APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Order of the Supreme Court of Illinois
(July 30, 2021) 1a

Order of the Supreme Court of Illinois
(July 27, 2021) 2a

Order of the Appellate Court of Illinois,
Fourth Judicial District (August 16, 2017) 3a

Order of the Fourth District Appellate Court
(June 7, 2017) 8a

Final Order of the Illinois Human Rights
Commission (November 18, 2016) 9a

Recommended Order and Decision of the Illinois
Human Rights Commission
(March 22, 2016)..... 11a

Recommended Liability Determination
of the Illinois Human Rights Commission
(September 15, 2015)..... 39a

RECONSIDERATION ORDER

Order of the Fourth District Appellate Court
Denying Motion for Reconsideration
(May 30, 2017) 75a

OTHER DOCUMENT

Proof of Postage
(August 24, 2017) 76a

ORDER OF THE SUPREME COURT OF ILLINOIS (JULY 30, 2021)

SUPREME COURT OF ILLINOIS

Jason Robert Craddock
Law Office of Jason R. Craddock
2021 Midwest Rd., Suite 200
Oakbrook, IL 60646

In re: *Walder Vacuflo, Inc. v. The Illinois Human Rights Commission*
127463

Today the following order was entered in the captioned case:

Motion by Petitioner for leave to file petition for appeal as a matter of right or, in the alternative, petition for leave to appeal in excess of the page limitation but not exceeding fifty-four (54) pages instanter. Denied.

Order entered by the Court.

Very truly yours,

/s/ Carolyn Taft Grosboll
Clerk of the Supreme Court

cc: Appellate Court, Fourth District
Attorney General of Illinois-Civil Division
Ghirlandi Christianni Guidetti

ORDER OF THE
SUPREME COURT OF ILLINOIS
(JULY 27, 2021)

SUPREME COURT OF ILLINOIS

Jason Robert Craddock
Law Office of Jason R. Craddock
2021 Midwest Rd., Suite 200
Oakbrook, IL 60646

In re: *Walder Vacuflo, Inc. v. Travers*
127472

Today the following order was entered in the captioned case:

Emergency motion by Movants for a supervisory order. Denied.

Order entered by the Court.

Very truly yours,

/s/ Carolyn Taft Grosboll
Clerk of the Supreme Court

cc: Ghirlandi Christianni Guidetti
Hon. Robert M. Travers
Ruth Elizabeth Wym

ORDER OF THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT (AUGUST 16, 2017)

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

WALDER VACUFLO, INC.,

Petitioner-Appellant,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, MARK WATHEN and TODD WATHEN,

Respondent-Appellees.

No. 4-16-0939

Agency case numbers 11-SP-2488, 11-SP-2489

Appeal from the Human Rights Commission

ORDER

This cause coming to be heard with proper notice having been served, and the Court being fully advised in the premises, it shall be the findings of the court as follows:

1. Counsel for Appellant was required by Illinois Supreme Court Rule 343 to file his initial brief by March 31, 2017.

2. Counsel for Appellant failed to file his initial brief by March 31, 2017.

3. On April 12, 2017, this court notified counsel for Appellant of the tardiness of Appellant's initial brief, and directed him to either file his brief or a motion for extension of time to file his brief *instanter* within seven days (by April 19, 2017).

4. On April 18, 2017, counsel for Appellant filed a Motion for Extension of Time to File Appellant's Initial Brief.

5. On April 28, 2017, this court granted counsel for Appellant's Motion for Extension of Time, and extended the deadline for the filing of Appellant's initial brief to May 24, 2017.

6. On May 4, 2017, Appellees, the Wathens, filed a motion asking this court to reconsider its grant of Appellant's Motion for Extension of Time to File Appellant's Initial Brief and to dismiss Appellant's appeal.

7. Counsel for Appellant failed to file his initial brief by the extended deadline of May 24, 2017.

8. On May 30, 2017, this court denied Appellees' motion to reconsider our grant of Appellant's Motion for Extension of Time to File Appellant's Initial Brief, which extended Appellant's deadline to file his initial brief to May 24, 2017.

9. On May 30, 2017, this court granted Appellees' Motion to Dismiss and gave notice of the dismissal to all parties.

10. On May 30, 2017, counsel for Appellant filed a second Motion for Extension of Time seeking additional time by which to file his initial brief.

11. On June 7, 2017, this court denied counsel for Appellant's Motion for Extension of Time as moot due to the court's dismissal entered the same date.

12. This court did not base its decision to grant the Motion to Dismiss on Appellant's failure to file a response to the Motion to Dismiss within 10 days. Under Supreme Court Rule 361, Appellant was not required to file a response.

13. This court granted the Motion to Dismiss due to Appellant's repeated failure to file his initial brief.

14. The mandate issued in this matter on July 6, 2017.

15. Counsel for Appellant filed a Motion to Reconsider and Vacate Dismissal of Appeal asserting Appellees, the Wathens, sent their motion to reconsider and dismiss to the wrong address for him.

16. Counsel for Appellant indicated in his proof of service that the Motion to Reconsider and Vacate Dismissal of Appeal was mailed on June 29, 2017. The Clerk of the Court received and filed the Motion to Reconsider on July 11, 2017.

17. On July 20, 2017, this court entered an order directing Appellees (the Wathens and the Illinois Human Rights Commission) to file, within seven days, a response to Appellant's Motion to Reconsider and Vacate Dismissal of Appeal.

18. On July 26, 2017, Appellees, the Wathens, attempted to file a paper copy of their response and sent a copy of the response to all parties.

19. On July 31, 2017, the Illinois Human Rights Commission filed a Motion for Leave to File Response to Petitioner's Motion to Reconsider and Vacate Dismissal of Appeal *Instanter*.

20. On August 1, 2017, the Clerk of the Court notified counsel for the Wathens of the rule effective July 1, 2017, requiring all filings to be done electronically.

21. On August 1, 2017, counsel for the Wathens filed a Motion for Leave to File Paper Copy of Appellees' Response to Appellant's Motion to Reconsider and Vacate Dismissal of Appeal.

22. On August 11, 2017, counsel for Appellant filed a Motion for Leave to File *Instanter* Petitioner's Response and Objections to Respondent IHRC's Motions to File *Instanter* Responses to Petitioner's Motion to Reconsider and Vacate Dismissal of Appeal.

23. Pursuant to Illinois Supreme Court rule 361(b)(3), a reply to a response to a motion is not allowed, except by order of the court.

It shall be the Order of the Court as follows:

A. Appellees' Motion for Leave to File Paper Copy of Appellees' Response to Appellant's Motion to Reconsider and Vacate Dismissal of Appeal is denied.

B. Illinois Human Rights Commission's Motion for Leave to File Response to Petitioner's

Motion to Reconsider and Vacate Dismissal of Appeal *Instanter* is denied.

C. Appellant's Motion for Leave to File Instanter Petitioner's Response and Objections to Respondent IHRC's Motions to File Instanter Response to Petitioner's Motion to Reconsider and Vacate Dismissal of Appeal is denied.

D. Petitioner's Motion to Reconsider and Vacate Dismissal of Appeal is denied.

ENTERED THIS 16th DAY OF AUGUST, 2017.

Order Entered by the Court

ORDER OF THE FOURTH DISTRICT APPELLATE COURT (JUNE 7, 2017)

STATE OF ILLINOIS
APPELLATE COURT, FOURTH DISTRICT

WALDER VACUFLO, INC.,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, MARK WATHEN and TODD WATHEN,

Respondents.

No. 4-16-0939

Human Rights Commission
Case No.: 11-SP-2488, 11-SP-2489

This cause coming to be heard with proper notice having been served, and the Court being fully advised in the premises:

IT IS ORDERED that appellant's Motion for Extension of Time to File Brief is denied as moot.

Order entered by the Court.

FINAL ORDER OF THE ILLINOIS HUMAN RIGHTS COMMISSION (NOVEMBER 18, 2016)

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:
TODD & MARK WATHEN.,

Complainants,

and

WALDER VACUFLO INC.,

Respondent.

Charge Nos.: 2011 SP2488, 2011SP2489

ALS No.: 11-0703(C)

Before: Terry COSGROVE, Patricia BAKALIS-YADGIR, Duke ALDEN, Commissioners

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Respondent's Exceptions filed thereto, and the Complainant's Response to the Respondent's Exceptions, if any.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of

Human Rights did not participate in the Commission's consideration of this matter.

IT IS HEREBY ORDERED:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has DECLINED further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on March 22, 2016 has become the Order of the Commission.

Entered this 18th day of November 2016.

/s/ Terry Cosgrove
Commissioner

/s/ Patricia Bakalis-Yadgir
Commissioner

/s/ Duke Alden
Commissioner

RECOMMENDED ORDER AND DECISION OF THE ILLINOIS HUMAN RIGHTS COMMISSION (MARCH 22, 2016)

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:
TODD WATHEN and MARK WATHEN.,

Complainants,

and

WALDER VACUFLO INC.,

Respondent.

Charge No.: 2011 SP2489, 2011SP2488

EEOC No: N/A
ALS No.: 11-0703(C)

Before: Michael R. ROBINSON,
Administrative Law Judge

This matter comes to me following the issuance of a Recommended Liability Determination (entered on September 15, 2015) that Respondent violated section 5-102(A) of the Human Rights Act (775 ILCS 5/5-102(A)) when it refused Complainants' request to host a same-sex, civil union ceremony on Respondent's premises due to their sexual orientation. The parties subsequently participated in a damages hearing, and

Complainants have filed a brief on the issue of damages, as well as a petition seeking fees and costs associated with the prosecution of the instant matter. Respondent has not filed a response to either document, although the time for doing so has expired. Accordingly, this matter is ready for a decision.

Contentions of the Parties

In their brief on the issue of damages, Complainants seek an award that will reimburse them for their emotional damages that they incurred after they learned that Respondent would never host their civil union ceremony because of their homosexual sexual orientation. In this regard, Complainants submit that the facts of their case are analogous to the $75,000 and $60,000 emotional distress awards that an Oregon lesbian couple received under circumstances where a cake-maker refused their request to bake a cake for their wedding ceremony. Complainants also seek an attorneys' fee award of $50,000 and costs of $1,218.35, arising out of 981.20 hours of work by seven attorneys in this matter. The requested fee constitutes a reduction from the $340,228.75 in fees that the seven attorneys had generated in the instant case.

Findings of Fact

1. All of the Findings of Fact contained in the Recommended Liability Determination entered on September 15, 2015 are incorporated into this Order.

2. On March 1, 2011, the Department of Human Rights received four Charges of Discrimination from Complainants. Of the four Charges of Discrimination, two formed the basis of the instant consolidated action, and two formed the basis of Complainants' alleged

experience with a different bed and breakfast (Beall Mansion Bed and Breakfast) in Alton, Illinois, where Complainants similarly contended that the respondent had turned down their request to host a civil union ceremony. The facts at issue in the Beall Mansion Bed and Breakfast charges of discrimination occurred prior to the allegations contained in the instant consolidated case.

