinquished her manager position. Tr. 143-44. Ms. Rodriguez' testimony that she was demoted is consistent with the fact that she was criticized by both Mr. Lofton and Ms. Reynolds on account of her failure to intervene and stop Mr. Martin's discriminatory conduct.

2. The Chicago Human Rights Ordinance, at §2-160-070, Chicago Municipal Code, provides in pertinent part:

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

3. Under Commission Regulation 520.110:

> 'Full use' of a public accommodation 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, and that the services offered to persons who are members of a Protected Class shall be offered under the same terms and conditions as are applied to all other persons.

4. Under Reg. 520.100, prohibited discriminatory acts of public accommodation discrimination include "harassing persons in a Protected Class (whether or not [they are] allowed admittance)" to the public accommodation. Regulation 520.150(b) further specifies:

> Slurs and other verbal or physical conduct relating to an individual's membership in a Protected Class...constitutes harassment when the conduct: (i) has the purpose or effect of creating an intimidating, hostile or offensive environment; (ii) has the purpose or effect of unreasonably interfering with an individual's full use of the public accommodation; or (iii) otherwise adversely affects an individual's full use of the public accommodation.

I. Respondent Martin Is Liable to Complainants Karl Warren And Corey Elbert

4. Because the Commission has entered an Order of Default against Respondent Martin and in favor of Complainants Karl Warren and Corey Elbert, the Commission finds that Respondent Martin has admitted the allegations in the Complaints of Mr. Warren and Mr. Elbert and, further, that he has waived any defenses to the allegations including defenses concerning the Complaints' sufficiency. Regulation 235.320. In addition, Mr. Warren and Mr. Elbert are entitled to a finding of liability in their favor against Respondent Martin and to an award of relief so long as they establish a *prima facie* case of sexual orientation discrimination. Regulation 235.320.

5. To prove a *prima facie* case of sexual orientation discrimination, Complainants Warren and Elbert must show that (a) they are members of a protected class; (b) they sought the use of a public accommodation; (c) they were subjected to harassment or some other discriminatory restriction on their use of the public accommodation based on their sexual orientation; and (d) similarly-situated persons not in their protected class were treated more favorably. See, e.g., *Trujillo v. Cuauhtemoc Restaurant,* CCHR Case No. 01-PA-52, at 4 (May 15, 2002). Complainants have more than met this burden. The evidence at the Administrative

Hearing establishes that Respondent Martin used anti-gay slurs that were directed at Complainants Warren and Elbert (who are gay men) while they were attempting to patronize Lofton's McDonald's restaurant, and that none of the other customers in the restaurant were subjected to such verbal abuse. *Supra* at 10-13. The Commission has previously held that the use of even one anti-gay slur can work to deprive a person of the full use of a public accommodation on the basis of their sexual orientation. See, e.g., *Craig v. New Crystal Restaurant*, CCHR Case No. 92-PA-40 (October 18, 1995). As the Commission explained in *Craig*:

> Based on the language of the CHRO and the Commission's Rules, a public accommodation cannot treat persons differently based on their sexual orientation. In addition, based on the singular or abbreviated nature of the contacts between members of the public and public accommodations, it follows that in many cases a single incident of verbal abuse may result in the person using the public accommodation being served differently than other customers because of his or her membership in a protected group. Where such is the case, the single incident will be sufficient to establish a violation of the CHRO.

Craig at 10. Consequently, the Commission finds that Respondent Martin—given the nature and context of his comments (*see Craig*, at 10)—has violated the Chicago Human Rights Ordinance with respect to his discriminatory treatment of Complainants Karl Warren and Corey Elbert. Accordingly, Complainants Karl Warren and Corey Elbert are entitled to relief against Respondent Martin.

II. Respondent Rodriguez Has No Liability To Complainants

6. The Commission concludes that Respondent Rodriguez has no liability to Complainants. The Commission has found that Respondent Rodriguez made no anti-gay statements and that her failure to reprimand Respondent Martin was not based upon her endorsement of his actions or any discriminatory motivation on her part. *Supra* at 12, 14-15; *infra* at 20. Furthermore, there is no basis for holding Respondent Rodriguez liable for the actions of Respondent Martin through principles of vicarious liability because there was no agency relationship between them.

III. Respondent Lofton & Lofton Management Is Liable To Complainants

a. Complainants' Assertions Regarding Respondent Lofton

7. Complainants assert that Lofton is liable because (1) Respondents Martin and Rodriguez made discriminatory remarks regarding Complainants; (2) Lofton did not adequately monitor the conduct of its employees to prevent and remedy discriminatory practices; and also (3) Lofton's failure to immediately reprimand Respondent Martin for his remarks constituted a practice of discrimination against gay and transgendered individuals that denied them their rights under the Ordinance. Complainants' Post-Hearing Brief ("Comp. Brief") at 3.

b. Respondent Lofton's Defenses And Objections

8. Lofton admits that Respondent Martin violated Complainants' rights under the Ordinance.[3] However, Lofton asserted in its post-hearing brief that there is no basis to impose liability on it because (1) Lofton has a strong and efficacious anti-discrimination policy and its owner Mr. Lofton—through his personal actions and philanthropy—has demonstrated a commitment to equal opportunity for all; (2) Ms. Rodriguez's alleged discriminatory comment ("OK, don't he?")—assuming for the sake of argument that she made the comment—is insufficient as a matter of law to constitute a violation of the Ordinance; and (3) Lofton cannot be liable for the discriminatory actions of Mr. Martin because he was an employee of Maximum and not an employee of Lofton. Respondents Lofton and Rodriguez's Post-Hearing Brief ("Resp. Brief") at 2, 12-14.

9. After it received the Administrative Hearing Officer's Recommended Ruling which found it vicariously liable to Complainants based upon the discriminatory conduct of Martin, Lofton filed objections in which it asserts that the authority cited in support of the Recommended Ruling is outdated and has been superceded by the U.S. Supreme Court's decision in *Meyer v. Holley,* 537 U.S. 280 (2003). Respondent Lofton's Objections ("Objections") at 6-7. Lofton further asserts that there is no basis for finding it vicariously liable based on the discriminatory conduct of Mr. Martin because (a) the Recommended Ruling is "wholly inconsistent" with the Commission's prior July 30, 2008, Order (*supra* at 3 n.1) which—according to Lofton—"bar[red] Complainants from pursuing theories of vicarious liability against Lofton"; (b) the evidence shows that there is no agency relationship between Lofton and Mr. Martin; and (c) even if there were sufficient evidence to show that an agency relationship existed between Lofton and Mr. Martin, Lofton is not liable because Mr. Martin acted beyond the scope of his agency when he engaged in the offensive conduct in question. Objections at 1, 5-9.[4]

c. Respondent Lofton Is Not Subject to Liability to Complainants Based Upon Its Own Intentional Actions

10. The Commission finds that Lofton did not violate the Ordinance through its own intentional actions towards Complainants. To the contrary, Lofton's anti-discrimination and zero tolerance policies were designed to ensure that Lofton's employees did not discriminate against customers and other persons based on their sexual orientation or any other protected basis. Moreover, the gay/lesbian friendly atmosphere within the Lofton-owned McDonald's restaurants

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[3] In his closing argument, counsel for Respondents Lofton and Rodriguez stated that (1) the Complainants had "suffer[ed] a tragic indignity" (Tr. 150); (2) what Complainants "experienced and what they went through is a result of what Mr. Martin did" (Tr. 152); and (3) the Commission should "make a very strong and far reaching finding against Gordon Martin" (Tr. 155); Respondents' Post-Hearing Brief at 1 ("The misconduct was initiated and caused by Mr. Martin").

