STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
WILFREDO BUSHER,	)		
	)		
	)		
Complainant,	)	CHARGE NO(S):	2003CF2792
	)	EEOC NO(S):	N/A
and	)	ALS NO(S):	04-392
	)		
RON KEATON ENTERPRISES, INC. d/b/a	)		
IRVING & PULASKI SHELL, AND	)		
RON KEATON, personally, and RMK	)		
ENTERPRISES OF ILLINOIS, INC., and	)		
SHELL OIL COMPANY, jointly and severally,	)		
	)		
	)		
Respondent.	)		

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 17th day of March 2009

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
WILFREDO BUSHER,	)	
	)	**Charge No. 2003CF2792**
Complainant,	)	**EEOC No. 21BA31678**
	)	**ALS No. 04-392**
and	)	
	)	
RON KEATON ENTERPRISES, INC. d/b/a/ IRVING & PULASKI SHELL, and RON KEATON, personally, and RMK ENTERPRISES OF ILLINOIS, INC., and SHELL OIL COMPANY, jointly and severally,	)	**Judge Reva S. Bauch**
	)	
Respondents.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on damages held on June 30, 2008, after a Default Order against Respondents Ron Keaton Enterprises, Inc. and Ron Keaton, personally, was entered on December 11, 2007. Complainant appeared with his attorney. Respondents did not appear, nor did anyone on their behalf. Complainant was given the opportunity to submit a post-hearing brief and a fee petition. Complainant opted not to file a post-hearing brief, but did opt to file a fee petition. Complainant's fee petition was timely filed on July 14, 2008. Respondents failed to file an appearance and respond to the Complainant's fee petition. This matter is now ready for disposition.

The Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following facts were derived from the record file in this matter, as well as testimony given, and exhibits admitted, at the public hearing.

1. On September 23, 2004, the Department filed a complaint on behalf of Complainant, Wilfredo Busher.

2. The original complaint named Ron Keaton Enterprises, Inc. as Respondent. Thereafter, Complainant filed a Motion for Leave to Amend the Complaint and name Shell Oil Company, RMK Enterprises, Inc, and Ron Keaton, personally, as Respondents.

3. On January 18, 2004, Administrative Law Judge Mariette Lindt entered an order granting Complainant's Motion to add Ron Keaton, personally, RMK Enterprises, Inc. and Shell Oil Company as additional Respondents and ordered Complainant to file an amended complaint.

4. On March 1, 2005, Shell Oil Company filed a Motion to Vacate or Clarify and/or a Motion to Dismiss.

5. On March 11, 2005, Complainant filed a Motion to Amend the Complaint to Correct the Identity of a named additional party as RMK Enterprises of Illinois, Inc.

6. Also on March 11, 2005, Complainant filed a Motion for Ex-parte Default Judgment against Ron Keaton Enterprises, Inc., d/b/a Irving Park & Pulaski Shell, Ron Keaton, personally, RMK Enterprises of Illinois, Inc., and Shell Oil Company.

7. On March 15, 2005, Judge Lindt granted Shell Oil Company's Motion to Dismiss, without objection by Complainant.

8 On April 6, 2005, Complainant filed its third amended complaint.

9. The third amended complaint is currently before the Commission.

10. The third amended complaint is comprised of religious discrimination, retaliation and religious harassment claims.

11. On May 17, 2005, Respondent RMK Enterprises of Illinois, Inc. filed a Motion to Dismiss.

12. On July 20, 2007, Judge Lindt entered an order recommending dismissal of the complaint as to Respondent RMK Enterprises of Illinois, Inc.

13. On November 1, 2007, Complainant filed a Renewed Motion for Ex-Parte Default Judgment against Ron Keaton, personally, and Ron Keaton Enterprises, Inc. d/b/a Irving Park & Pulaski Shell.

14. On December 11, 2007, Respondents Ron Keaton, personally, and Ron Keaton Enterprises, Inc. d/b/a/ Irving Park & Pulaski Shell were found to be in default for failure to file appearances and file a response to Complainant's Renewed Motion for Default.

15. On June 30, 2008, a damages hearing was held.

16. Although Respondents were served with notice of the damages hearing, nobody appeared at the hearing on either Respondent's behalf.