3. On November 1, 2011, the Complaints in the instant consolidated action (ALS No. 11-0703C), as well as Complainants' complaints against Beall Mansion Bed and Breakfast (ALS Nos. 11-0705 and 11-0707) were filed. Complainants eventually settled their lawsuits in the Beall Mansion Bed and Breakfast Complaints, and a Final Order and Decision was entered with respect to both complaints on April 17, 2012. The record does not indicate what, if anything, Complainants received for settling their lawsuits against Beall Mansion Bed and Breakfast, or whether Complainants' attorneys had received any fees/costs as a result of such settlement,

4. Complainant Todd Wathen suffered actual damages in the form of emotional distress in the amount of $15,000 arising out of Respondent's refusal to host his civil union ceremony.

5. Complainant Mark Wathen suffered actual damages in the form of emotional distress in the amount of $15,000 arising out of Respondent's refusal to host his civil union ceremony.

6. On or before February 11, 2011, Betty Tsamis began her representation of both Complainants, albeit with respect to the Beall Mansion Bed and Breakfast cases, and at some point between February 18, 2011

and February 28, 2011 assisted Complainants with the filing of the Charges of Discrimination in the instant case. Ms. Tsamis continued in her representation of Complainants in the instant matter up until the present day. Ms. Tsamis graduated from the University of Denver Law School with honors in 2001 and is the founder and managing partner of Tsamis Law Firm, P.C.

7. At all times pertinent to the instant case, Ms. Tsamis charged Complainants $350.00 per hour and performed 67 hours in legal tasks on behalf of Complainants in this matter. Neither the hourly rate nor the number of hours is opposed by Respondent, although Tsamis asserted an additional 5 hours on tasks associated with Complainants' action against Beall Mansion Bed and Breakfast.

8. John Knight began his representation of Complainants in this matter in October of 2011 and has continued his representation of Complainants to the present day. Mr. Knight graduated from the University of Chicago in 1988 and has served as the Director of the Lesbian Gay Bisexual Transgender and HIV Project (LGBTHIV) of the Roger Baldwin Foundation of ACLU, Inc. since March of 2004. He is also a Senior Staff Attorney for the LGBTHIV Project of the American Civil Liberties Union Foundation and since 1995 has provided trial and appellate representation in civil actions involving federal and state statutory and constitutional issues concerning transgender rights, marriage for same-sex couples, employment discrimination, government benefits, housing discrimination, parental rights, corrections, and health insurance and family leave rights for lesbian and gay male state employees.

9. Mr. Knight performed 233.35 hours in legal tasks on behalf of Complainants in this matter. Mr. Knight seeks an hourly rate of compensation of $450 per hour. Neither the hourly rate nor the number of hours is opposed by Respondent.

10. Ingrid Bergstrom began her legal representation of Complainants in September of 2012 and continued her representation of Complainants through August of 2013. Ms. Bergstrom is a 2012 graduate of the University of Chicago Law School and performed the instant legal services while serving as a legal fellow at the Roger Baldwin Foundation of ACLU, Inc.

11. Ms. Bergstrom performed 271.25 hours on legal tasks on behalf of Complainants in this matter. Ms. Bergstrom seeks an hourly rate of compensation of $225 per hour. Neither the hourly rate nor the number of hours is opposed by Respondent.

12. Bharathi Pillai began her legal representation of Complainants in November of 2015 and has continued her representation of Complainants to the present day. Ms. Pillai is a 2009 graduate of the New York University School of Law and is currently a General Civil Liberties Fellow at the Roger Baldwin Foundation of ACLU, Inc.

13. Ms. Pillai performed 56.6 hours on legal tasks on behalf of Complainants in this matter. Ms. Pillai seeks an hourly rate of $225 per hour. Neither the hourly rate nor the number of hours is opposed by Respondent.

14. Mr. Clay Tillack began his representation of Complainants in the instant case, as well as in the Beall Mansion Bed and Breakfast cases in February of 2012 and has continued to represent Complainants

in the instant matter until the present day. Mr. Tillack is a 1982 graduate of the University of Texas Law School and is currently a partner in the Chicago law firm of Schiff Harden, LLP, with a law practice that focuses on complex commercial litigation, intellectual property and franchise law.

15. Mr. Tillack performed 228.25 hours on legal tasks on behalf of Complainants. Mr. Tillack's hourly rate at the time he performed his services was $702.29 per hour, although Complainants are seeking only $475 per hour for his services in the instant petition. Neither the proposed hourly rate nor the number of hours is opposed by Respondent.

16. Mr. Tal C. Chaiken began his representation of Complainants in the instant case in March of 2013 and continued such representation through December of 2013. Mr. Chaiken is a 2012 graduate of the University of Chicago Law School and was an associate attorney in the Schiff Harden, LLP law firm at the time of his representation of Complainants.

17. Mr. Chaiken performed 110.25 hours on legal tasks on behalf of Complainants. Mr. Chaiken charged his clients $335 per hour at the time he rendered his services to Complainants, although Complainants are seeking only $225 per hour for his services in the instant petition. Neither the proposed hourly rate nor. the number of hours is opposed by Respondent.

18. Mr. Robert Middleton began his representation of Complainants in the instant case in November of 2015 and continues his representation of Complainants to the present day. Mr. Middleton is a 2014 *cum laude* graduate of Northwestern University School of Law and is currently an associate attorney with Schiff

Hardin LLP in its general litigation and environmental law groups.

19. Mr. Middleton performed 9.5 hours on legal tasks on behalf of Complainants. Mr. Middleton charged his clients $375 per hour at the time he rendered services on behalf of Complainants, although Complainants are seeking only $170 per hour for his services in the instant petition. Neither the proposed hourly rate nor the number of hours is opposed by Respondent.

20. Complainants are seeking a total of $1,218.35 in costs associated with the prosecution of the instant case, although the law firm of Schiff Harden, LLP reports an additional $10,867.76 in disbursements/ charges associated with the instant matter.

Conclusions of Law

1. A prevailing complainant may recover reasonable attorneys' fees and costs as to only those claims at issue in the Complaint.

2. The Commission will not search the record to find a reason to deny a specific entry in a fee petition, where the petition otherwise appears to be valid on its face and the opposing party has not challenged the entry.

3. A prevailing complainant is entitled to provable damages including emotional distress for only those violations of the Human Rights Act at issue in the Complaint.

4. A representative of respondent may testify regarding his intent/motivation with respect to his conduct *vis a vis* the complainant, where a complainant

is seeking emotional damages arising out of such conduct, and where such testimony gives a context on the issue as to whether the representative's conduct was outrageous.

Discussion

Preliminary matters

Complainants have filed a motion seeking to correct certain typographical errors contained in the transcript of the public hearing on the issue of damages. Specifically, Complainants proffer the instant corrections:

1. Tr. pg. 4, line 4: 'Walter" should be "Walder;"
2. Tr. pg. 4, line 17: "Dorothy" should be "Bharathi;"
3. Tr. pg. 7, line 6: "Wathen" should be Wathens;"
4. Tr. pg. 7, line 15: "happened" should be "happen;"
5. Tr. pg. 7, line 21: "weekend together and a peaceful" should be "weekend together in a peaceful;"
6. Tr. pg. 18, line 3: "exited" should be "excited;"
7. Tr. pg. 25, lines 1, 2, and 15: "vial" should be "vile;"
8. Tr. pg. 26, line 8: "vial" should be "vile;"
9. Tr. pg. 39, lines 4, 6, and 8: "Bill" should be "Beall;"
10. Tr. pg. 48, lines 5: "Environment mental" should be "Environmental;"
11. Tr. pg. 68, lines 14 and 15: "vial" should be "vile;"

12. Tr. pg. 69, line 5: "vial" should be "vile;"
13. Tr. pg. 76, line 22: 'Walter" should be "Walder;"
14. Tr. pg. 77, lines 13 and 22: "vial" should be "vile;"
15. Tr, pg. 78, line 8: "vial" should be "vile;"
16. Tr. pg. 79, lines 1, 10 and 13: "vial" should be "vile;" and
17. Tr. pg. 82, line 5: "vial" should be "vile."

Given that there are no objections to the instant motion, and given that the proffered suggestions comport with my own understanding of what took place at the public hearing, I will grant the motion to modify the transcript with the above suggested corrections. Moreover, my own review of the transcript has produced two other corrections that need to take place: (1) Tr. pg. 9, line 20: "anosmous" should be "animus;" and (2) Tr. pg. 67, line 13: "home sexuality" should be "homosexuality." Accordingly, the transcript will be modified with these two additional corrections as well.

Also, during the public hearing and in their brief, Complainants have moved to strike all testimony by Jim Walder that attempted to support his argument that he did not intend to harm Complainants in any fashion when he refused to hold their (or anyone else's) same-sex, civil union ceremony. Specifically, Walder testified that his communications with Todd regarding Walder's beliefs about the homosexual lifestyle were not based on hatred or bigotry, or, for that matter, any homophobia, but rather were based on his interpretations of the Bible and on the tenets of his religion, *i.e.*, the "great commission," that mandated

that he inform others about the contents/teachings of the Bible. (Tr. at pgs. 66 to 69) Similarly, Walder suggested in one of his February 15, 2011 emails that he was not required to abide by the prohibition against discrimination based on sexual orientation under the Human Rights Act because the contents of the Bible overrides all Illinois and United States laws. However, Complainants submit that none of these explanations are germane to a determination of their emotional damages, and they cite to three cases, *i.e.* one appellate court case (*Ford v. Grizzle,* 398 Ill.App.3d 639, 924 N.E.2d 531, 338 Ill.Dec. 325 (5th Dist. 2010)) and two Commission decisions *(Estate of G.S and Baksh,* IHRC, ALS No. 2818, June 26, 1996 and *Porter and Treasure Island Foods, Inc.,* IHRC, ALS No. 11593 February 7, 2003) to support their argument that any lack of intent to harm on the part of Walder does not have a tendency to make it more or less probable that either Complainant experienced pain, humiliation or anxiety, or that his actions and words had a bearing on the determination as to whether his conduct was outrageous.

None of the cases cited by Complainants, though, address this issue or support their arguments with respect to the admissibility of evidence regarding Walder's motivation as it pertains to a calculation of emotional damages. Specifically, the Appellate Court in *Ford* merely affirmed a jury's verdict in favor of the defendant in a negligence case, and thus the court, of necessity, did not address the issue of the plaintiff's alleged damages, let alone address the issue raised by Complainants' counsel at the public hearing. Indeed, the terms "emotional damages," "intent" or "motivation" do not appear anywhere in

that opinion. Similarly, counsel's citation to the Commission's decision in *Baksh* does not advance Complainants' claim, where counsel's description of the case, *i.e.*, "Commission gave respondent's allegedly benevolent motivations no consideration in awarding complainant emotional damages," suggests that the administrative law judge in that case actually admitted evidence of the respondent's "benevolent motivations" into the record during the damages phase of the public hearing, but ultimately found them not to be persuasive.