[4] The Commission notes that Lofton does not object to any of the findings of fact within the Recommended Ruling, nor does it object to the proposed awards of relief to Complainants.

as well as Mr. Lofton's personal philanthropy towards gay-related causes demonstrates that there is no institutionalized anti-gay bias within the Lofton organization. Tr. 65-67, 93-94, 136-41.

d. Respondent Lofton Has No Liability to Complainants Based Upon the Actions of Respondent Rodriguez

11. The Commission also concludes that the actions of Respondent Rodriguez provide no basis upon which to impose liability upon Lofton. The Commission has found that Respondent Rodriguez did not make the alleged discriminatory comments that Complainants attributed to her. *Supra* at 12. Moreover, Respondent Rodriguez's failure to reprimand Respondent Martin for his discriminatory comments does not reflect any discriminatory intent on her part. Respondent Rodriguez credibly testified that while she found Respondent Martin's comments to be distasteful, she did not reprimand him because she did not believe that she had the authority to do so since he was not a McDonald's employee. Tr. 72, 75, 77, 80. The sincerity of Respondent Rodriguez's belief that she had no authority to discipline Respondent Martin is supported by the testimony of Maximum's President, Emma Digby Boyd—who stated that Maximum alone had the right to discipline its security officers. Tr. 129-30. In sum, because Respondent Rodriguez did not engage in any actionable discriminatory conduct herself, there is no basis to impute liability to Lofton based upon her actions.

e. Respondent Lofton Is Vicariously Liable to Complainants Based Upon the Discriminatory Actions of Respondent Martin

12. Lofton asserts that there is no basis to hold it vicariously liable to Complainants because (a) the Commission barred Complainants from recovering against it under any theories of vicarious liability in its July 30, 2008, pre-Administrative Hearing Order; (b) the United States Supreme Court's decision in *Meyer v. Holley, supra*, forecloses a finding of vicarious liability as a matter of law; (c) there was no agency relationship between it and Mr. Martin upon which a finding of vicarious liability could be based; and (d) even if there had been an agency relationship between it and Mr. Martin, no liability is warranted because Mr. Martin's discriminatory conduct was beyond the scope of his agency. After careful consideration, the Commission respectfully overrules Lofton's objections and adopts the Recommended Ruling's finding that Lofton is vicariously liable to Complainants based on Mr. Martin's discriminatory conduct.

1. The Commission's July 30, 2008, Order Did Not Bar Complainants From Establishing Liability Against Lofton Based Upon Principles of Vicarious Liability

13. On June 24, 2008, Complainants filed a motion for leave to add additional parties and to amend their complaint regarding additional claims and allegations. The Commission denied this motion by its Order dated July 30, 2008 (the "July Order"). Lofton asserts that the July Order "is dispositive of the issue of whether Lofton is vicariously liable for the discriminatory conduct of [Martin]" because the "point and holding" of the July Order was "to bar Complainants from proceeding with agency theories against Lofton." Objections at 2, 4. Lofton further asserts that the Recommended Ruling is "wholly inconsistent" with the July Order because it found that Lofton was vicariously liable to Complainants based on Mr. Martin's

discriminatory misconduct. Objections, at 2.[5] However, Lofton has mischaracterized the limited nature of the July Order.

14. The issue presented by Complainants' motion to amend was *not* whether Complainants could present any theory of vicarious liability, and the July Order did not resolve that question. Rather, the issue was whether Complainants could amend their Complaints to add a new respondent (namely, Maximum) and assert theories of vicarious liability that concerned "whether Lofton was negligent when it hired Maximum or whether Lofton took steps to cloak Martin with apparent authority." July Order at 4. The Commission denied Complainants leave to assert these two theories of vicarious liability because the factual underpinnings of the theories were not investigated by the Commission during its investigation. *Id.* On the other hand, the July Order noted that the Commission had investigated the facts concerning "Lofton's claim 'that the security guard [namely, Martin] is employed by Maximum Security, an agency contracted to provide security services for the restaurant.'" July Order at 4, quoting Investigation Summary for Case Nos. 07-P-62, 63 at 2. The Commission's finding of vicarious liability derives directly from these facts (*infra* at 28-40), and not from facts pertaining to the two excluded theories of vicarious liability. Thus, there is no inconsistency between the July Order and the finding of vicarious liability in the Recommended Ruling.

15. Even if the Commission had in fact ruled in its July Order that Complainants could not pursue any theories of vicarious liability, the Commission—as Lofton admits (Objections at 5)—would have the discretion to vacate its ruling on this issue. Indeed, in one of the decisions cited by Lofton, the Illinois Supreme Court made it clear that "courts have the inherent power to amend and revise such [interlocutory] orders at any time before final judgment." *Towns v. Yellow Cab Co.*, 73 Ill.2d 113, 120, 382 N.E.2d 1217, 1220 (1978); see also Objections at 5 (acknowledging that a ruling may be reversed if "there is a change of circumstances or additional facts which warrant such action.").

16. Consideration of the issue of vicarious liability would be appropriate here for three reasons even if Lofton had correctly interpreted the holding of the July Order as barring Complainants from relying on such theories. First, Complainants' intent to hold Lofton liable based on the actions of Mr. Martin was apparent from the onset of this case. The Complaints apprised Lofton that Complainants believed—albeit mistakenly—that both Ms. Rodriguez and Mr. Martin were McDonald's employees, and Lofton received service of copies of the Complaints that were directed to McDonald's, Ms. Rodriguez, and Mr. Martin. See, e.g., Exhibit 13 (Corey Elbert Complaint) at ¶1 ("I believe the manager and the security guard of McDonald's mistreated me because of my sexual orientation."); Tr. 98. Lofton seems to have understood this because it denied liability for Mr. Martin's actions during the Commission's investigation based on the fact that Mr. Martin was employed by Maximum (and not by Lofton). July Order at 4 (citing to the Investigation Summary for Case Nos. 07-P-62 and 63 at 2). Second, the factual record concerning the parameters of the relationships between Lofton, Maximum, and Mr. Martin was fully developed at the Administrative Hearing through the testimony of various

[5] Lofton also asserts—incorrectly—that the Recommended Ruling contained no "discussion or acknowledgement" of the July Order. Objections, at 2; see Recommended Ruling at 3 n.1 ("By its Order dated July 30, 2008, the Commission also denied Complainants' motion for leave to add additional parties and to amend the complaint regarding additional claims and allegations.").

witnesses (most notably, Emma Digby-Boyd) and the detailed documentary evidence concerning the business dealings between Lofton and Maximum that was admitted into evidence. Consequently, the Commission has a factual record that is sufficient to make all requisite findings as to whether Lofton is vicariously liable for Mr. Martin's conduct. *Supra,* at 6-9. Third, Lofton—notwithstanding its assertion to the contrary—has suffered no prejudice by virtue of the Commission's consideration of the vicarious liability issue.[6]

2. The United States Supreme Court's Decision in *Meyer v. Holley* Does Not Preclude Complainants From Establishing Vicarious Liability Against Lofton Based Upon Martin's Discriminatory Conduct

17. In its Objections, Lofton asserts that the "older case law" that the Recommended Ruling cited to support a finding of liability against Lofton has been superceded by the United States Supreme Court's decision in *Meyer v. Holley,* 537 U.S. 280 (2003), and that "*Meyer* calls into question the Hearing Officer's ruling that an "indirect" agency relationship [existed between Lofton and Martin] sufficient to impose liability on Lofton." Objections, at 6, 7. In view of Lofton's argument, the Commission will take this occasion to reexamine its precedent in view of *Meyer.* As shown below, the *Meyer* decision does not warrant a wholesale abrogation of Commission precedent. Moreover, any modifications in the Commission's jurisprudence that *Meyer* does counsel do not change the result in this case because the evidence shows that Lofton is vicariously liable to Complainants under traditional agency principles and *Meyer* is—in any event—factually distinguishable.