17. Complainant is a Christian man.

18. Complainant's religion is Christian Evangelical.

19. Complainant attends church three times a week.

20. Complainant is now blind and suffers from extreme kidney problems.

21. Complainant worked as a store clerk at the Irving Park & Pulaski Shell station beginning in October of 2002.

22. Ron Keaton was the owner of the Irving Park & Pulaski Shell station.

23. There were two supervisors at the Irving Park & Pulaski Shell station, Andy and John.

24. Ron Keaton, the owner, would come in early in the morning to check-in and call his wife.

25. As a store clerk, Complainant would attend to the customers by authorizing payment for gasoline purchases.

26. During the time he was a store clerk, Complainant was able to see and performed his job well.

27. Complainant worked many hours of overtime because he was always available to work.

28. At some point, Complainant began to be concerned about the behavior of some of his co-workers and supervisors.

29. They called him names like "holy-holy."

30. They said, "[h]ere comes the preacher man."

31. The other employees talked about sexual acts with women.

32. The other employees asked Complainant if he did certain sexual acts.

33. Complainant told his co-workers and supervisors not to speak to him about sexual acts with women.

34. The other employees and supervisors asked Complainant if he had his sex in the morning.

35. The other employees and supervisors asked Complainant what he did after he prayed.

36. When female customers were present, Complainant's co-workers said, "[w]hy don't you give her your hose so you can put some gasoline in it?"

37. Complainant felt uncomfortable and he told his co-workers he was a Christian man.

38. Complainant told his co-workers that he was bothered by what they said to him and he was not into joking around about sex.

39. Complainant felt they ignored him and continued to say things about sex and religion.

40. Complainant felt more and more uncomfortable working at the Irving Park & Pulaski Shell station.

41. The sexual and religious comments occurred all day long.

42. The supervisors, Andy and John, instigated and encouraged discussions about girls in Complainant's presence.

43. One other employee, a female, had conversations with Complainant about sexual matters.

44. The female co-worker described sexual acts and asked Complainant if he had ever done these acts.

45. One of the sexual acts she described was a blow job.

46. The female co-worker asked Complainant if he had ever touched a female.

47. Complainant did not like these questions and discussions.

48. Complainant said, "[l]isten, man, you know, I'm not into this. I just want to do my hours, and that's it."

49. Complainant spoke to Andy about his concerns with these comments and conversations.

50. Andy laughed at Complainant's complaints.

51. On one occasion, John brought in a Hustler magazine and asked Complainant if he liked the magazine.

52. John showed Complainant women with their legs spread.

53. Complainant got upset

54. Complainant began to actively avoid his co-workers because he was very uncomfortable with their behavior and comments.

55. Complainant regularly told his co-workers and supervisors that he was a Christian and did not look at dirty magazines.

56. Complainant told his co-workers that he was a man, a hundred percent man, but he was not into kinky stuff like looking at magazines.

57. When Complainant complained to John, John said he could not do anything about the situation and told Complainant to get another job or go somewhere else.

58. One time, one of his co-workers, Enrique, took a bottle of Mr. Clean and put something in the bottle and then put Complainant's name on it.

59. Andy was with Enrique during the Mr. Clean event.

60. Andy and Enrique showed the Mr. Clean bottle to John, who then laughed.

61. Complainant took pictures of the bottle.

62. A picture of a priest was glued to the Mr. Clean bottle.

63. The co-workers placed the Mr. Clean bottle in the rest room for Complainant to see when he went to the bathroom.

64. Complainant took the Mr. Clean bottle and complained to Andy, who laughed.

65. Complainant complained to John and he also laughed and began joking about it with Andy.

66. Complainant felt uncomfortable and felt he was being singled out for harassment by his co-workers and supervisors.

67. Complainant felt like he was left out because he did not comment or laugh at the nasty jokes.

68. Complainant did his best to tolerate the environment and do his job and go home.

69. One day, Complainant went to pick-up his pay check and he was told that he was fired.

70. Complainant was told that he was terminated because he worked too many overtime hours and got paid too much.

71. Complainant does not believe that was the reason for his termination

72. Complainant made $7.50 per hour, or approximately $300 per week.

73. Although he tried, Complainant could not find another job.

74. Complainant was told that Respondents were giving him bad references.

75. Eventually, Complainant started to have significant problems with his vision and his kidneys, thereby preventing him from looking for work.

76. Complainant looked for work for eight or nine months before becoming too sick to work.

77. On July 14, 2008, Complainant filed a petition for attorney's fees for work performed by Attorney Lourdes Monteagudo.

78. Despite being served with the fee petition, Respondents did not file any response to the fee petition.

79. Ms. Monteagudo is licensed to practice law in the state of Illinois.

80. Ms. Monteagudo has seven years of litigation experience representing clients who have been victimized by fraudulent practices in real estate and other business dealings.

81. Complainant's fee petition references an Exhibit A that is a time sheet totaling 53.71 hours of work performed for this case.