Indeed, although one would not have known from the contents of Complainants' brief, the Commission's decision in *Baksh* was ultimately *reversed* by the Appellate Court in *Baksh v. Human Rights Commission,* 304 Ill.App.3d 995, 711 N.E.2d 1187, 238 Ill.Dec. 313 (1st Dist. 1999), petitions for leave to appeal Nos. 89849 and 89850 denied October 6, 1999, after the court found that a dentist office is not a place of public accommodation. As such, I do not know what, if anything, Complainants' counsel want me to take from the observations made by the Commission in *Baksh,* which had awarded complainant a relatively insignificant $8,000 in emotional damages when a dentist refused to treat complainant in 1986 due to complainant's HIV status because the dentist had a fear that he might contract the disease. In any event, the mere fact that we know from the decision why the dentist refused to clean the teeth of the complainant suggests that Walder should be given an equal chance to explain why he refused services to our Complainants.

Finally, the Commission's decision in *Porter* does not shed any light on the current dispute as to whe-

ther a respondent may testify as to his or her motivations when the issue of a complainant's emotional damages is at issue. There, the Commission awarded $6,500 in emotional damages when a parking attendant refused to allow the complainant the ability to park in Respondent's parking lot while allowing others to do so. In reviewing the analysis regarding the calculation of emotional damages, there was no discussion about any parking attendant's testimony at the damages portion of the public hearing, let alone any discussion regarding whether the testimony regarding the parking attendant's motivation in refusing to allow the complainant a parking space was admissible during the damages portion of the public hearing. Moreover, a review of all of the remaining Commission cases cited by Complainants anywhere in their brief produces the same result, since those cases were decided under circumstances suggesting that the respondent did not attempt to offer an explanation for its conduct either because the respondent had previously defaulted on the issue of liability or because the respondent had simply failed to appear at the public hearing. As such, it is understandable that the focus of any emotional damages award in these cases was necessarily based solely on what the complainant had presented during the damages phase of the public hearing.

To be sure, Complainants are correct that Walder's testimony regarding his motivation in refusing their request to host a same-sex, civil union ceremony is admissible on the issue of their emotional damages, only if it is relevant with respect to either the outrageousness of his conduct in terms of the type of discriminatory conduct, its nature, duration, frequency

and severity, or the amount of emotional harm suffered by Complainants. (*See*, for example, *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission,* 184 Ill.App.3d 339, 541 N.E.2d 1248, 1258, 133 Ill.Dec. 810, 820, (1st Dist., 3rd Div. 1989).) In this regard, Walder's testimony confirming what he originally said in his emails that homosexuality is "wrong" and "unnatural" based upon biblical passages, and that he was compelled via the "great commission" to inform Complainants on two occasions regarding what he thinks the Bible says about their gay lifestyle (Tr. at pg. 66 to 68) not only puts a context on what he said in the emails but, more importantly, goes precisely to the question as to whether his conduct was "outrageous" in terms of the type of discrimination, as well as the nature, duration, frequency and severity of his conduct.

Ironically, as we will see below, while Walder apparently thought that his biblically inspired beliefs regarding homosexuality were mitigating factors in the calculation of any emotional distress damages claim, much of what he had to say regarding his motivation for informing Complainants about such beliefs proved to be an aggravating factor in the calculation of emotional damages because it provided a basis as to why Complainants were particularly upset over his conduct, and why they could reasonably believe that his statements regarding their gay lifestyle were an attack on their identity. Accordingly, because Complainants' legal authority does not support their objections to Walder's testimony regarding his motivation in refusing their requests to host a same-sex civil union ceremony, and because such testimony is relevant with respect to issues regarding the type of

discrimination, as well as the nature, frequency and severity of his conduct, Complainants' objections during the damages phase of the public hearing to Walder's testimony regarding his motivation in denying their requests to hold a same-sex, civil union ceremony are overruled.

The merits

In the instant case, Complainants testified that they had intended to have a civil union ceremony at Respondent's bed and breakfast that would enable them to invite around 125 guests that consisted of their close family and friends. They also wanted some of their guests to be able to stay at the bed and breakfast over a period of days to share in their celebration of this important aspect of their lives. Todd further testified that once Walder denied their request to host a same-sex, civil union ceremony, he attempted to clarify with Walder the legal basis for their right to have a same-sex, civil union ceremony, but was only rebuffed by Walder, who responded that Respondent would never host either same-sex, civil union ceremonies or weddings, even if they became legal in Illinois. At that juncture, Todd testified that after discussing the email exchanges of February 15, 2011 with Mark, they decided to just drop the matter and let it go. (Tr. at pg. 23)

However, according to Todd, things got worse when Walder decided three days after the initial email exchange to send him another email that contained a biblical passage describing his relationship with Mark as "vile" and "unseemly." At that juncture, he felt hurt and humiliated, began to cry and tried with difficulty to communicate the contents of the email

on the phone to Mark, and both Complainants thereafter experienced for a second time hurt, humiliation and anger arising out of Walder's refusal to host their same-sex civil union ceremony. As a result, he became concerned that other businesses would turn them away because of their sexual orientation, and that, as a result, both he and Mark lost their excitement at planning a same-sex, civil union ceremony and put such plans on hold. (Tr. at pg. 51) Plans for conducting a same-sex, civil union ceremony eventually resumed after Mark and Todd saw an outdoor wedding in someone's backyard and learned that an owner of a wedding shop had offered to officiate at their wedding. Mark and Todd subsequently decided to hold a ceremony in their backyard on the first weekend after the statute recognizing same-sex, civil unions became effective (as they had originally planned), but were only able to invite about 30 people due to size constraints of their home. Both Mark and Todd further testified that their backyard ceremony was not what they had originally wanted because it fell far short of the festive, full weekend with friends and family that they had originally planned.

In the instant case, Complainants maintain that they are entitled to a sizable emotional distress damages award because the record shows that Walder's conduct was outrageous when: (1) he refused to host their same-sex, civil union ceremony even after being informed that his refusal was discriminatory and against the law; and (2) he maintained that he would continue to disregard the mandate against discrimination based on sexual orientation under the Human Rights Act due to his interpretation of the Bible. Moreover, they submit that their emotional distress

was heightened by the fact that Walder went out of his way to insult their identity as gay men by admonishing them that it was not too late to change their "unseemly" relationship with each other and describing their love for one another as "vi[le] affections" based on "lust" and "against nature." (Tr. at pg. 24) In this regard, Complainants insist that an award of emotional damages is appropriate because the record shows that: (1) Walder's conduct and words demonstrated an overt discrimination based on their sexual orientation; (2) they reasonably believed that Walder's words and biblical references constituted an attack on their identity as gay men; and (3) they suffered humiliation, hurt and fear as a result of Walder's conduct.

The Human Rights Act specifically provides for "actual damages" that may be awarded as a remedy to a prevailing complainant (775 ILCS 518-104(B)), and the court in *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission,* 184 Ill.App.3d 339, 541 N.E.2d 1248, 1258, 133 Ill.Dec. 810, 820 (1st Dist., 3rd Div. 1989), expressly included emotional harm and mental suffering within its interpretation of "actual damages" as that term is contemplated under the Human Rights Act. According to the Commission's decision in *Davenport and Hennessey Forrestal Illinois, Inc.,* IHRC, ALS No. 3751, November 20, 1998, cases qualifying for an award of "emotional [distress] damages are very much the exception, [and] not the rule" because the mere existence of a "civil rights violation, without more . . . is insufficient to support an award for emotional damages." (*See*, *Davenport,* slip op. at pg. 11.) Indeed, the Commission has approved recommended awards of zero emotional distress damages in some

types of discrimination claims, especially where there is evidence that the complainants were suffering from an unrelated emotional distress at the time of the discriminatory act. (*See*, *Kauling-Schoen and Silhouette American HealthSpas,* IHRC, ALS No. 2918M, February 8, 1993.) Thus, in order to obtain an award for emotional distress, the Commission has required a complainant to make it "absolutely clear" that the recovery of his readily quantifiable pecuniary losses will not sufficiently compensate him for the civil rights violation. (*Davenport,* slip op. at p. 12.) Here, it would seem that an emotional distress award is potentially apt because Complainants' claim for emotional distress damages is the only financial claim at issue in this case.

But if so, how much is this case worth? Complainants have referred to a few Commission cases in which emotional distress damages have fluctuated between $6,500 *(Porter)* and $15,000 *(Kilpatrick and Lifetime Fitness, Inc.,* IHRC, ALS No. 05-011, April 27, 2005) arising out of various refusals of respondents to provide services in establishments that qualified as places of public accommodations under the Human Rights Act. However, Complainants focus their emotional distress claim on a recent case out of Oregon *(In the Matter of: Sweetcakes by Melissa,* Oregon Bureau of Labor and Industries, Case Nos. 44-14, 45-14, July 2, 2015, hereinafter referred to as "Sweetcakes"), where an Oregon agency awarded $75,000 and $60,000 in emotional distress damages to a lesbian couple under circumstances where a wedding cake-maker refused to make a wedding cake on the basis of the couple's sexual orientation under circumstances where

the cake-maker orally referred to a biblical passage[1] as a reason for the denial of the cake request.

Admittedly, there are some parallels between both cases, especially where Mark and Todd testified that they were disturbed by Walder's communicated belief that homosexuality is wrong and unnatural based upon his interpretation of the Bible. (Tr. at pgs. 21, 53 and 54) However, the Oregon agency noted that at least one of the plaintiffs had apparently bought into the religious argument set forth by the cake-maker, since that plaintiff had testified that the cake-maker's use of the term "abomination" meant to her that: (1) God made a "mistake" with her; (2) because of her sexual orientation, she was not supposed to exist; (3) she had no right to love or be loved; and/or (4) she had no right to have a family or go to heaven. (*Sweetcakes,* slip op. at pg. 20) In this regard, *Sweetcakes* is distinguishable since, although both Mark and Todd were disturbed about Walder's biblical justification for his refusal to host a same-sex, civil union ceremony, neither witness believed they were actually "vile" or "unseemly" individuals simply because of the language in the Bible text cited to them by Walder. Indeed, Todd stated the exact opposite, when he testified that: "I am happy with who I am" (Tr. at pg. 25), and "I am who I am, and, you know, I do believe in God and I don't think God makes mistakes." (Tr. at pg. 24)

---

[1] The biblical passage cited by the cake-maker was different than the biblical passage cited by Walder. Specifically, the cake-maker, in referring to Leviticus 18:22, told one of the plaintiffs: "You shall not lie with a male as one lies with a female; it is an abomination."

Other factual/legal differences between *Sweetcakes* and the instant case preclude a finding that Complainants are entitled to a similar award for emotional damages. Specifically, unlike the Illinois Human Rights Act, the applicable Oregon law provides a separate cause of action against business owners, who, while acting on behalf of a place of public accommodation, publish an intent to discriminate on the basis of sexual orientation, and the opinion in *Sweetcakes* reflects that a portion of the emotional distress awards was based on such a violation. Moreover, one of the plaintiffs in *Sweetcakes* testified that: (1) after the cake-maker had briefly posted a copy of the her complaint on his Facebook page, she received a telephone call from a local conservative radio talk show host, who had already spoken to the cake-maker about her complaint and wanted her to give her side of the story; and (2) she was greatly distressed that potential publicity about the case would threaten their pending contested adoption of two special needs children, because certain adoption officials had previously indicated that they would have to "re-address" the placement of the children if any information about the children were to become public. (*Sweetcakes,* slip op. at pg. 21) Also, one of the plaintiffs asserted that: (1) she experienced distress by reading "hate-filled" comments posted through social media and in comment sections of various websites that were supportive of the cake-maker and critical of her position in her complaint; and (2) such criticism was also lodged by a sister of one plaintiff and by an aunt of the other plaintiff, who allegedly threatened to shoot said plaintiff in the face if she ever set foot on family property again.