18. In *Meyer,* the issue was whether the president and sole shareholder of a corporation could be held vicariously liable for the actions of the corporation's employees under the Fair Housing Act ("FHA"). *Meyer,* 537 U.S. at 283-284, 286. The Supreme Court held that vicarious liability under the FHA was to be determined in accordance with "traditional vicarious liability rules [which] ordinarily make principals or employers vicariously liable for the acts of their agents or employees within the scope of their authority or employment." *Meyer,* 537 U.S. at 285, 286-91. The Court further recognized that "in the absence of special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents." *Id.* at 286. In view of these

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[6] Lofton contends that its defenses were "severely prejudiced" by the fact that it had "no notice" of the Commission's decision to consider vicarious liability. Objections, at 6. However, this alleged lack of notice would have caused prejudice only if there had been some additional material evidence that Lofton could have offered to support its defense. See *Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1227-28 (7th Cir. 1995). As in *Avitia,* Lofton has failed to point to any additional facts that it would have offered had it been aware that the issue of vicarious liability was on the table. Indeed, in view of the comprehensive evidence that was presented by Respondents themselves as to the parameters of the relationships between Lofton, Maximum, and Martin, it is difficult to imagine what more could possibly have been offered that would have made any difference. Furthermore, Lofton has taken full advantage of its opportunity to file Objections prior to the Commission's Final Ruling that have set forth its substantive legal arguments as to why vicarious liability should not be applied in this case. *Infra,* at 18-19. Under these circumstances, Lofton has suffered no prejudice. See, e.g., *Avitia.,* 49 F.3d at 1227-28 (finding no prejudice to a party that received no notice of the trial court's reversal of a prior ruling where the party made no offer of proof to show what additional evidence it might have offered if it had known the issue in question was under consideration).

principles, the Court reversed the court of appeals because it "held that the Fair Housing Act imposed more extensive vicarious liability that . . . went well beyond traditional principles." *Id.*. In particular, the court of appeals erroneously "held that the Act made corporate owners and officers [as opposed to the corporation itself] liable for the unlawful acts of a corporate employee simply on the basis that the owner or officer controlled (or had the right to control) the actions of that employee." *Id.*

19. The *Meyer* Court also rejected the court of appeals' conclusion that the FHA created a "non-delegable duty" of protection that would extend beyond the scope of the traditional vicarious liability principles by subjecting "individual officers or owners of corporations—who are not principals (or contracting parties) in respect to the corporation's unlawfully acting employee" to personal liability for the employee's actions. *Id.* at 290 (citing to *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 396 (1982)).[7] The Court could not conclude that "Congress intended, through silence, to impose this kind of special duty of protection" in "the absence of legal support" manifesting such an intent. *Meyer*, 537 U.S. at 290. A legislature's intent to impose a non-delegable duty is shown by legislation that not only prohibits covered persons from taking discriminatory actions but also imposes upon covered persons the affirmative obligation to ensure that persons protected by the legislation do not suffer discrimination at the hands of third parties. See *General Building*, 458 U.S. at 396.

20. The principal lesson of *Meyer* is that liability is to be determined under traditional principles of vicarious liability unless the legislative body that passes the legislation in question has explicitly stated its intention to impose a more rigorous standard. *Meyer*, 537 U.S. at 290. In reliance on *Meyer*, the Circuit Court of Cook County reversed the Commission's decision in *Byrd v. Hyman*, CCHR Case No. 97-H-2 (Dec. 12, 2001). See *Hyman v. City of Chicago Commission on Human Relations and Byrd*, No. 03-CH-4247, Order (Cir. Ct. Cook County Dec. 11, 2003)(hereafter the "*Hyman* Order"). The court held that the Commission erroneously "utilized a strict liability standard rather than a scope of employment standard to impose vicarious liability on the plaintiff (Hyman)" and that the "authority that the Commission cited to for support in applying a strict liability standard pre-dates and is subservient to *Meyer*." *Hyman* Order at 2. The court then determined that the issue was whether Hyman's building manager engaged in the discriminatory harassment while acting within the scope of his employment. *Id.* After an analysis using traditional agency principles, the court found that the building manager was not acting within the scope of his employment as a matter of law because he was not even at Hyman's building at the time he made the harassing comments and he acted in the capacity of a neighbor (as opposed to as a building manager). *Id.* at 3.

21. The Commission agrees for two reasons that its precedent has been superceded by *Meyer* to the extent that it holds that a respondent that has done "everything that can reasonably be required of [it]" can be held strictly liable for the discriminatory action of an agent or employee "irrespective of whether the agent [or employee] was acting with or without authority." *Meyer*, 537 U.S. at 290 (internal quotation marks omitted). First, §2-160-070 of the

[7] In *General Building*, the Supreme Court defined a non-delegable duty as "an affirmative obligation to ensure the protection of the person to whom the duty runs" and it held that 42 U.S.C. §1981 did not impose such a duty. *General Building*, 458 U.S. at 396.

Chicago Human Rights Ordinance states that owners (and other covered persons) shall not "withhold, deny, curtail, limit or discriminate concerning the full use of such public accommodation by any individual because of the individual's . . . gender identity . . . [or] sexual orientation." §2-160-070. Thus, owners and other covered persons are accountable for their own actions (which include the actions of their agents and employees acting within the scope of their agency/employment). On the other hand, there is no indication on the face of the Ordinance that the Chicago City Council intended to impose a more expansive non-delegable duty that would make owners of public accommodations "guarantors" of the rights of their patrons "as against third parties who would infringe them." *General Building,* 458 U.S. at 396; see also *Hyman* Order, at 1 (finding no indication that the City of Chicago Fair Housing Ordinance imposed a strict liability standard).

22. Second, the Commission relied on a pre-*Meyers* federal appellate court decision (namely, *Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992)) to support the imposition of what at first glance appears to be a strict liability standard in public accommodation discrimination cases. See *Craig* at 12-13 (citing to *Matchmaker*); [8] *Horn v. A-Aero 24 Hour Locksmith et al.*, CCHR Case No. 99-PA-32 at 6-7 (July 19, 2000)(citing *Craig* and stating that the Commission "in public accommodations cases looks more to the standards used in housing discrimination cases than those used in employment discrimination or tort cases."). However, the *Matchmaker* court (as the Supreme Court observed in *Meyer*) resolved the case in accordance with traditional vicarious liability principles and its analysis therefore provides no support for the imposition of a strict liability standard of liability in the public accommodation setting. See *Meyer,* 537 U.S. at 289 (citing to *Matchmaker*).

23. For these reasons, the Commission will henceforth determine the potential liability of respondent owners and other covered persons in accordance with traditional agency principles in public accommodation cases.

3. The Evidence Shows That an Agency Relationship Existed Between Lofton and Martin

24. In the Recommended Ruling, the Administrative Hearing Officer found "[a]t the time Respondent Martin engaged in the discriminatory conduct at issue, the evidence shows that he was acting as an employee/agent of Maximum and that Maximum was in turn acting as an agent of Lofton," and that Lofton was liable for Mr. Martin's conduct based on an indirect agency theory. Recommended Ruling at 19. Lofton contends that there was no agency relationship between itself and Mr. Martin because Complainants were barred from pursing any

[8] Although *Craig* stated that "it is more consistent with the purpose of the CHRO to hold employers *strictly liable* for the discriminatory acts of their employees in the public accommodations context," the Commission actually held that "owners of public accommodations should be held liable for the acts of their non-managerial and non-supervisory agents *if done during the course of serving a member of the public* whether or not the owners knew about or authorized the alleged discrimination." *Craig,* at 14 (emphasis added). As the second segment of underscored language illustrates, the Commission in *Craig* contemplated that public accommodations owners would face liability for their agents' discriminatory actions *only* if those actions were taken while serving the public. As shown below, *infra,* at 37-38, discriminatory actions taken while serving a member of the public are quite often actions that are taken within the scope of agency notwithstanding their discriminatory character.

agency theories under the Commission's July Order and the Supreme Court's decision in *Meyer* "calls into question the Hearing Officer's ruling that an 'indirect' agency relationship existed sufficient to impose liability on [it]." Objections at 6. However, as shown above (*supra* at 21-22), Lofton has misconstrued the July Order, and the *Meyer* decision is factually distinguishable. In *Meyer,* the issue was whether the president and sole shareholder of a corporation could be held vicariously liable for the actions of the corporation's employees. *Meyer,* 537 U.S. at 283-284, 286. The issue in this case, by contrast, is whether one corporation (Lofton) can be held vicariously liable for the discriminatory actions of the employee (Martin) of a second corporation (Maximum) with which the first corporation (Lofton) has a contractual relationship.[9]

25. Lofton also suggests that it is not liable because an independent contractor cannot be an agent for purposes of a traditional vicarious liability analysis. Objections at 6. This assertion is incorrect as a matter of law. The Commission, which "uses the test for agency that the Illinois courts apply," has previously held that a person can be the agent of a respondent corporation even if that person is not employed by the respondent. See *Wiles v. The Woodlawn Organization and McNeil,* CCHR Case No. 96-H-1, at 4, 5 (Apr. 9, 1998)("It is possible that WCDC was TWO's agent and that McNeal was WCDC's agent. TWO could then still be held liable under the CFHO."); *Wiles v. The Woodlawn Organization and McNeil,* CCHR Case No. 96-H-1, at 23 (March 17, 1999)("*Wiles II*"). The Commission's conclusion in this regard is fully consistent with the common law of Illinois and other jurisdictions. See, e.g., *Horwitz v. Holabird & Root,* 212 Ill.2d 1, 13, 816 N.E.2d 272, 279 (2004)("That someone is an independent contractor does not bar the attachment of vicarious liability for her actions if she is also an agent."); *Letos v. Century 21-New West Realty,* 285 Ill.App.3d 1056, 1065, 675 N.E.2d 217, 225 (1st Dist. 1996)("A party may be both an independent contractor and an agent for another."); see also *Matchmaker,* 982 F.2d at 1097 (Fact that discriminating agents were independent contractors was immaterial so long as agency relationship existed with defendant principal).