82. The fee petition fails to itemize the services rendered for Complainant and the time allocated for these tasks.

83. The fee petition simply states that the services performed included time spent for usual and customary representation of the client.

84. The fee petition requests $175.00 per hour for conferences, discovery and office work and other non-court time.

85 The fee petition requests $200.00 per hour for hearings and court time.

86. A Commission clerk contacted Complainant's attorney two times, and spoke to her each time, asking her to submit the missing Exhibit A and an itemization of her services

87. Complainant's attorney has failed to submit the missing Exhibit A or an itemization of services rendered.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondents are "employers" as those terms are defined in the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B).

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. In accordance with the Default Order entered on December 11, 2007, Respondents are liable for violation of the Illinois Human Rights Act that prohibits discrimination based on religion

4. Complainant has demonstrated that he is entitled to back pay in the total amount of $9,600.00.

5. Complainant is entitled to prejudgment interest on the back pay award in accordance with the Illinois Human Rights Act and the Commission's procedural rules.

6. Complainant has demonstrated that he is entitled to emotional distress damages in the amount of $30,000.00.

8. In light of the finding of liability against Respondents, Respondents should be ordered to cease and desist from any religious discrimination, religious harassment and retaliation in the future.

11. Because of their failure to file appearances and respond to Complainant's fee petition, Respondents have waived the issue of fees.

9. Attorney Lourdes Monteagudo's hourly rate of $175.00 for non-court time and $200.00 for court time is reasonable.

10. Since the fee petition fails to itemize services rendered and the time allocated to those services, the fee petition must be reduced.

11. Complainant has demonstrated that he is entitled to attorney's fees and costs in the amount of $5,184.75.

12. Punitive damages may not be awarded for claims arising under the Illinois Human Rights Act.

Discussion

A. Default

Although granted an opportunity to respond to Complainant's Motion for Default, both Respondents remaining in this case failed to respond. Thus, on December 11, 2007, Judge Mariette Lindt granted the Motion for Default. I recommend that the default against Respondents be affirmed by the Commission and a finding of liability for religious discrimination, religious harassment and retaliation be found against Respondents. Once an order of default is entered, the allegations of the complaint are deemed to be admitted. **Payne and Roseland Christian Health Ministries, Inc.,** IHRC, 11591, Jan. 1, 2003. As a result, a finding of liability against Respondents is appropriate in this case.

B. Dismissal as to Shell Oil Company

On March 1, 2005, Shell Oil Company filed a Motion to Vacate or Clarify, and/or to Dismiss. Complainant's counsel informed Judge Lindt that she did not object to Shell's motion. As such, on March 15, 2005, Judge Lindt entered an order granting Shell Oil Company's motion requesting that it be dismissed from the complaint. That Order is incorporated by reference. I recommend that the Commission affirm the March 15, 2005 Order and dismiss Shell Oil Company from the complaint, with prejudice.

C. Dismissal as to RMK Enterprises of Illinois, Inc.

On May 17, 2005, RMK Enterprises of Illinois, Inc. filed a Motion to Dismiss. Both the Department and the Complainant filed responses to the Motion. RMK Enterprises of Illinois, Inc. filed a reply. On July 20, 2007, Judge Mariette Lindt entered

an order recommending that RMK Enterprises of Illinois, Inc. be dismissed from the complaint, with prejudice. That Order is incorporated by reference. Judge Lindt found that the requirements of Section 5300.660 of the Commission's procedural rules had not been met. Judge Lindt found that RMK Enterprises of Illinois, Inc. had no connection whatsoever to the discriminatory acts alleged to have occurred in the Complaint. I recommend that the Commission affirm Judge Lindt's July 20, 2007 Order and dismiss RMK Enterprises of Illinois, Inc. from the complaint, with prejudice.

D. Damages

i. Back Pay

The first element of damages to be considered is back pay. Complainant requests a back pay award of $9,600.00.

Often, a calculation of back pay can be somewhat speculative. Ambiguities in this process must be resolved in favor of a prevailing complainant, and against the discriminating employer, since the employer's wrongful acts gave rise to the uncertainty. **Clark v. Human Rights Comm'n**, 141 Ill App 3d 178 (1986). The principle must be rigorously followed when a respondent has failed to participate in the case in any way. **Taylor and Amerienvironmental, Inc.,** IHRC, 11722, Feb. 23, 2004.