However, neither of our Complainants testified to experiencing either unwanted notoriety arising out of the prosecution of this case or to "hate-filled" speech by members of the general public that was critical of their lifestyle. They also did not cite to any instance where publicity about the instant Complaints had a negative collateral consequence with members of their family. Furthermore, Complainants made no claim that a close relative threatened them with physical violence either because of their gay lifestyle or because they had sued Respondent over the denial of services. Instead, the instant record shows that Walder communicated his denial of service in a private manner, and, as far as this record shows, did not take to the airwaves or social media to air his dispute with our Complainants. Furthermore, Todd's testimony, that his and Mark's family members were "very supportive" of their relationship (Tr. at pg. 17), and that his family members, including his children, were "very happy for us" (*Id.*), seemingly takes this case outside the contours of the emotional distress experienced by the plaintiffs in the *Sweetcakes* decision.

Finally, there is a wildcard in this case that makes this case distinguishable from the *Sweetcakes* matter. Specifically, Respondent's counsel was able to elicit from Todd the fact that a different bed and breakfast (Beall Mansion) had turned down their prior request to host their same-sex civil union ceremony, and the Commission's records show that Complainants had filed a similar charge of discrimination against Beall Mansion (on the same day that they filed two charges of discrimination against Respondent), which they

ultimately settled for an undisclosed amount of money.[2] Indeed, the records kept by one of Complainants' attorneys (Ms. Tsamis) strongly indicate that she was already performing tasks on behalf of Complainants associated with the filing of a charge of discrimination against Beall Mansion prior to the time that Todd had approached Walder about hosting a same-sex, civil union ceremony.[3]

Thus, Complainants' actions with respect to the prosecution of their claim against Beall Mansion briefly suggest that both of our Complainants could be mere "testers" who would not be particularly upset by any denial of their requests to host a same-sex civil union ceremony, because, as testers, their requests for a same-sex, civil union ceremony were made with an expectancy that some establishments would deny their requests. Indeed, in examining Todd's direct testimony, one would never have known that there had been a prior denial, given his statement that they were (still) very excited about the prospect of having a same-sex, civil union ceremony at the time they made the deci-

---

[2] *See*, Wathen and Beal Mansion Bed and Breakfast, ALS Nos. 11-0705 and 11-0707.

[3] Although Todd and Mark denied that they had contacted any attorney prior to Walder's email on February 15, 2011 (Tr. at pgs. 35, 36, 52 and 53), Tsamis indicated in the instant fee petition that on February 11, 2011 she had "reviewed intake notes with clients; reviewed applicable IDHR procedures; reviewed applicable law; [and] analyzed potential claims under IHRA." Moreover, it is unlikely that the February 11, 2011 entry is mere a typographical error, since she also indicated that on February 14, 2011 she had begun "drafting [a] charge of discrimination and IDHR filing packet" that could only have been done with respect to Complainants' claims against Beall Mansion.

sion on February 14, 2011 to inquire about the use of Respondent's facility. (Tr. at pg. 17-18) However, I quickly dispensed with the notion that Complainants were mere testers since: (1) both individuals seemed genuine on the witness stand regarding their intent to have a same-sex, civil union ceremony near the day that such ceremonies were permitted under Illinois law; (2) Complainants stopped making inquiries after only the second refusal; and (3) unlike some testers who never intend to follow through on their requests, both Complainants actually went through and had a same-sex, civil union ceremony.

Still, if Complainants are to receive any emotional damages award in this case, they have to establish that Walder aggravated any existing injury that had been generated through the recent denial by Beall Mansion of their similar request to host a same-sex, civil union ceremony. In this regard, Todd rather unhelpfully testified on cross examination that although he would be upset after each denial of a request to host a same-sex, civil union ceremony, being turned down by "one or two isn't going to make a difference." (Tr. at pg. 37) Thus, although a prior denial by a different establishment might explain why Complainants did not go through the same process and perhaps endure a similar outcome with a third establishment, Todd never did explain why he would be asking for any emotional damage award in this case if: (1) being turned down by one or two establishments "isn't going to make a difference;" and (2) Complainants had already received some sort of compensation arising out of their settlement of the Beall Mansion cases. The answer to this problem, though, must be in how Walder communicated his refusal to host a same-sex,

civil union ceremony that would distinguish the circumstances of this case from the refusal at issue in the Beall Mansion cases.

In this respect, Walder had three options at the time Todd first emailed him with his inquiry on February 15, 2011 as to whether Respondent would be hosting same-sex, civil union ceremonies. Specifically, he could have said: (1) "no," without any explanation; (2) "no" with a general reference to his religious beliefs; or (3) "no" with a citation to a biblical passage that condemns the gay lifestyle. True enough, Walder began the process of communicating his decision by merely stating "no" in his first responsive email without a clarification as to why he was refusing Todd's request. If he had left it at that, I would agree that Complainants would be unable to obtain any significant amount of emotional damages under the standards set forth by the Commission. However, Walder did not just leave it alone at a bare denial and purposefully went out of his way in subsequent emails to communicate to Complainants his disapproval of their gay lifestyle by citing to a biblical verse to back up his opinion, as well as registering his intention to discriminate against them and others because of his belief that homosexuality is "wrong" and "unnatural" based upon what the Bible says about the topic.[4] To be sure, Walder denied in his testimony that he was personally calling Complainants "vile" when the "vile affections" phrase appeared in his February 18, 2011 email. (Tr. at pg. 68) Yet, he certainly was aware that such a reference could be hurtful to Todd, since he starts off his February 18,

---

[4] *See*, Walder's February 15, 2011 footnote dated "09:27:54"

2011 email with the phrase: "I know you may not want to hear this[.]"

As such, I find in light of all of the above that Complainants are entitled to emotional damages at the higher end of what the Commission has awarded in the past, *i.e.*, $15,000 for each Complainant, based upon: (1) the understandable emotional pain they endured after being told by Walder that they would not be given equal treatment as others seeking a venue to celebrate an important event in their lives; and (2) on their unrebutted testimonies that (whatever happened with their encounter with Beall Mansion) they were in a good frame of mind at the time Todd sent his initial February 15, 2011 email to Walder until Walder refused their request through a series of emails. This award is especially apt given the fact that Walder, in refusing Complainants' request to host a same-sex, civil union ceremony, went out of his way to make a statement about their lifestyle in a manner that he knew would be upsetting to Complainants. Moreover, while I will take Walder at his word that the "great commission" of his religion requires that he inform Complainants or anyone else about the teachings of the Bible, this obligation necessarily has a cost to him if his unsolicited message generates an emotional distress on the person receiving his message.

Indeed, Respondent's counsel acknowledged as much in his opening statement, when he asserted that all Respondent was attempting to do was to show "love" for our Complainants, even though "sometimes love can be tough [and] can be disagreeable." (Tr. at pg. 10) Yet, Complainants never came to Walder seeking his advice on their lifestyle, but rather sought

out Walder only on a secular matter having to do with the renting of a space to conduct their same-sex, civil union ceremony. Indeed, as Todd stated during the public hearing: "we didn't go to a church and ask to be married, we went to a business, and . . . thought the business would follow the law." (Tr. at pg. 25) Walder's testimony that he would continue to violate the provisions of the Human Rights Act that prohibit discrimination based on sexual orientation when it comes to individuals seeking same-sex, civil union and marriage ceremonies provides additional grist for a finding that Walder's conduct towards Complainants was outrageous.

With respect to other remedies at issue in this case, I agree with Complainants that Respondent should be the subject of an order that directs it to cease and desist from violating the Human Rights Act by denying same-sex couples access to its facilities and services for their civil union ceremonies, or for that matter legal marriages, where, as here, Walder expressed an intent not to abide by the Human Rights Act when it comes to requests for same sex-civil union ceremonies or marriages. Moreover, where section 8A-104(E) of the Human Rights Act (775 ILCS 5/8A-104(E)) contemplates the entry of an order directing Respondent to "admit [Complainants] to a public accommodation," I will require that, within a year after the instant decision becomes final, Respondent make its facilities available to Complainants (at their option and expense) for some sort of ceremony that celebrates their civil union under the various packages (and prices) offered by Respondent in February of 2011.

With respect to their petition for fees and costs, Complainants contend that their seven attorneys expended a total of 981.20 hours at rates that vary between $170 to $475 per hour.[5] In addition, Complainants' lead counsel at the damages hearing (John Knight) wrote off all time provided by five other attorneys who collectively spent an additional 77 hours providing legal services on behalf of Complainants. In their petition, Complainants' counsel have attached affidavits indicating that all of the respective hourly rates were in accordance with what others with similar experience in the Chicago legal market charge for their services, and I would note that Respondent has not filed a response to the instant petition. Thus, in view of the lack of any objection, I find that the instant hourly rates sought by Complainants' counsel are reasonable. With respect to the number of hours spent on the instant matter, it would seem that the roughly 1,000 hours spent by seven attorneys for a case that never reached a hearing on liability is a bit excessive, and Complainants have offered to reduce their claim of $340,228.75 in fees to a total of $50,000. This roughly eighty-five percent reduction in total fees is certainly reasonable, even when the five hours that Tsamis devoted to Complainants' claims against Beall Mansion are deducted, and again, Respondent has not filed an objection to Complainants' proposal. As such, I will award Complainants a total of $50,000

---

[5] Actually, some of Complainants' counsel asserted greater hourly rates in their affidavits (*i.e.*, Clay Tillack's hourly rate was $702.29, instead of the $475 per hour, Tal Chaiken's hourly rate was $335 per hour, instead of $225 per hour, and Robert Middleton's hourly rate was $375, instead of the $170 per hour) than what was sought in the instant fee petition.

in attorneys' fees and leave it up to Complainants to divide the fee award among their attorneys. The same ruling applies to Complainants' request for $1,218.35 in costs, to which Respondent has not filed an objection. Complainants have not sought any other remedies in their brief, and thus no other remedy will be recommended.

Recommendation

Based on the forgoing, I recommend that:

1. Respondent pay each Complainant $15,000, which represents damages for the emotional distress arising out its refusal to host their same-sex, civil union ceremony;

2. Respondent be directed to cease and desist from violating the Human Rights Act by discriminating on the basis of sexual orientation when denying same-sex couples access to its facilities and services for their civil union ceremonies and/or marriages;

3. Within one year after this decision becomes final, Respondent be directed to grant Complainants access to its facility by hosting (at Complainants' option and expense) a ceremony celebrating Complainants' civil union under one of the wedding packages and prices offered by Respondent in February of 2011;

4. Respondent pay Complainants $50,000 in attorneys' fees;

5. Respondent pay Complainants $1,218.35 in costs.

Human Rights Commission

By: /s/ Michael R. Robinson
Administrative Law Judge
Administrative Law Section

ENTERED THE 22ND DAY OF MARCH, 2016

RECOMMENDED LIABILITY DETERMINATION OF THE ILLINOIS HUMAN RIGHTS COMMISSION (SEPTEMBER 15, 2015)

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:
TODD WATHEN and MARK WATHEN.,

Complainants,

v.