26. The Commission's holding that "an 'indirect' agent—agent of an agent" can subject a principal to liability under the Ordinance (*Wiles II,* at 23) is also consistent with Illinois common law. See, e.g., *Ayh Holdings, Inc. v. Avreco, Inc.,* 357 Ill.App.3d 17, 33-34, 826 N.E.2d 1111, 1126-27 (1st Dist. 2005)(A subagent is an agent who is appointed by one who is himself an agent and an agency relationship exists between the principal and an authorized subagent); *Hukic v. Aurora Loan Services, Inc.,* 2007 WL 2563363 at *8 (N.D.Ill. 2007)(citing to *Ayh*); Restatement (Third) of Agency, §3.15 Subagency, comment b. ("When an agent is itself a corporation or other legal person, its officers, employees, partners, or members who are designated to work on the principal's account are subagents."). Indeed, it is well-settled that "[a]s between a principal and third parties, it is immaterial that an action was taken by a subagent as opposed to an agent directly appointed by the principal . . . [and] an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent." Restatement (Third) of Agency, §3.15 Subagency, comment d; *Blanchette v. Cataldo,* 734 F.2d 869, 875 (1st Cir. 1984); *Marchman v. NCNB Texas National Bank,* 120 N.M. 74, 92, 898 P.2d 709, 727 (1995); *Sharp v. W.H. Moore, Inc.,* 118 Idaho 297, 303, 796 P.2d 506, 512 (1990).

[9] This case would be more analogous to *Meyer* if Complainants were seeking to hold Mr. Lofton, who is Lofton's owner, president, and CEO (Tr. 135), personally liable for the conduct of Martin. Complainants, however, have not sued Mr. Lofton in his personal capacity.

27. The question of whether Mr. Martin was Lofton's indirect agent/subagent requires the application of a two-pronged inquiry: (a) was Mr. Martin the agent of Maximum; and (b) was Maximum the agent of Lofton? It is undisputed that Mr. Martin was the employee/agent of Maximum (*supra*, at 8-9), and the evidence presented at the Administrative Hearing also establishes that Maximum was Lofton's agent.

28. As the Illinois Supreme Court has held:

> The agency relationship is a consensual, fiduciary one between two legal entities, where the principal has the right to control the conduct of the agent and the agent has the power to affect the legal relations of the principal....The determination of whether the relationship is employer/employee, principal/agent, or owner/independent contractor depends on a number of facts, including the manner of hiring, the right to discharge, the manner and direction of the work of the parties, the right to terminate the relationship, and the character of the supervision of the work done.

Taylor v. Kohli, 162 Ill.2d 91, 95-96, 642 N.E.2d 467, 468-69 (1994)(citations omitted). The most important consideration "is the right to control the manner that the work is done" (*Id.*, 162 Ill.2d at 96, 642 N.E.2d at 468-69), and this is true "regardless of whether or not the principal exercises that right to control." *Anderson v. Boy Scouts of America, Inc.*, 226 Ill.App.3d 440, 443-44, 589 N.E.2d 892, 894 (1st Dist. 1992). Finally, it is the actual nature of the relationship between two parties—and not the label that the parties attach to their relationship—that controls whether an agency relationship exists. See, e.g., *Wargel v. First National Bank of Harrisburg*, 121 Ill.App.3d 730, 736, 460 N.E.2d 331, 334 (5th Dist. 1984)(finding the existence of an agency relationship as a matter of law between a bank and an insurance company even though the parties' written agreement stated that the bank was not an agent).

29. Notwithstanding the fact that the Agreement between Lofton and Maximum states that Maximum is an independent contractor, the evidence presented at the Administrative Hearing clearly shows that an agency relationship existed between the two companies. In particular:

a. Lofton exercised a high degree of control over how Maximum performed its security services at Lofton's restaurants despite Lofton's contention to the contrary. Objections at 8. Specifically, the Agreement required Maximum to "enforce those policies and procedures of [Lofton] of which it has been apprised and which relate generally to the maintenance of good order" and to "undertake and perform such other public safety and security duties as directed by [Lofton]." Exhibit 11, ¶8. In addition, the evidence introduced at the Administrative Hearing shows that (1) the incident that prompted this lawsuit began immediately after Lofton's on-duty manager (Rodriguez) exercised control over Maximum's security guard (Martin) by directing him to approach Complainant Karl Warren to ascertain whether he was going to make a purchase; (2) Lofton's senior management expected Ms. Rodriguez to intervene and stop Mr. Martin once he began to make discriminatory comments; and (3) Lofton reprimanded and demoted Ms. Rodriguez because she failed to confront and stop Mr. Martin. *Supra* at 14-15. Moreover, the post orders that governed the security officers' day-to-day work were developed with Lofton's input and approval and Maximum was required to report all unusual incidents and occurrences to Lofton. *Supra*, at 6-7. Finally, Lofton had a right of approval over various

aspects of Maximum's performance (including selection of insurance policies, uniforms, and the drug screening of security officers). *Supra*, at 6-7.

b. Lofton appointed Maximum as its "special agent" and granted Maximum the authority to sign criminal complaints for offenses witnessed on Lofton's property. *Supra*, at 7.

c. Lofton reserved "the right to reject, with or without cause" any security officer assigned to its restaurants by Maximum, and to control the number of security officers assigned by Maximum, the hours of coverage, and the deployment of the officers. *Supra*, at 8.

d. The Agreement was subject to renewal at Lofton's sole discretion and Lofton retained the right to terminate the Agreement if Maximum failed to perform its responsibilities in a manner which in Lofton's "reasonable judgment w[ould] have a materially adverse effect" on Lofton's operations. Exhibit 11, ¶¶1, 6.

e. The parties recognized the possibility that Maximum could subject Lofton to liability through its performance of security services under the Agreement by, for example, giving mistaken direction regarding the towing of cars in Lofton's parking lots or by improperly using force against persons on Lofton's premises. Exhibit 5, at 4; Exhibit 1, at 32. As a result, Lofton required Maximum to indemnify it against any losses or claims caused by Maximum's provision of security services under the Agreement. *Supra* at 7.

30. Several courts have concluded that the existence of an agency relationship between businesses and security companies with whom they have contracted could be found where the evidence is analogous to the factual record in this case. See *Doe v. Exxon Mobil Corp.*, 573 F.Supp.2d 16, 24-27 (D.D.C. 2008)(holding that an agency relationship could be found where company, among other things, had the right to control the deployment and procedures used by the security personnel); *Sharp*, 118 Idaho at 302-03, 796 P.2d at 511-12 (reversing the entry of summary judgment based on evidence that security provider was required to follow the owner's guidelines and where another security provider was designated as an agent in its contract with the building manager); *Safeway Stores, Inc. v. Kelly*, 448 A.2d 856, 861-62 (D.C. 1982)(finding an agency relationship where business had the right to direct the guards' conduct, it exercised such control, and it had the right to discharge individual guards assigned to it)(citing to *Adams v. F.W. Woolworth Co.*, 257 N.Y.S. 776, 780-81,144 Misc. 27, 30-31 (Sup.Ct. 1932)); *Cf. Savinsky v. The Bromley Group, Ltd.*, 106 N.M. 175, 176, 740 P.2d 1159, 1160-61 (Ct.App. 1987)(finding no agency relationship between a management company and a security firm where the management company had no control over how the security firm performed its duties, the hours that the security firm worked, or the personnel that the security firm assigned to its premises).

4. The Evidence Shows That Martin Acted Within the Scope Of His Agency When He Engaged in the Discriminatory Conduct in Question

31. A principal may be held liable for the tortious actions of an agent even if the principal does not itself engage in any illegal conduct relative to the injured party so long as the agent commits his/her torts within the scope of his/her agency. See *Woods v. Cole*, 181 Ill.2d 512, 517, 693 N.E.2d 333, 336 (1998); *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 163, 862

N.E.2d 985, 991 (2007). Illinois courts - - which follow the Second Restatement of Agency—find that an agent's actions are within the scope of his/her agency when the agent's conduct (a) is of the kind he is employed to perform; (b) occurs substantially within the authorized time and space limits; and (c) is actuated, at least in part, by a purpose to serve the master[10] *Bagent,* 224 Ill.2d at 164, 862 N.E.2d at 992. On the other hand, conduct is considered outside the scope of agency "if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." *Id.* (internal quotation marks omitted). Courts consider all the surrounding circumstances when weighing these factors. *Id.,* 224 Ill.2d at 165, 862 N.E.2d at 992.

32. Lofton asserts that Mr. Martin "clearly acted outside the scope of any traditional agency relationship when he engaged in the subject conduct." Objections, at 8. While it is true that the policies of both Lofton and Maximum prohibited the sort of discriminatory comments that Mr. Martin made towards Complainants (*supra,* at 5, 8), the Commission rejects the proposition that the unauthorized nature of Mr. Martin's conduct—standing alone—shows that he was acting outside the scope of his agency.

33. It is well-settled that a "forbidden act" by an agent can nonetheless be within the scope of the agent's authority even if that act is "negligent, willful, malicious, or...criminal." *Bagent,* 224 Ill.2d at 163-64, 862 N.E.2d at 991. When determining whether an unauthorized act is so incidental to an employee's authorized conduct as to be within the scope of employment, "the ultimate question is whether or not the loss resulting from the employee's [or agent's] acts should justly be considered as one of the normal risks to be born by the employer." *Bagent,* 224 Ill.2d at 167, 862 N.E.2d at 993. When answering this question, courts consider whether there was a "contemporaneous relationship between the tortious act and the scope of employment": i.e., (a) was the agent in the course of authorized activity when the tortious action took place?; (b) was the tortious act performed substantially within constraints of authorized time and location of the agency?; and (c) was the tortious act foreseeable? See, e.g., *Bagent,* 224 Ill.2d at 165-70, 862 N.E.2d at 992-995; *Pyne v. Witmer,* 129 Ill.2d 351, 360-61, 543 N.E.2d 1304, 1309 (1989);[11] *Davila v. Yellow Cab Co.,* 333 Ill.App.3d 592, 600-03, 776 N.E.2d 720, 727-730 (1st Dist. 2002); *Bryant v. Livigni,* 250 Ill.App.3d 303, 314-15, 619 N.E.2d 550, 559 (5th Dist. 1993); *Bonnem v. Harrison,* 17 Ill.App.2d 292, 298-99, 150 N.E.2d 383, 386-87 (2d Dist. 1958).

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[10] The Illinois Supreme Court elaborated on this third factor with citation to Section 235 of the Restatement, which states that "an act of an employee, *i.e.,* the particular act of the employee that is at issue, is not within the scope of employment if it is done with no intention to perform it as part of or incident to a service on account of which he or she is employed." *Bagent,* 224 Ill.2d at 169-170, 862 N.E.2d at 995. In other words, an act is within the scope of employment if it is performed as part of the employee's authorized duties or, at least, as incident to the authorized duties.

[11] In *Pyne,* the Illinois Supreme Court also noted the long-standing "distinction between 'frolic' (pursuit of an employee's personal business seen as unrelated to employment) and 'detour' (an employee's deviation for personal reasons that is nonetheless seen as sufficiently related to employment)." *Pyne,* 129 Ill.2d at 360-61, 543 N.E.2d at 1309.

34. Where there is a sufficiently contemporaneous relationship between the tortious act and the scope of agency and the act is not unforseeable, courts have found that a principal can be liable for the agent's tortious action even where such action is "outrageous." See, e.g., *Bryant,* 250 Ill.App.3d at 314-15, 619 N.E.2d at 559-60 (upholding jury verdict that found a drunken, off-duty store manager was acting within the scope of his employment when he arrived at the store, shouted racial epithets at a mother and her children, and attacked an innocent four-year old after seeing a different minor child urinating against the store wall); *Davila,* 333 Ill.App.3d at 600-03, 776 N.E.2d at 727-30 (reversing a grant of summary judgment after finding a material factual dispute as to whether a cab driver who was transporting a passenger was acting within the scope of his agency when he drove forward and severely injured a police officer after the officer had reached inside his cab); *Wilson v. Clark Oil & Refining Corp.,* 134 Ill.App.3d 1084, 1090-91, 481 N.E.2d 840, 843-44 (5th Dist. 1985)(holding that gas station clerk who accidently shot a customer with a gun while waiting on another customer was acting within the scope of employment even though the gas station had a policy prohibiting the possession of guns on the premises); *Bonnem,* 17 Ill.App.2d at 298-300, 150 N.E.2d at 386-87 (reversing directed verdict in favor of employer who had argued that its mechanic whom the employer had sent on an errand to an auto parts store acted outside the scope of his employment when he hit the store owner with a broom in response to a racial insult); *Jones v. Patrick & Associates Detective Agency, Inc.,* 442 F.3d 533, 535-36 (7th Cir. 2006)(applying Illinois law and reversing grant of summary judgment because a jury could find that an apartment complex's security guard acted within the scope of his employment when he entered the holding cell at a police station after dropping off a report and beat two teenagers including one who had injured him earlier in the evening at the apartment complex).

35. On the other hand, courts have found that the employee's tortious acts were outside of the scope of employment where the tortious acts (a) "ha[d] no connection with the conduct the employee is required to perform;" (b) occurred outside the "authorized time and space limits" of the employment relationship; and/or (c) were unforeseeable. *Bagent,* 224 Ill.2d at 167-68, 862 N.E.2d at 994 (finding that a hospital employee who disclosed confidential medical information to a patient's sister while off duty at a tavern was not acting within the scope of her employment); *Montgomery v. Petty Management Corp.,* 323 Ill.App.3d 514, 517-19, 752 N.E.2d 596, 598-99 (1st Dist. 2001)(holding that a McDonald's employee was not acting within the scope of his employment when he got into a fight with a customer while the employee—who was in street clothes—was not performing any work duties at the time of the fight but was instead waiting in line to order a drink on the customer's side of the counter); *Williams v. Hall,* 288 Ill.App.3d 917, 920, 681 N.E.2d 1037, 1039-40 (1st Dist. 1997)(finding that pizzeria employee's tortious actions—which included pursuing thieves by driving the wrong way down a one way street—were outside the scope of his employment when they were "not a foreseeable extension of [his] job responsibilities" and citing to other cases where unforeseeable tortious actions were beyond the scope of agency/employment).

36. Courts have frequently been called upon to apply traditional agency principles when determining whether employees/agents of public accommodations who directed discriminatory comments towards customers were acting within the scope of their employment/agency. See, e.g., *Arguello v. Conoco, Inc.,* 207 F.3d 803, 810-12 (5th Cir. 2000). In *Arguello,* plaintiff Arguello (a Latina) stopped at a Conoco-owned store and pumped gas. When she went inside the store to pay for the gas and purchase other items, the store's cashier

(Smith) began to insult her with profanity and racial epithets. *Id.* at 805. After Arguello retreated from inside the store, Smith continued to yell racial epithets through the store's intercom and make obscene gestures through the window. *Id.* The Fifth Circuit held that a jury could find that Smith was acting within the scope of her employment notwithstanding her violation of store policy because (a) her tortious acts took place in an authorized place (i.e., the inside of the station) during an authorized time (i.e., while she was on duty); (b) she engaged in the tortious acts while performing her normal, Conoco-authorized work duties (i.e., completing Arguello's purchase and processing her credit card transaction); and (c) Conoco's authorization of Smith to perform sales put her in a position to commit the racially discriminatory acts. *Id.* at 810-11; *see also Green v. Albertson's, Inc.*, 67 Fed.Appx. 248 (5th Cir. 2003)(vacating grant of summary judgment and instructing the district court to apply the *Arguello* test to determine whether a clerk who called a customer a "nigger" and a "faggot" while dealing with the customer's check was acting within the scope of employment).