WALDER VACUFLO INC.,

Respondent.

Charge Nos.: 2011 SP2489, 2011SP2488

EEOCNO: N/A
ALS No.: 11-0703(C)

Before: Michael R. ROBINSON,
Administrative Law Judge

This matter comes to me on cross-motions for issuance of a summary decision. Both parties have filed a response to the other party's motion, and both parties have filed a reply to the responses in their motions. Accordingly, this matter is ready for a decision.

Contentions of the Parties

In the instant consolidated Complaint, Complainants allege that they were denied equal enjoyment of Respondent's bed and breakfast facilities on account of their homosexual orientation when Respondent refused their request to host a same-sex civil union ceremony on Respondent's premises. In its motion for issuance of a summary decision, Respondent asserts that: (1) neither Complainant has standing to bring the instant lawsuit since Complainants never specifically asked it to host a same-sex civil union ceremony, but rather made a general inquiry into Respondent's policy about hosting such a ceremony; (2) it is not a place of public accommodation at least for purposes of providing accommodations for weddings or civil unions; and (3) any application of the public accommodations provisions of the Human Rights Act under the particular facts of this case would violate terms of the Illinois Religious Freedom Restoration Act (RFRA), as well as violate Article I, Section 3 of the Illinois Constitution, the Free Exercise Clause of the First Amendment to the Unites States Constitution, the Free Speech Clauses of the First Amendment to the Unites States Constitution/Article 1, Section 4 of the Illinois Constitution, Respondent's freedom of expressive association rights under the First Amendment to the United States Constitution/Article I, Section 5 of the Illinois Constitution. This is so, according to Respondent, because forcing it to host a same-sex civil union ceremony that publicly communicates messages that conflict with its sincerely held religious beliefs would violate its and its owners' statutory and constitutional rights.

In their motion for issuance of a summary decision, Complainants maintain that they have standing to bring the instant discrimination claim where the undisputed facts show that Respondent's owner, upon Complainants' inquiry into Respondent hosting a civil union ceremony, told Complainants that Respondent would not hold a 'same-sex civil union" ceremony due to the owner's belief that "homosexuality is wrong and unnatural based upon what the Bible says about it." As such, Complainants maintain that Respondent violated the Human Rights Act's ban on sexual orientation discrimination when it refused to allow them to hold their civil union ceremony at its bed and breakfast even though Respondent provided similar wedding services for heterosexual couples. Moreover, Complainants submit that the RFRA offers Respondent no defense to this lawsuit since the instant case concerns only private parties. They also contend that Respondent's constitutional claims are without merit either because Respondent cannot rely upon the religious beliefs of its shareholders/owners to justify the discrimination that occurred in the instant case, or because allowing them to hold a civil union ceremony at Respondent's bed and breakfast does not substantially burden the religious exercise of Respondent or its shareholders/owners, and because any burden is otherwise justified by the state's compelling interest in preventing discrimination through the uniform enforcement of the Human Rights Act.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. Complainants, Mark and Todd Wathen, are homosexual men who have lived together in a committed relationship since January of 2003.

2. In January of 2011, the Illinois General Assembly passed a law (*i.e.* the Illinois Religious Freedom Protection and Civil Union Act) (RFPCUA) making it possible for individuals of the same sex to enter into a civil union. At all times pertinent to the instant case, section 5 of the RFPCUA provided that: "[t]his Act shall be liberally construed and applied to promote its underlying purposes, which are to provide adequate, procedures for the certification and registration of a civil union and provide persons entering into a civil union with the obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses." Moreover, section 20 of the RFPCUA provided that: "[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law."

3. At some point after the passage of the RFPCUA, Complainants began to look for a suitable place to hold their civil union ceremony to take place shortly after the June 1, 2011 effective date of the RFPCUA.

4. At all times pertinent to the instant Complaint, Respondent, Walder Vacuflo, Inc., d/b/a TimberCreek Bed and Breakfast, was a for-profit Subchapter S corporation. Moreover, at all times pertinent to the instant Complaint Respondent was not a church, did not have a religious mission statement, and was not organized and operated exclusively for educational, scientific or charitable purposes.

5. At all times pertinent to the instant Complaint, Respondent offered to the public sleeping accommodations and breakfast meals and advertised its services on its website. It also offered guests a Jacuzzi, oversized beds, laundry facilities, a business center and a kitchen. In addition, Respondent offered to host both, religious and civil weddings and also invited the public to reserve its facilities for birthday celebrations, anniversaries, bridal showers, business meetings and family gatherings.

6. At all times pertinent to the instant Complaint, Respondent served approximately 1,200 guests per year and hosted 49 opposite-sex weddings in 2011. At all times pertinent to the instant Complaint, Respondent did not keep records as to the individual officiating at the wedding ceremonies or whether the wedding ceremony was religious in nature.

7. At all times pertinent to the instant Complaint, James and Elizabeth Walder each owned 50 percent of Respondent-corporation. Moreover, Respondent had three officers, including James Walder as President, Wilma Walder (relationship to either James or Elizabeth Walder unclear) as Vice-President, and Elizabeth Walder (wife of James Walder), as Secretary/Treasurer.

8. At all times pertinent to the instant Complaint, James and Elizabeth Walder held certain religious beliefs that included the belief that: (1) sex outside of marriage is a sin; and (2) homosexuality is "wrong and unnatural." However when it came to the renting of rooms at Respondent's bed and breakfast, the Walders did not ask Respondent's guests to disclose their relationship before providing them a room, did not ask if guests were homosexual or in a same-sex relationship

before renting a room, and did not prevent two men or two women from sharing a room.

9. At some point prior to February 15, 2011, Todd Wathen conducted research on the Internet in an effort to find a place to host his and Mark Wathen's civil union ceremony.

10. On or prior to February 15, 2011, Todd Wathen came across Respondent's website on the Internet. On the website, Respondent stated in part:

> "**TimberCreek is serious about hosting your wedding and reception.** We specialize in creating wonderful outdoor country weddings, memorable for you and your guests. TimberCreek is private and very secluded. We have beautiful landscaping ideal for photography and romance. We have a number of settings for ceremonies and receptions. We offer complete autonomy in selecting vendors such as caterers, florists and officiates. We extend a wide range of flexibility to our clients. Electricity, waste removal and free parking are always included." (Bold in original)

The website described at least one wedding package that called for the wedding ceremony to take place inside the Bed and Breakfast facility and also contained language that expanded the above description of "complete autonomy" to include the ability of guests to select "planners, photographers and DJs." Respondent's website also stated:

> "**TimberCreek Bed and Breakfast** is an upscale, sophisticated Bed & Breakfast . . . The Inn is situated at the end of a long

> winding lane in a secluded meadow surrounded by trees and a stream. It is the ideal setting to escape fast-paced everyday living to relax, recharge, and reconnect with each other . . . The Breakfast and Gathering Rooms can be reserved daily for business, church retreats, bridal showers, focus groups . . . TimberCreek is often bustling with weddings and receptions during the Spring, Summer and Fall months." (Bold and underline in original.)

11. On February 15, 2011, Todd Wathen, after discussing with Mark Wathen the possibility of Respondent hosting their civil union ceremony, emailed Respondent and asked the following question: "Do you plan on doing same sex civil unions starting June 1st???? Thanks, Todd." Todd Wathen's email had the word "Question" in the subject line and indicated that the email was from "The Wathens."

12. On February 15, 2011, James Walder sent Todd Wathen the following email in response to Todd Wathen's email described in Finding of Fact No. 11: "No. We only do weddings. Jim A. Walder TimberCreek Developers TimberCreek Bed & Breakfast"

13. On February 15, 2011, Todd Wathen sent to Respondent the following email that was responsive to Walder's February 15, 2011 email described in Finding of Fact No. 12:

> "[S]tarting [J]une 1st, a civil union is a wedding. [Y]ou have to get licenses at the county clerk[']s office, it is just not a marriage . . . but a legal wedding. . . . so aren't you dis-

> criminating against me and my partner, because of our sexual orientation?????"

14. On February 15, 2011, James Walder sent the following email in response to Todd Wathen's February 15, 2011 email described in Finding of Fact No. 13:

> "Todd,
>
> Civil unions and legal marriage are not the same thing, nor do they have the same legal status. We will never host same-sex civil unions. We will never host same-sex weddings even if they became legal in Illinois. We believe homosexuality is wrong and unnatural based on what the Bible says about it. If that is discrimination I guess we unfortunately discriminate." (Underlines in original)

15. On February 15, 2011, Todd Wathen sent to Respondent the following email in response to Walder's February 15, 2011 email described in Finding of Fact No. 14:

> "On June 1st . . . . There will be people getting [m]arried that is [sic] having a wedding, and people having [c]ivil [u]nions that will be having a wedding. . . . You still have to get a licenses [sic] for both, and you advertise for weddings, not marriage. . . . Well maybe I need to contact the IL Attorney General Dept. of [C]ivil [R]ights and the State of IL Department of Human Rights, because you are a business and IL passed a law back in Jan. of 2006 for any business or employer, etc. not to discriminate against someone over there [sic] sexual orientation. . . and I do

> believe you are a business.. . . and when you run a business . . . a person needs to keep their opinions to there [sic] self."

16. On February 15, 2011, James Walder sent to Todd Wathen the following email in response to Todd Wathen's email as described in Finding of Fact No. 15:

> "*Correction*
>
> Todd,
>
> The Bible does <u>not</u> state opinions, but facts. It contains the highest laws pertinent to man. It trumps Illinois law, United State law, and Global law should there ever be any. Please read John 3:16." (Italics in original)

17. By the conclusion of this email, James Walden had formed the belief that Todd Wathen and his partner were engaging in a homosexual lifestyle.

18. On February 18, 2011, Walder sent Todd Wathen the following email:

> "Hi Todd,
>
> I know you may not want to hear this, but I thought I would send along a couple of verse in Romans I detailing how the Creator of the Universe looks at gay lifestyle. It's not to[o] late to change your behavior. He is loving and kind and is ready to forgive all men their trespasses, including me.
>
> <u>For this cause God gave them um unto vile affections for even their women did change the natural use into that which is against nature. And likewise also the men, leaving</u>

> the natural use of the woman, burned in their lust one toward another, men with men working that which is unseemly and receiving in themselves that recommence [sic] of their error which was meet." (Underline in original)

19. At no time on February 15, 2011 or thereafter did either Todd or Mark Wathen tell James Walder that they expected a Respondent employee to either officiate at their civil union ceremony, perform any religious rite at their civil union ceremony or participate in their civil union ceremony.

20. By February 23, 2011, Respondent's website was changed to contain the following phrases: "We do not host civil unions," and "Civil Unions: not available at TimberCreek." Also by that time, Respondent's website was changed from "upscale, sophisticated country Bed & Breakfast" to "upscale Christian country Bed & Breakfast."