37. Other courts have concluded, consistent with *Arguello*, that owners of public accommodations are subject to vicarious liability "under general agency principles" for discriminatory slurs made by their employee/agent "where the remarks are made in the normal course of business and while the particular employee is conducting 'normal duties.'" *Eddy v. Waffle House, Inc.*, 335 F.Supp.2d 693, 701 (D.S.C. 2004), aff'd, 482 F.3d 674 (4th Cir. 2007), *vacated on other grounds*, 128 S.Ct. 2957 (2008), quoting *Arguello*, 207 F.3d at 810; *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1244, 1246-47 (11th Cir. 2001)(where jury properly found that cook was acting within the scope of his employment when he cursed the African-American plaintiffs and declared that "he was not going to serve any niggers" as he turned while lifting food off the grill); *Williams v. Cloverland Farms Dairy, Inc.*, 78 F.Supp.2d 479, 482-84 (D.Md. 1999)(denying summary judgment because a jury could find that a store clerk was acting within the scope of her employment when the clerk directed racial slurs at a customer and kicked her out of the store as she was making a purchase); *State of Hawaii v. Hoshijo*, 102 Hawaii 307, 311-12, 318-21, 76 P.2d 550, 554-55, 561-64 (2003)(student manager of college's basketball team acted within the scope of his agency when he called a heckling fan a "nigger," made threats, and told the fan to shut his mouth); see also *Slocumb v. Waffle House*, 365 F.Supp.2d 1332, 1340-41 (N.D.Ga. 2005)(holding that a reasonable jury could find that Waffle House servers were acting within the scope of their employment when they denied service to African-American plaintiffs on account of their race).

38. In this case, the Commission finds that Mr. Martin was acting within the scope of his agency when he engaged in his discriminatory conduct for the following reasons:

a. Mr. Martin made his discriminatory comments after Ms. Rodriguez requested that he approach Complainant Karl Warren to ascertain his purpose for being in the restaurant. *Supra* at 10. The Agreement between Lofton and Maximum provided Ms. Rodriguez with authority to direct Mr. Martin to perform security duties and it was within Mr. Martin's authorized duties (per the post orders) to monitor persons who entered the restaurant and ensure that "unauthorized persons" (including loiterers and those who were not there for business purposes) were not allowed in the restaurant. *Supra* at 6-7. Thus, Mr. Martin's discriminatory actions occurred as an incident to his performance of authorized duties that he was directed to perform by Lofton's manager on-duty. See *Arguello*, 207 F.3d at 810-11; *Middlebrooks*, 256

F.3d at 1244, 1246-47; *Williams,* 78 F.Supp.2d at 483-84; *Hoshijo,* 102 Hawaii at 320, 76 P.2d at 563.

b. Mr. Martin's actions occurred within the authorized time and space (i.e., during his shift at his post within Lofton's restaurant) of his agency. Moreover, Lofton's consent to Maximum's assignment of Mr. Martin to work at its restaurant put Mr. Martin in a position to commit his discriminatory actions.

c. Mr.Martin's actions, though perhaps unexpected as Lofton has argued (Objections, at 8), were nonetheless foreseeable. Lofton had previously fired one of its own employees who used a derogatory name relating to another person's sexual orientation. *Supra* at 5. Moreover, both Lofton and Maximum had policies that explicitly prohibited such offensive conduct. *Supra* at 5, 8; *Hoshijo,* 102 Hawaii at 320 n.29, 76 P.2d at 563 n.29 (finding that discriminatory comments while "unexpected" were foreseeable when university's handbook prohibited discriminatory commentary).

d. The Commission finds that the loss resulting from actions of the sub-agent (Mr. Martin) should justifiably be considered as one of the normal risks to be borne by Lofton (the principal). The discriminatory conduct in question was foreseeable and Lofton took steps to protect itself from bearing the ultimate financial responsibility for the tortious acts of Maximum's security guards through its inclusion of an indemnity provision in its Agreement with Maximum. *Supra* at 7. Furthermore, "it makes more sense to place the burden of responsibility for the discriminatory acts of a principal's agent [who has acted within the scope of his/her agency] on the 'innocent' principal who generally benefits from its dealings with the public rather than the 'innocent' member of the public who was discriminated against." *Craig* at 13. In *Hoshijo,* the Hawaii Supreme Court similarly concluded that the risk that a university basketball team's student manager would engage in discriminatory conduct was a normal risk that should be borne by the university. See, e.g., *Hoshijo,* 102 Hawaii at 320 n.29, 76 P.2d at 563 n.29.

For these reasons, the Commission finds that Lofton is liable for the discriminatory conduct of its sub-agent Respondent Martin.

39. The Commission further finds that Respondents Lofton and Martin are jointly and severally liable to Complainants Karl Warren and Corey Elbert. See, e.g., *Rogers/Slomba v. Diaz et al.,* CCHR Case No. 01-H-33/34, at 8-9 (April 17, 2002).

D. Remedies

40. Under 2-120-510(l) of the Chicago Commission on Human Relations Enabling Ordinance:

> 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;...admit the complainant 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,...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 whole, including, but not limited to, awards of interest on the complainant's actual damages and back pay 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 Chapters 2-160 and 5-8.

It is a complainant's burden to prove by a preponderance of the evidence that he or she is entitled to the damages claimed. See, e.g, *Carter v. CV Snack Shop*, CCHR Case No. 98-PA-3, at 5 (November 18, 1998).

I. Compensatory Damages

41. "Emotional distress damages are awarded in order to fully compensate a complainant for the emotional distress, humiliation, shame, embarrassment and mental anguish resulting from a respondent's unlawful conduct." *Winter v. Chicago Park District and Lincoln Park Conservatory,* CCHR Case No. 97-PA-55, at 16 (Oct. 18, 2000). The Commission does not require "precise proof" of damages for emotional distress, *Nash & Demby v. Sallas & Sallas Realty,* CCHR No. 92-H-128, at 20 (May 17, 1995), and "[n]either expert testimony nor medical evidence is necessary" to establish such damages. *Ordon v. Al-Rahman Animal Hospital,* CCHR No. 92-E-139, at 14-15 (July 23, 1993); *Hanson v. Association of Volleyball Professionals,* CCHR No. 97-PA-62, at 11 (Oct. 21, 1998). A complainant's testimony standing alone may be sufficient to establish that he or she suffered compensable emotional distress. *Hanson* at 11; *Ordon* at 14-15. The Commission also acknowledges that "[p]utting a dollar value on emotional distress and suffering is unavoidably subjective and difficult." *Ordon* at 16; *Hanson* at 11.

42. Complainant Karl Warren. Karl Warren testified the June 16 incident made him afraid to go into McDonald's restaurants because McDonald's "managers can't control their employees" and that his family "will just go through the drive through because [they] don't want to be harassed." Tr. 18. He further testified that the incident has caused a "little bit" of an impairment on his enjoyment of life because it has caused him to double his dosage of the anti-depressant Prozac (from 20 milligrams to 40 milligrams). Tr. 19. Mr. Warren—who assumed that Mr. Martin was a McDonald's employee—attributes "[a]ll of it" (i.e., his emotional distress) to Ms. Rodriguez because he felt that she "validated" Mr. Martin's comments and that "it was like she said it too." Tr. 26, 27, 28.