21. On March 1, 2011, Todd and Mark Wathen each filed a Charge of Discrimination alleging that Respondent denied him an equal enjoyment of Respondent's facilities on account of his sexual orientation.

22. By June 4, 2011, Complainants made alternative arrangements for a civil union ceremony and held a civil union ceremony on that date in the back yard of their home in Mattoon, Illinois.

23. On an uncertain date, Respondent on at least one occasion made its facilities available for an anniversary ceremony. Respondent did not organize the ceremony or participate in it in any way, and none of Respondent's personnel were present for the ceremony.

24. At all times pertinent to the instant Complaint, Respondent has refused to host "a few" weddings and on one occasion refused to rent its facilities to a photographer due to conflicts over payment due and other business reasons.

25. In 2011, Respondent had a total income of $121,830.55. Of that total, $70,038.60 was for "room income," $15,937.09 was for "wedding room income," and $35,854.86 was for "wedding rental income."

26. In 2012, Respondent had a total income of $173,555.15. Of that total, $92,091.15 was "room income," $24,369.96 was for "wedding room income," and $57,094.04 was for "wedding rental income."

Conclusions of Law

1. Complainants are individuals aggrieved by the denial of the full and equal enjoyment of the facilities and services of a place of public accommodation on the basis of sexual orientation discrimination prohibited by section 5-102(A) of the Illinois Human Rights Act (775 ILCS 5/5-102(A)).

2. Respondent's bed and breakfast business that includes facilities for holding weddings and receptions is a place of public accommodation as that term is defined under sections 5-101(A)(1) and (2) of the Illinois Human Rights Act (775 ILCS 5/5-101(A)(1) and (2)).

3. The futile gesture doctrine applies to Article V cases under the Human Rights Act when the record shows that a business's known and consistently enforced discriminatory policy renders it futile for an aggrieved party to make a specific request to use the business's facilities.

4. Complainants have proved by a preponderance of the evidence a *prima facie* case of unlawful discrimination based upon Respondent's denial of the full and equal enjoyment of its place of public accommodation when Respondent gave an unequivocal statement that it was unwilling to host Complainants' same-sex civil union ceremony.

5. Respondent articulated a reason for denying Complainants the use of its facilities for a civil union ceremony.

6. Complainants established by a preponderance of the evidence that Respondent's proffered reasons for denying them the use of its facilities either had a discriminatory motivation or were insufficient to excuse its denial of its facilities to Complainants.

7. Respondent may not assert before the Commission the legal defense that it was entitled under the Illinois Religious Freedom Restoration Act to discriminate against Complainants based upon protections afforded to it under said Act.

8. The Human Rights Commission lacks jurisdiction to consider freedom of speech/freedom of association claims under the First Amendment to the United States Constitution, as well as claims under Article 3, Sections 1 and 3 of the Illinois Constitution.

Discussion

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue as to any material fact, and the moving party is entitled to a recommended order as a matter of law. (*See*, section 8-106.1 of the Human

Rights Act (775 ILCS 5/8-106.1), and *Bolias and Millard Maintenance Service Company,* IHRC, ALS No. 2032, June 16, 1988.) Moreover, in determining whether there is any genuine issue of material fact, the record is construed most strictly against the moving party and most liberally in favor of the opponent. (*See*, for example, *Armagast v Medici Gallery and Coffee House,* 47 Ill.App.3d 892, 365 N.E.2d 446, 8 Ill.Dec. 208 (1st Dist., 5th Div. 1977).) Inasmuch as a summary order is a drastic method for the disposing of cases, it should only be allowed when the right of the moving party is clear and free from doubt (*See*, *Susmano v Associated Internists of Chicago,* 97 Ill.App.3d 215, 422 N.E.2d 879, 52 Ill.Dec. 670 (1st Dist 1981).) Furthermore, although there is no requirement that the non-moving party prove his, her or its case to overcome a motion for summary decision, the non-moving party is still required to present some factual basis that would arguably entitle him, her or it to a judgment under the applicable law. (*See*, *Schoondyke v. Heil, Heil, Smart & Golee, Inc.,* 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist, 2nd Div. 1980).)

As mentioned above, the instant case concerns a refusal by Respondent to allow Complainants to use its facilities for the purpose of conducting a same-sex civil union ceremony. In such a case alleging discrimination based on sexual orientation, or for that matter, any other protected classification, the Commission and the courts, have applied a three-step analysis to determine whether there has been a violation of the Human Rights Act. (*See*, for example, *Canady and Caterpillar, Inc.,* IHRC, ALS No. S8795, March 17, 1998, and *Loyola University of Chicago v. Illinois*

Human Rights Commission, 149 Ill.App.3d 8, 500 N.E. 2d 639, 102 Ill.Dec. 746 (1st Dist., 3rd Div. 1986).) Under this approach, a complainant must first establish *a prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate a legitimate non-discriminatory reason for its action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (*see*, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination.

While this three-step process has been used primarily in an employment discrimination setting, the Commission has also approved of its use in resolving cases alleging discriminatory denials in the use and enjoyment of public places of accommodation. (*See*, for example, *Davis and Ben Schwartz Food Mart,* IHRC, ALS No. 1361(B) April 7, 1986.) Typically, a *prima facie* case of a denial or refusal to afford full and equal enjoyment of a place of public accommodation requires a complainant to show that: (1) he or she is a member of a protected class; (2) he or she was denied the full and equal enjoyment of a place of public accommodation; and (3) similarly-situated individuals not within the protected classifications were afforded full and equal enjoyment of the facility. (*See*, *Davis,* slip op. at pgs. 7-8, and *Hornick v. Noyes,* 708 F.2d 321 (7th Cir. 1983).) While Respondent essentially does not quarrel with Complainants' contention that they

are homosexuals, and thus were members of a protected classification, it nevertheless submits as an initial matter in its motion for issuance of a summary dismissal, that Complainants cannot establish that it ever denied them the use of their facilities because a close reading of the February 15, 2011 emails sent by Todd Wathen (hereinafter referred to as Todd) did not reveal that Todd ever made a specific request for such a use, but rather sought only information regarding Respondent's policy about holding civil union ceremonies, which had not become legal at the time of Todd's inquiry

A fair reading of the record, though, does not support Respondent's argument in this regard. Specifically, it is true that as an initial matter Todd only asked whether Respondent had "plan[ned]" on doing same-sex civil unions, and that Walder initially responded "No, we only do weddings." Had the email exchange ended there, I would agree with Respondent that Todd's simple inquiry might not have given Walder any indication that Todd was seeking the use of Respondent's facilities. However, any ambiguity with respect to what Todd was asking was clarified in his follow-up email, where he expressed his opinion that a civil union was a "wedding" and specifically accused Walder of discrimination based on Todd's and his partner's sexual orientation if Respondent failed to host same-sex civil union ceremonies under circumstances where Respondent had hosted traditional weddings.

Indeed, Walder's responsive email to Todd's second email demonstrates that Walder actually believed Todd's inquiry was a request to use Respondent's facility for a same-sex civil union ceremony since Walder did not stop with his observation that "[c]ivil

unions and legal marriage are not the same thing." Rather, Walder continued by addressing the issue of Todd using the facility for a same-sex civil union ceremony by stating: (1) "[Respondent] will never host same-sex civil unions [, and] [w]e will never host same-sex weddings even if they become legal in Illinois (underlines in original);" and (2) "[w]e 'believe homosexuality is wrong and unnatural based on what the Bible says about it[;] if that is discrimination, I guess we unfortunately discriminate." In short, Todd would not have personalized his claim that Walder was discriminating against him if he was not essentially asking to use Respondent's facilities, and Walder would not have mentioned Respondent's intention to never host same-sex civil unions or same-sex weddings, as well as lectured Todd about his homosexuality in his two additional emails on February 15, and 18, 2011, if Walder did not actually believe that Todd and his partner (Complainant Mark Wathen) were seeking to use Respondent's facilities. Moreover, as Complainants note, section 5-102(A) of the Human Rights Act also prohibits a person from refusing to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation. Accordingly, regardless of whether Walder was merely expressing Respondent's policy or responding to a specific request, his statement that Respondent would never host a same-sex civil union fits comfortably within the "refusal" language of section 5-102(A).

Moreover, the fact that Todd made no express request to use Respondent's facilities does not require a different result. Specifically, Respondent's argument presupposes that any such request would not have been a "useless act" or a "futile gesture" on the part

of Todd. In general, courts have applied the "futile gesture" doctrine in an employment setting under circumstances where an employer's known and consistently enforced discriminatory policy renders it futile for an aggrieved party to apply for a position or a promotion. (*See*, for example, *International Brotherhood of Teamsters v. United States,* 341 U.S. 324, 365-66 (1977), where the Court applied the futile gesture doctrine under circumstances where there was a systematic pattern and practice of racial discrimination that deterred applicants from seeking open positions, as well as *Babrocky v. Jewel Food* Co., 773 F.2d 857, 867 (7th Cir. 1985), where Seventh Circuit applied the futile gesture doctrine when excusing potential female job applicants from formally applying for the subject position where there was evidence of class-wide discrimination against women with respect to hiring individuals in the subject position.) Indeed, while the parties have not cited any Commission cases that have specifically applied the futile gesture doctrine, the Commission has previously observed that parties will not be required to perform "useless acts" where to do so would run contrary to "common sense, established principles of statutory construction and long standing precedent." (*See*, *Stallings and General Tire,* IHRC, ALS No. 6873(S), October 6, 1995, slip op at pg. 1.)

In applying these cases to the instant case, what Respondent must be arguing is that Todd should have insisted on Respondent booking a same-sex civil union ceremony, even after being told that Respondent would "never" hold a same-sex civil union ceremony, or for that matter "never" hold a same-sex wedding, even if it was directed to do so by Illinois law. However, given

the existence of Respondent's "consistently enforced discriminatory policy"[1] against holding same-sex civil unions or same-sex weddings, it would appear that this case is a good candidate for the application for the futile gesture doctrine since Walder made it abundantly clear in his second February 15, 2011 email that it would be pointless to ask him to schedule a same-sex civil union that would take place after June 1, 2011. Similarly, Respondent's related contention that Complainants' discrimination claim was not ripe because it could not hold a same-sex civil union at the time Todd emailed him on February 15, 2011 is without merit since: (1) Todd's first email merely asked if Walder was "plan[ning]" to do same-sex civil unions starting on the June 1, 2011 effective date for same-sex civil union ceremonies, and Walder's initial response was "[n]o;" (2) there was nothing in Todd's inquiries to Respondent that indicated that he wanted a same-sex civil union ceremony prior to the June 1, 2011 effective date of the law allowing same-sex civil unions; and (3) such an contention ignores Walder's actual statement in his second February 15, 2011 email that he would "never host same-sex civil unions" at any time. As such, I find that Complainants have standing to proceed on their claim.

Respondent, though, in focusing on the second element of a *prima facie* case of Complainants' discrimination claim, submits that although it is a place of public accommodation when it comes to the portion of its business providing sleeping rooms for its guests

---

[1] Walder even conceded in his second February 15, 2011 email that Respondent's refusal to host to host same-sex civil unions or same-sex weddings could be a form of discrimination.

(and presumably the next morning breakfasts), it is not a place of public accommodation when it comes to providing space for civil union ceremonies or for that matter same sex weddings, because: (1) it never offered same-sex civil union ceremonies to any member of the public; and (2) its wedding ceremony/reception facilities did not qualify as a place of public accommodation because it routinely screened potential customers for their use. (*See*, for example, *Gilbert v. Illinois Department of Human Rights,* 343 Ill.App.3d 904, 799 N.E.2d 465, 278 Ill.Dec. 747 (1st Dist. 4th Div. 2003).) Moreover, it submits that businesses are not required to offer particular services that they would not otherwise offer by virtue of the fact that they offer some services to the public. As such, according to Respondent, it cannot be guilty of discrimination under Article V of the Human Rights Act since the instant record shows that neither same-sex nor opposite-sex couples were able to book a civil union ceremony at its facility.

Respondent's arguments in this regard, though, can be rejected on many levels. First, as a factual matter, Respondent's contention that it provided equal treatment to individuals seeking civil union ceremonies does not square with what actually transpired between Todd and Walder during the February 15, 2011 emails. Specifically, Todd limited his initial inquiry to "same sex" civil unions, and Walder's second email from the same date made it clear that Respondent's prohibition regarding civil union ceremonies covered only "same-sex" civil union ceremonies, since, immediately after declaring that Respondent would never host same-sex civil unions or weddings, Walder explained in the next sentence that: "[w]e believe homosexuality is wrong and unnatural based on what the Bible says

about it." Indeed, there was no mention of a prohibition of opposite-sex civil unions in any of Walder's responsive emails at issue in this case, when he easily could have offered a such a non-discriminatory rationale if that was the case. Moreover, where Walder expressly conceded in his second February 15, 2011 email that what he was saying about same-sex civil unions and homosexuality was discriminatory, Respondent's current claim that it has at all times afforded Complainants equal treatment because it was not allowing civil union ceremonies for anyone rings hollow under the instant record.

Similarly, I agree with Complainant that Respondent has not provided any facts that would justify its claim that there is a meaningful distinction between providing its facilities and services for opposite-sex weddings as opposed to civil union ceremonies. Specifically, Walder did not use this justification in any of his February 15 and 18, 2011 emails as a reason why Respondent could not allow Complainants to use Respondent's facilities for their civil union ceremony and instead justified his refusal based upon his interpretation of the Bible. More important, Respondent has not indicated what, along with the provision of space, chairs, tables, tablecloths, electricity, tents, garbage removal and free parking as depicted in the wedding section of its website, it would need to do to accommodate a same-sex civil union ceremony that it does not already provide to an opposite-sex wedding (or for that matter to any other celebratory event) so as to minimally support its contention that providing facilities and services for a same-sex civil union ceremony was outside the scope of the services it already provided to other guests. Thus, for all of the

above reasons, I find that a same-sex ceremony was within the scope of services Respondent already provided to other guests that used Respondent's facility and further find that Walder's statement in his second February 15, 2011 email indicating that Respondent would never schedule a same-sex civil union ceremony constituted a denial of the full and equal enjoyment of a place of public accommodation for purposes of satisfying the second element of Complainants' discrimination claim.

Respondent's citation to *Gilbert* for the proposition that it is not a place of public accommodation because it "prescreened" individuals prior to allowing them to use their facilities for weddings does not require a different outcome. In *Gilbert,* the court addressed an issue as to whether a business, which taught and certified individuals in scuba diving, was a place of public accommodation where such a business was not specifically enumerated in the list of public accommodations mentioned in the Human Rights Act. There, in noting that the respondent directed its prospective customers to submit a medical form that was used to determine whether the prospective customer was required to obtain a medical clearance from a physician before taking a scuba diving class, the court in *Gilbert* found that the respondent was not a place of public accommodation because it did not "provide its services 'as if one individual was no different from the next.'" (*Gilbert,* 799 N.E.2d at 469, 278 Ill.Dec. at 751, citing *Cut 'N Dried Salon v. The Department of Human Rights,* 306 Ill.App.3d 142, 239 Ill.Dec. 61, 713 N.E.2d 592 (1st Dist., 4th Div. 1999).) Indeed, the court in *Cut 'N Dried,* in finding that an insurance agency was not a place of public accommodation,

talked about a screening process where the price that the customer paid for the service (*i.e.*, insurance coverage) was based on an applicant's individual medical and other characteristics and distinguished its holding from instances where a business provides overnight accommodations, entertainment, recreation or transportation under circumstances where one customer is treated no differently than the next. (*Cut 'N Dried,* 713 N.E.2d at 595, 239 Ill.Dec. at 64.)

Accordingly, Respondent's citation to *Gilbert* in support of its argument seems inapt since, unlike the scuba diving business at issue in that case, Respondent's business as either an inn or restaurant are specifically mentioned as "places of public accommodation" under sections 5-101(A)(1) and (2) of the Human Rights Act (775 ILCS 515-101(A)(1), (2)). As such, *Gilbert* is distinguishable on this basis alone. Moreover, the record shows that Respondent only asked its customers for a name, address, telephone number, email and credit card number and only turned down "a few" customers based not on the information obtained during the "screening process" at issue in the instant case, but rather on other factors, such as use of foul language, the making of unreasonable demands, the display of a poor attitude, and the existence of a conflict over when payments were due. (Respondent's response to Interrogatories Nos. 16 and 42) Thus, *Gilbert* is also distinguishable since the five basic questions that was actually asked by Respondent to screen its applicants, which generally concerned the establishment of the identity of the customer and his or her ability to pay, are nothing like the detailed inquiries about the individual 'characteristics of potential customers made by the respondent in either

Gilbert or *Cut 'N Dried* that concerned a customer's peculiar medical characteristics or his or her physical ability to partake in the services provided by the respondent.

True enough, there is nothing under the Human Rights Act that would preclude all businesses, including those specifically mentioned as places of public accommodation in section 5-101(A), from screening/excluding customers, who do not have the ability to pay for the services rendered by the business or, for that matter, who display unruly manners. Yet, if screening on the customer's ability to pay for the service or for the customer's unruly attitude takes a business outside the contours of section 5-101(A) as Respondent seemingly suggests, no business would be included in that section. More important, such a stance would stand on its head the observation made by the *Cut 'N Dried* court that the provision of overnight accommodations (and for that matter food and drink) are typically given under circumstances where one individual is no different than the next. As such, I must reject Respondent's contention that its minimal screening function with respect to offering its facilities to host weddings precludes it from being considered a place of public accommodation under the instant record.

As to the third element of their discrimination claim, Complainants need only establish that other similarly-situated individuals outside their protected classification were treated more favorably. Again, Respondent submits that Complainants cannot establish this element because it did not offer civil union ceremonies to any couple regardless of their sexual preference. However, as noted above, I found that a same-sex civil union ceremony that was the focus of

Todd's inquiry was within the same scope of services Respondent provided to opposite-sex weddings, and thus Complainants are entitled to use guests seeking Respondent's provisions of services for their wedding ceremonies as suitable comparatives for their discrimination claims. In this regard, the record shows that Respondent allowed guests seeking to use its facilities for weddings on 49 occasions in 2011, an amount that would more than satisfy the definition of a "goodly sample" of disparate treatment to support an inference of discrimination on the basis of sexual orientation, where: (1) Walder flatly refused to schedule any same-sex civil union ceremonies; and (2) Respondent provided the space and other related services associated with a wedding ceremony to heterosexual couples. (*See*, *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1141 (7th Cir. 1997).)

Moreover, aside from the evidence of disparate treatment contained in this record, Complainants have provided direct evidence of Walder's discriminatory animosity towards their sexual orientation, and that such animosity played an operative role in Respondent's refusal to schedule same-sex civil unions at its facility. Specifically, Walder declared in his second and third February 15, 2011 emails that: (1) Respondent would never host same-sex civil union ceremonies or same-sex weddings even if directed to do so by Illinois law; (2) homosexuality was "wrong and unnatural" based upon the Bible; and (3) the Bible "contains the highest laws pertinent to man." Moreover, not content to leave the issue of Todd's homosexuality alone, Walder cited to two Bible verses in his February 18, 2011 email to Todd that informed him that it was "not to[o] late to change your behavior." As such, based on what had

actually occurred during the February 15-18, 2011 email exchanges between Walder and Todd, the record is clear that Complainants have successfully established all three elements of their discrimination claim under section 5-102(A) of the Human Rights Act arising out of Respondent's refusal to host same-sex civil union ceremonies, and that Complainants' homosexuality was the only reason that Respondent was not going to host a proposed civil union ceremony on its premises.

Somewhat surprisingly, Respondent's counsel asserts that Walder's views on homosexuality are completely irrelevant to the instant case. (Respondent's reply brief at pg. 11) But how can that be so? As far as this record shows, Walder was serving as Respondent's president at the time of the instant February 15 and 18, 2011 email exchanges with Todd, and, as Respondent's president, Walder was (according to Respondent's by-laws) "the principal executive officer" of Respondent who was "in charge of" Respondent's business. (*See*, Article IV, section 4 of Respondent's by-laws.) Moreover, Respondent's ties to Walder's religious views regarding homosexuality were amply demonstrated by Respondent's amended response to Complainant's Interrogatory No. 32, which declared that Respondent was controlled by James and Elizabeth Walder, "whose religious beliefs cannot be separated from the operation of Respondent. As such, Walder certainly had the authority to decide on behalf of Respondent whether it was going to host same-sex civil union ceremonies, and if he did not have such authority so as to make his thoughts on homosexuality irrelevant, Respondent has not proffered any other individual who could speak for the corporation or decide whether it was going to host same-sex civil unions. Indeed,

the stance by Respondent's counsel is fundamentally at odds with all of Respondent's First Amendment and Religious Freedom Restoration Act claims that emphasize and equate the religious views of Walder with the religious views of the corporate Respondent. Thus, not only are Walder's views on homosexuality relevant in this case, they are dispositive in a finding that Complainants have established a viable claim of discrimination under section 5-102(A) for Respondent's refusal to host same-sex civil union ceremonies.

However, Respondent submits that even if Complainants could establish a technical violation of section 5-102(A) of the Human Rights Act, the Commission could not enforce such a finding since, as the record shows, Respondent made a business decision not to host same-sex civil unions because of sincerely held religious beliefs by its owners regarding the sanctity of marriage between a man and a woman. As such, Respondent insists that forcing it to host an inherently expressive event, such as a same-sex civil union ceremony that publicly communicates messages conflicting with its sincerely held religious beliefs, would violate: (1) Respondent's and its owners' free exercise of religion rights under the Illinois Religious Freedom Restoration Act, Article I, Section 3 of the Illinois Constitution, and the Free Exercise Clause of the United States Constitution; (2) Respondent's and its owners' freedom from compelled speech or expression under the Free Speech Clause of the First Amendment of the United States Constitution and Article I, Section 4 of the Illinois Constitution; and (3) Respondent's and its owners' freedom of expressive association rights under the First Amendment to the United

States Constitution and Article I, Section 5 of the Illinois Constitution.