43. It was clear at the Administrative Hearing that Mr. Warren has suffered emotional distress on account of the incident. Indeed, Mr. Warren's voice was breaking and he seemed on the verge of tears when he testified regarding the impact that this incident had on his life. His pain was evident. Moreover, the fact that Mr. Warren suffered emotional distress is corroborated by Ms. Warren, who testified that Mr. Warren has become reclusive after the incident. Tr. 39 ("Now that he is on a higher dosage of Prozac, his personality is different, and it's like he don't want to go anywhere, he just stay inside. He don't want to do anything.") The Commission also credits Mr. Warren's testimony as to his need for an increased dosage of Prozac notwithstanding Respondents' contention that his testimony on this point lacks foundation. Resp. Brief at 3 n.2. The Commission has often credited complainants' lay testimony that they had to increase the

dosage of their psychiatric medications on account of the discrimination that they experienced. See, e.g., *Barnett v. T.E.M.R. Jackson Rental et al.*, CCHR Case No. 97-H-31 at 10, 12 (December 6, 2000); *Pryor/Boney v. Echevarria, et al.* CCHR Case No. 92-PA-62/63 at 7, 8 n.5 (Oct. 19, 1994).[12]

44. In their post-hearing brief, Complainants did not request any particular damages award for Mr. Warren (or for the other two Complainants for that matter). Thus, the task of determining what damages award each Complainant should receive rests entirely in the Commission's discretion. In determining the amount of damages to award to Mr. Warren and the other Complainants, the Commission considers "the length of time that complainants have experienced emotional distress; the severity of the mental distress including whether it was accompanied by physical manifestations; the vulnerability of the complainant;...the duration and egregiousness of the underlying discrimination;" and the amount of damages awarded in past Commission cases. *Pudelek/Weinmann v. Bridgeview Garden Condominium Association et al.*, CCHR Case No. 99-H-39/53, at 30-31 (Apr. 18, 2001); *Hanson* at 11; *Nash* at 21.

45. Mr. Warren suffers some continuing emotional distress to this date and he was particularly vulnerable to injury given his pre-existing depression. See *Winters* at 17 ("Respondents must take complainants as they find them, whether they are particularly resilient or particularly vulnerable"); *Mullins v. AP Enterprises, LLC, et al.*, CCHR Case No. 03-E-164 at 7 (Jan. 19, 2005)(noting that complainant was particularly vulnerable due to prior depression). Moreover, Respondent Martin's repeated use of anti-gay slurs was egregious. As the Commission has observed, "The term 'faggot' often has the purpose and effect of automatically 'separating the person addressed from other non-heterosexual persons,' as does the use of the term 'nigger,' the use of which has been held to be 'discrimination *per se*.'" *Lapa v. Polish Army Veterans Association et al.*, CCHR Case No. 02-PA-27, at 7 (Mar. 21, 2007), quoting *Craig*, at 10. Even so, this was an isolated incident and Mr. Warren has neither sought any medical treatment nor suffered any physical manifestations from his emotional distress. Moreover, his testimony regarding emotional distress was not extensive and detailed. Finally, although Complainants were harassed based on their sexual orientation and gender identity, Respondent Martin's actions did not result in Complainants suffering a total denial of access to the McDonalds restaurant. These factors place Mr. Warren's damages claim within the category of cases where the Commission has awarded $5,000 or less for emotional distress damages. See, e.g., *Nash/Demby* at 21-22 (citing factors that warrant a damage award of under $5,000); *Hanson* at 11-12.

46. On the other hand, evidence of Mr. Warren's emotional distress and his vulnerability due to pre-existing depression sets his case apart from several other public accommodations and housing cases where the Commission has awarded complainants $1,000 or

[12] Respondents Lofton and Rodriguez also claim that Mr. Warren "was clearly overreaching" when he attributed "all" of the emotional distress he claims to have suffered to Respondent Rodriguez. Resp. Brief, at 3. The Commission agrees, and it will not consider this testimony in determining an award of damages to Mr. Warren. The notion that that the anti-gay slurs hurled by Respondent Martin caused Mr. Warren *no* emotional distress yet Respondent Rodriguez's failure to reprimand Respondent Martin for these same slurs *did* cause emotional distress defies common sense.

less for compensatory damages after finding that they offered "slim", "brief", or "minimal" evidence of their emotional distress. See, e.g., *Jenkins v. Artists' Restaurant,* CCHR Case No. 90-PA-14, at 21 (Aug. 14, 1991)(awarding $1,000 after finding "minimal evidence of emotional distress"); *Macklin v. F & R Concrete et al.,* CCHR Case No. 95-PA-35, at 5 (Nov. 20, 1996)($1,000 award); *Efstathiou v. Café Kallisto,* CCHR Case No. 95-PA-1, at 9, 22 (May 21, 1997) (awarding $1,000 to complainant who testified that he was "really upset" that he was denied admission to a café); *Trujillo* at 2-3, 5 (awarding $1,000 to complainant who was "humiliated" by receiving inferior service but did not experience racial slurs or any injuries that required medical care); *Craig* at 14-15 (awarding $750 in compensatory damages where complainant was not vulnerable, he suffered no physical or psychological injury, and he continued to eat at respondent's restaurant after the incident); *Pryor/Boney* at 7-8 (awarding $500 to one complainant who offered "very slim" evidence of damages despite being subjected to a racial slur and $1,000 to another complainant who experienced continuing but non-severe stress-related symptoms).

47. Given the nature of Respondent Martin's discriminatory conduct, Mr. Warren's emotional injuries, and the countervailing factors which mitigate the harm caused here, the Commission finds that Mr. Warren's claim is analogous to cases where the Commission has awarded between $2,500 and $3,500 for emotional distress damages. See *Hanson* at 11-12 (awarding $3,500 to a disabled complainant who was "very angry and frustrated" after being denied access to a tournament and found the experience to be one of the most "humiliating experiences" of his life); *Sullivan-Lackey v. Godinez,* CCHR Case No. 99-H-89, at 12-14 (July 18, 2001)(awarding $2,500 to a complainant who felt degraded, angry, and depressed after the respondent refused to accept her Section 8 voucher), aff'd, 352 Ill.App.3d 87, 815 N.E.2d 822 (1st Dist. 2004); *Jones v. Zvidic,* CCHR Case No. 91-FHO-78-5663 at 15-16 (May 20, 1992)(awarding $2,500 to a complainant who was denied utilities and subjected to racial slurs); compare *Brennan v. Zeman,* CCHR Case No. 00-H-5 at 15-16 (Feb. 19, 2003)(awarding $5,000 to complainant who was subjected to anti-gay slurs on several occasions and experienced significant distress but who was not particularly vulnerable or in need of medical treatment). The Commission finds that an award of $3,000 in damages will sufficiently compensate Mr. Warren for the emotional distress he experienced.

48. Complainant Ebonii Warren. Ms. Warren was not in the vicinity during most of the confrontation and she did not testify that she heard any of Respondent Martin's anti-gay slurs. Instead, she heard a "commotion" involving Mr. Warren's defense of the fact that they were homosexual and transgender and his assertion that Respondents had no right to say what they were saying. Tr. 35-36. She also witnessed Respondent Martin's "aggressive" commentary during his exchange with Mr. Warren. Tr. 36. Ms. Warren was thus aware that the commotion had something to do with anti-gay commentary and she testified that she felt Complainants were forced to leave on account of it. Tr. 36-37. Ms. Warren further testified that the June 16 incident made her feel "kind of bad," that society was never really going to change, and that the incident caused her to become "more secluded" and less comfortable. Tr. 37-38. She also testified the incident has affected the relationship with her father "a little bit" because his personality is "different" on account of his higher dosage of Prozac. Tr. 38-39. Mr. Warren does not want to go anywhere or do anything and he just stays inside and this makes Ms. Warren feel like Mr. Warren is trying to push her away. Tr. 39.

49. The evidence establishes that Ms. Warren's case falls into the category of cases cited above (*supra,* at 44) where the Commission has awarded $1,000 or less to complainants who have been discriminated against while patronizing a public accommodation. While Ms. Warren has become more secluded and less comfortable in public and her relationship with her father has been negatively impacted to the present day, her testimony at the Administrative Hearing was brief and non-emotional. Moreover, she was not exposed to the worst of the discriminatory conduct, she was not particularly vulnerable,[13] and she did not testify to any psychological or physical injuries (such as loss of sleep, loss of appetite, or depression) that resulted from the discrimination. In consideration of the evidence and Commission precedent, the Commission finds that an award of $1,000 in damages will sufficiently compensate Ms. Warren for the emotional distress she experienced.

50. Corey Elbert. Mr. Elbert testified that the June 16 incident has caused him to be very cautious about how he carries himself and that he is on "edge" when he enters fast food establishments. Tr. 50. The incident has also affected his relationship with his family. Before the incident, he had been very open about his identity but now he keeps a distance from his immediate family. Tr. 50-51. He has also become cautious with what he wears, and he feels like the incident is causing him to be something that he is not. Tr. 51. Mr. Elbert was the focal point of Respondent Martin's slurs and it was evident at the Administrative Hearing that this incident caused him to suffer embarrassment and humiliation. On the other hand, Mr. Elbert's testimony did not indicate that he had particular vulnerability and he did not testify to any psychological or physical injuries that resulted from Respondent Martin's discriminatory actions.