However, under the Commission's decision in *Langley and Illinois Secretary of State,* IHRC, ALS No. 5288(S), April 23, 1999, Respondent's constitutional arguments can be set aside for now since: (1) Respondent seeks to find that section 5-101(A) as applied to Respondent under the instant case is unconstitutional; (2) the Commission's authority to act is circumscribed by the language contained in the Human Rights Act; and (3) there is nothing in the Human Rights Act that gives the Commission the authority to enforce any clause of the federal or state constitutions. (*Langley,* slip op. at pg. 5) This is not to say, though, that Respondent will not have an opportunity to raise such a claim in any appeal to the Appellate Court, and thus it is enough to say that Respondent has preserved his first amendment claims for any appellate review.

The resolution of Respondent's Religious Freedom Restoration Act (RFRA) defense, though, requires a separate analysis. Section 15 of the RFRA (775 ILCS 35/15) provides that the "[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is (i) in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." Moreover, section 20 of the RFRA states that a person "may assert [an RFRA violation] as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government." In the instant case, Respondent asserts that: (1) the

RFRA prohibits a governmental agency such as the Department of Human Rights from substantially burdening a person's exercise of religion; and (2) an application of the non-discrimination provisions contained in section 5-102(A) would violate the RFRA because section 5-102(A) would impermissibly force Respondent and its owners to engage in activities that are forbidden by their sincerely held religious beliefs.

Complainant, though, contends that the provisions of the RFRA simply do not apply in the instant lawsuit because: (1) by its own terms, section 35 of the RFRA prohibits only the "government" from substantially burdening a person's exercise of religion; and (2) the instant Complaint is a lawsuit that pertains to only private parties. (*See*, for example, *Marshaw v. Richards,* 368 Ill.App.3d 418, 857 N.E.2d 794 (1st Dist., 5th Div. 2006), where the court found that the RFRA was not applicable in a lawsuit between various members of a church to determine who were the rightful members of the church's board of directors.) In viewing the current status of the instant Complaint, I agree that neither the Department of Human Rights nor the Commission itself is a "party" at this juncture of the instant lawsuit in the sense that neither agency has initiated an action[2] against the Respondent. Indeed, Complainants make a valid point when they assert that they should not be required to step in the shoes of the Department or the Commission in order to provide sufficient legal support for section 5-102(A) from any constitutional or statutory

---

[2] Recall that it was Complainants who filed the instant Complaints on their own behalf with the Commission.

challenge, since the Attorney General would be in the best position to make any such arguments.

However, Respondent also makes a valid point in the sense that our Complainants are attempting to enforce the provisions section 5-102(A) of the Human Rights Act in an effort to seek a recovery from Respondent. Thus, this case is distinguishable from *Marshaw* where, unlike the Commission in the instant proceeding, the circuit court in that case had no stake in the outcome of the case and was not adjudicating the viability of any statute. Moreover, it would appear that under section 20 of the RFRA Respondent should be able to file a "claim or defense" to the dictates of section 5-102(A) at some point during these proceedings, since Complainants are essentially basing their claim for recovery on that statute. Accordingly, because the Commission will be a party in any appeal of this case to the Appellate Court and would be represented by the Attorney General at that time, I find that Respondent's claims under the RFRA should be resolved in that forum.

Yet, even if I am wrong on the issue as to whether Respondent can assert a defense under the RFRA in any proceeding before the Commission, I would find that Respondent has not established a violation of the RFRA, since it failed to factually support any claim that forcing it to host same-sex civil union ceremonies would cause a substantial burden on its exercise of religion (or the exercise of religion on the part of the Walders), even if I could attribute the religious views of the Walders to the corporate Respondent. For example, while the Walders explain that they cannot host a same-sex civil union ceremony because such an event "publicly glorify[ies] and

endorse[s] homosexual conduct and same-sex relationships in violation of Biblical teachings condemning such conduct and relationships (*see*, Respondent's cross-motion, page 8)," the Walders have not explained how this is so, if all they would be doing is supplying the tables, chairs, tablecloths, rental space, tents, electricity, garbage removal and free parking in order to accommodate such a ceremony. In this respect, and given the declaration in Respondent's website that guests, when planning a wedding, have "complete autonomy" in terms of selecting the caterers, florists, wedding cakes, officiates, planners photographers and DJs," it is not all that clear that the Walders or any of their like-minded employees would be required to even be present at such a ceremony if all the details/tasks associated with the ceremony have been assigned to others selected by the guests. Indeed, there is no testimony that Complainants even asked the Walders to participate in any way in their same-sex civil union, and the record otherwise contains evidence that at least on one occasion, Respondent made its facilities available for an event (*i.e.*, an anniversary ceremony), which it did not organize or participate, and for which none of its personnel were present. If that is true, and the presence of Respondent's employees is not mandatory at the events it hosts, Respondent has not explained how providing a space for any ceremony is somehow a *sub silencio* endorsement of anything that goes on during the event.

Moreover, the record suggests that if Mark and Todd had gone to Respondent's Bed and Breakfast on the evening after their same-sex civil union ceremony and asked to rent a sleeping room, Respondent would

have rented them the room because, as Respondent puts it, it does not act as "sex police" over its guests. (Respondent's response to Interrogatory No. 8.) Indeed, Respondent admits that it does not ask about the relationship status of guests seeking to stay in its sleeping rooms and concedes that it allows two individuals of the same sex to stay in the same room. (Respondent's response to Complainants' Interrogatory No. 39) Yet, given the likelihood that some of Respondent's same sex guests renting rooms are homosexuals, the fact that Respondent would rent a sleeping room to Complainants, or any other homosexual couple, is somewhat surprising since the Walders have previously explained that their "religious faith forbids them from supporting romantic relationships between persons of the same sex." (Respondent's response to Complainants' Interrogatory No. 8) In this respect, I would find that Respondent loses on its RFRA claim since Respondent has not shown how, according to its own business model, renting a room to a homosexual couple would not be a substantial burden on the exercise of its religion (although it would violate its religious beliefs to do so), but providing a space for same-sex couples to conduct a civil union ceremony would be a substantial burden on the exercise of its religion where, as far as this record suggests, in both cases all that Respondent would be required to do is to provide a space for its same-sex guests to conduct an activity.

Finally, I would note that the Seventh Circuit, in *Grace Schools v. Burwell,* Nos. 14-1430 and 14-1431 Cons. (September 4, 2015) has recently addressed a similar claim where, a number of religious not-for-profit organizations challenged the implementation

of the "contraceptive mandate" contained in the Patient Protection and Affordable Care Act (ACA) by arguing that the enforcement of the mandate would impose a substantial burden on their free exercise of religion in violation of the federal Religious Freedom Restoration Act of 1993. Specifically, said organizations maintained that an accommodation under ADA regulations, which allowed them to opt out of the contraceptive mandate by filling out a form that declared their religious objection to the contraceptive mandate or by notifying the government directly of their religious objection to the contraceptive mandate, gave them no relief and violated the federal Religious Freedom Restoration Act because: (1) the end result of the accommodation was the eventual inclusion of the contraceptive mandate into the health plans of their employees; and (2) the accommodation caused them to be conduits to the provision of the same contraceptive services to which they had objected. However, the Court of Appeals found that the instant accommodation did not serve as a conduit for the provision of contraceptive services, since the provision of contraceptive services was by operation of federal law and not by any actions that the organizations might be required to take in order to assert their religious objections. (*Grace Schools*, slip op. at pg. 38)

The same result should apply in the instant case, where Respondent has similarly asserted a "conduit" theory with respect to its defense under the RFRA. Specifically, it submits that to compel it to host same-sex civil union ceremonies would be tantamount to compelling it to use its expressive First Amendment rights to convey (and thus implicitly endorse) the message that two individuals in love can enter into a

relationship that mimics marriage in contravention to certain passages in the Bible. (Respondent's reply brief at pg. 19) Yet even if Respondent's religious views in this regard were sincerely held, its complaint is not with section 5-102(A) of the Human Rights Act, but rather with the Illinois Religious Freedom Protection and Civil Union Act (RFPCUA), because it is that statute which grants same-sex couples the right to hold a same-sex civil union ceremony which Respondent finds to be objectionable. As such, the requirement in section 5-102(A) of the Human Rights Act that Respondent treat homosexual couples seeking a space and other related services to hold a same-sex civil union ceremony in the same manner that it would treat heterosexual couples seeking to hold a traditional marriage ceremony cannot be a "trigger" or "conduit" for anything that Respondent finds to be objectionable in this case because it is the operation of the RFPCUA that is the cause of the provision of services that Respondents finds to be objectionable. Indeed, Respondent has not contended that treating individuals equally conflicts with any of its religious beliefs. Accordingly, Respondent loses on its RFRA defense in the instant Human Rights Act lawsuit because it is not making a religious statement of any sort when all it is doing is providing a space and related services for heterosexual or same-sex couples seeking to use its facilities.

Determination

For all of the above reasons, Respondent's motion for issuance of a summary decision is denied, and Complainants' motion for issuance of a summary decision is granted. Moreover, both parties shall make

themselves available for a telephone conference call on September 28, 2015 at 9:30 a.m. for the purpose of setting up a date for a hearing on Complainants' damages and the submission of a fee petition by Complainants' counsel.

Human Rights Commission

By: /s/ Michael R. Robinson
Administrative Law Judge
Administrative Law Section

ENTERED THE 15TH DAY OF SEPTEMBER, 2015

File No: 11-0703c
Charge No: 2011sp2489, 2011sp2488
EEOC No: N/A
Case Name: Todd & Mark Wathen vs Walder Vacuflo, Inc

MEMORANDUM OF SERVICE

The undersigned certifies that on September 15, 2015, she served the foregoing ORDER on each person named below by depositing in the U.S. mail box at the Wm. G. Stratton Bldg., Springfield, Illinois, properly posted for first class mail, addressed as follows:

Betty Tsamis
Tsamis Law Firm, P.C.
1509 W Berwyn, Suite 201E
Chicago, IL 60640

John Knight
Harvey Grossman
Roger Baldwin Foundation of ACLU, Inc.
180 North Michigan Ave, Suite # 2300
Chicago, IL 60601

Clay A Tillack
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606

Jason Craddock
19 S Lasalle, Suite 604
Chicago, IL 60603

INTEROFFICE MAIL TO:

Donyelle Gray
General Counsel
IL Human Rights Commission
100 W Randolph St Ste 5-100
Chicago IL 60601

ORDER OF THE FOURTH DISTRICT APPELLATE COURT DENYING MOTION FOR RECONSIDERATION (MAY 30, 2017)

STATE OF ILLINOIS
APPELLATE COURT, FOURTH DISTRICT

WALDER VACUFLO, INC.,

Petitioner,

v.

THE ILLINOIS HUMAN RIGHTS COMMISSION, MARK WATHEN and TODD WATHEN,

Respondents.

No. 4-16-0939

Human Rights Commission
Case No.: 11-SP-2488, 11-SP-2489

This cause coming lo be heard with proper notice having been served, and the Court being fully advised in the premises:

IT IS ORDERED that Appellee's motion for reconsideration denied. Motion to dismiss appeal granted. Appeal dismissed.

Order entered by the Court.

PROOF OF POSTAGE
(AUGUST 24, 2017)