51. In consideration of this evidence, the egregiousness of the discriminatory conduct, and Commission precedent, the Commission finds that an award of $1,500 in damages will sufficiently compensate Mr. Elbert for the emotional distress he experienced. See *Rogers/Slomba v. Diaz et al.,* CCHR Case No. 01-H-33/34 (Apr. 17, 2002)(awarding $1,500 to complainant who was subjected to anti-Polish slurs but was not unusually vulnerable and provided "limited" testimony of emotional distress); *Miller v. Drain Experts & Derkits,* CCHR No. 97-PA-29, at 11 (Apr. 15, 1998)(awarding $1,250 in damages notwithstanding respondent's use of racial slurs after finding "'slim' evidence of any emotional distress").

II. Punitive Damages

52. The Commission has repeatedly held that punitive damages may be awarded when a respondent's actions were willful, wanton, or taken in reckless disregard of the complainant's rights. The Commission also looks to a respondent's history of discrimination, any attempts to cover up and respondent's attitude towards the adjudication process (including whether the respondent disregarded the Commission's processes). Further, the Commission has regularly held that the purpose of punitive damages is to punish the violator and to deter him or her from taking similar, discriminatory actions in the future. In public accommodation cases,

[13] If anything, Ms. Warren's testimony sadly shows that she routinely encounters issues on account of the fact that she is transgender. Tr. 37 ("It's like everywhere we go we deal with certain things from different people, and I said that is—the people would always know that I am transsexual").

where actual damages are often not high, punitive damages may be particularly necessary to ensure a meaningful deterrent. *Miller* at 12 (citing cases).

53. Complainants assert that Respondents' "discriminatory conduct was egregious, willful and wanton, and done with a reckless disregard to Complainants' rights." Comp. Brief at 5. The Commission agrees insofar as this statement is limited to Respondent Martin. Indeed, several factors support an award of punitive damages against him. Respondent Martin unquestionably acted in a willful and wanton manner toward Complainants. He also displayed defiance and a complete lack of remorse. When Complainant Elbert asked a McDonald's employee for Ms. Rodriguez's name, Respondent Martin said to Ms. Rodriguez, "I don't know why they are asking your name because I am the one that said it, and I will tell them that I said it." Tr. 73. Finally, Respondent Martin has completely ignored the Commission's proceedings and the compensatory damages awarded to Complainants are comparatively small. For all of these reasons, the Commission finds that an award of punitive damages is necessary to deter Respondent Martin. See, e.g., *Miller* at 12-13 and *Horn* at 11-13.

54. "Ordinarily, the Commission considers the income and assets of a respondent in determining the appropriate amount of the punitive damages. However, where a respondent does not appear for the hearing, the Commission may award punitive damages without regard to its financial circumstances. *Horn* at 12; *Miller* at 13. In this instance, Respondent Martin did not participate in the Commission's proceedings and the only information about his assets is that he was employed as a Cook County correctional officer as of the time of he applied for work with Maximum in May 2006. *Supra* at 8-9. The Commission finds that $3,000 is an appropriate amount of punitive damages to punish and deter Respondent Martin. See *Horn* at 12-13 (awarding $3,000 in punitive damages where a racist epithet was used while complainant was attempting to obtain service and respondents failed to participate in the Commission's proceedings); *Miller* at 13 (awarding $2,500 in punitive damages under circumstances comparable to those in *Horn*). The punitive damages shall be payable to Complainants Karl Warren and Corey Elbert in equal parts of $1,500.

55. The Commission further finds that there is no basis for an award of punitive damages against Respondent Lofton. As the Commission held in *Craig*, a principal faces liability for punitive damages based upon the acts of its agent only if the principal knew of or ratified the acts. *Craig* at 16; *Byrd* at 21-22. In this case, Lofton did not ratify or condone Respondent Martin's discriminatory actions. To the contrary, Lofton terminated Maximum based upon Respondent Martin's misconduct. Moreover, an award of punitive damages against Lofton would serve no deterrent purpose. *Craig* at 16. As found above (*supra* at 5-6), Lofton and its owner have a strong anti-discrimination policy and they are committed to equal opportunity for all persons including those who are gay and transgender.[14]

[14] For these reasons, although the Commission is authorized to grant injunctive relief to remedy past violations of the Ordinance and to prevent future violations, there is no basis for an award of injunctive relief in this case. See *Cotten v. Taylor Street Food and Liquor*, CCHR Case No. 07-P-12, at 6 (Aug. 22, 2008); see also *Hanson* at 16 n.9 (noting that the Commission retains the power to order injunctive relief when warranted even if complainants do not request such relief).

III. Fine

56. Section 2-160-120 of the Chicago Human Rights Ordinance provides, in pertinent part:

> Any person who violates any provision of this ordinance as determined by this Commission shall be fined not less than $100.00 and not more than $500.00 for each offense.

The Commission imposes the maximum fine of $500 on Respondent Martin for violating the Ordinance and for repeatedly failing to respond to the Commission's Orders. See *Miller* at 13. The Commission imposes the minimum fine of $100 on Respondent Lofton for its violation of the Ordinance. See *Craig* at 17.

IV. Interest

57. Commission Regulation 240.700 provides for pre-judgment and post-judgment interest at the prime rate, adjusted quarterly and compounded annually starting on the date of the violation. Such interest is routinely awarded in Commission cases. See, e.g., *Cotten* at 6. Consequently, the Commission orders that Respondents Lofton and Martin pay pre-judgment and post-judgment interest on the emotional distress damages awards to Complainants Karl Warren and Corey Elbert and that Respondent Lofton pay such interest on the emotional distress damages award to Complainant Ebonii Warren starting on June 16, 2007, the date of the incident, calculated pursuant to the methodology specified in Regulation 240.700.

V. Attorney Fees And Costs

58. Section 2-120-510(1) of the Ordinance provides that the Commission has the power to order Respondents Lofton and Martin to pay all or part of the Complainants' reasonable attorney fees and costs. *Craig* at 17. The Commission has routinely found that prevailing complainants are entitled to an award of their reasonable attorney's fees and costs. *Craig* at 17. Therefore, the Commission awards Complainants their reasonable attorney fees and costs to be determined in accordance with Regulation 240.630.

Conclusion

For the reasons stated above, the Commission finds in favor of Complainants Karl Warren and Corey Elberton on their claims of sexual orientation discrimination against Respondents Lofton and Martin; in favor of Complainant Ebonii Warren on her claim of sexual orientation and gender identity discrimination against Respondent Lofton; and in favor of Respondent Rodriguez and against Complainants on Complainants' claims against her.

The Commission awards the following relief:

1. Complainant Karl Warren is awarded compensatory damages in the amount of $3,500 and punitive damages of $1,500. Respondents Lofton and Martin are jointly and severally liable for the compensatory damages award and Respondent Martin is solely responsible for the punitive damages award.

2. Complainant Corey Elbert is awarded compensatory damages in the amount of $1,500 and punitive damages in the amount of $1,500. Respondents Lofton and Martin are jointly and severally liable for the compensatory damages award and Respondent Martin is solely responsible for the punitive damages award.

3. Complainant Ebonii Warren is awarded compensatory damages in the amount of $1,000. Respondent Lofton is solely liable for this compensatory damages award.

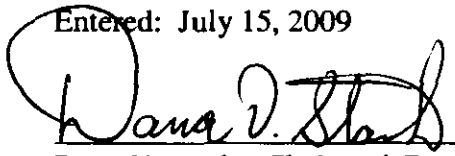
4. Respondents are directed to pay pre-judgment and post-judgment interest on the compensatory damages awards in accordance with Regulation 240.700, from the date of violation on June 16, 2007.

5. Respondent Martin is fined $500 for violating the Ordinance.

6. Respondent Lofton is fined $100 for violating the Ordinance.

7. Complainants are awarded their reasonable attorney fees and costs in an amount to be determined in accordance with Regulation 240.630.

CHICAGO COMMISSION ON HUMAN RELATIONS
Entered: July 15, 2009



By: Dana V. Starks, Chair and Commissioner