Complainant testified that he earned $7.50 per hour and earned approximately $300.00 per week. He testified that he was out of work for eight or nine months before he got too ill to work. Given all of the foregoing, I recommend a back pay award of **$9,600.00** ($300.00 times 32 weeks or approximately eight months).

ii. Pre-Judgment Interest

Respondents should also be ordered to pay Complainant interest on the back pay award contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-

104(J)), and calculated as provided in Section 5300.1145 of the Commission's procedural rules.

iii. Emotional Distress

Emotional distress damages are recoverable as actual damages for injury or loss suffered by a complainant and caused by violations of the Illinois Human Rights Act. **Village of Bellwood v. Illinois Human Rights Comm'n,** 184 Ill App 3d 339 (1989). Complainant has the burden of coming forward and presenting evidence for the relief he seeks. Complainant must prove by a preponderance of the evidence that he is entitled to emotional distress damages.

It is apparent from the record that Complainant suffered a severe emotional reaction to Respondent's conduct and statements. The degree of emotional distress was significantly over and above that which would be expected from "the mere fact of a civil rights violation" and therefore, is compensable under the Illinois Human Rights Act. **Harris and Vinylgrain Industries of Illinois**, IHRC, 11382, Aug. 1, 2001.

The probative factors in determining the amount of an emotional distress award are the nature and duration of the suffering experienced by complainant **Smith v. Cook County Sheriff's Office,** 19 Ill HRC Rep 131 (1985).

In support of his claim for emotional distress damages, Complainant testified on his own behalf. Throughout much of his testimony, especially when discussing the religious discrimination and harassment and how it made him feel, Complainant appeared noticeably upset. It was apparent that Complainant is a religious and conservative man who is deeply offended by sexual statements and sexual pictures. Complainant's testimony was compelling. He was visibly disturbed as he testified to the humiliation inflicted on him by his co-workers and supervisors. The sexual and religious comments occurred on a regular basis for a long period of time. Complainant regularly

told his co-workers and supervisors to stop. They did not stop, but rather laughed at him. They called him the "preacher man" and "holy-holy." Complainant felt alone and had to take affirmative steps to avoid other workers while at his job. Complainant was frustrated and uncomfortable that he had to listen to comments and look at pictures that he found extremely offensive. Complainant's co-workers showed him pictures in Hustler magazine of women with their legs spread. He was subjected to regular questions about his sexual activities, after co-workers would describe sexual acts. When female customers were present, Complainant's co-workers would say,[w]hy don't you give her your hose so you can put some gasoline in it?" Complainant was asked whether he ever touched a woman and whether he ever had a blow job. At one point, his co-workers and supervisors took a Mr. Clean bottle, taped a priest's picture on it and wrote Complainant's name on the bottle. Complainant was very upset. His co-workers placed the Mr. Clean bottle in the restroom so Complainant would see it several times a day. His supervisors, rather than stopping the harassment, actually participated in the harassment, and even encouraged it. On several occasions when Complainant complained to his supervisor John, he was told that John would do nothing to stop the conduct and he should find another job.

In sum, based on the record in this case and Commission precedent, I find Complainant has met his burden of proof; an award of **$30,000.00** for emotional distress damages is appropriate

iv. Cease and Desist

Since a Default Order has been entered and there has been a finding of liability against the Respondents, it is recommended that Respondents be ordered to cease and desist from religious discrimination, religious harassment and retaliation in the future. *See* **Magraff and Alexopolis**, IHRC, 7082, Nov. 8, 1993.

v. Attorney's Fees

As permitted by the Commission's Order entered on June 30, 2008, Complainant's attorney timely submitted a fee petition on July 14, 2008. In considering petitions for the award of attorney's fees and costs, the Commission requires that any award be fair and reasonable. The most common measure of fees remains the charging of a set rate per hour for work performed in consideration of the client's matter at hand, and multiplying that figure by the number of hours expended.

The standard for determining the proper fee award by the Commission is found in **Clark and Champaign National Bank**, 4 Ill HRC Rep 193 (1982). Respondents chose not to file a timely response. Since no response was filed, all issues related to the petition are waived. **Leseiko and Chase/Ehrenberg & Rosene, Inc.,** IHRC, 11592, Mar. 23, 2004. However, I have still analyzed the billing rates and hours requested to determine if they meet appropriate standards of reasonableness.

a. *Reasonable Hourly Rates*

In the fee petition, Attorney Lourdes Monteagudo requests $10,369.50 for her time on this case. This amount was calculated using 53.71 hours of time. In addition, the fee petition states that the rate of $175.00 per hour was used for non-court time and $200.00 per hour was used for court time.

Attorney Monteagudo is licensed as an attorney in the State of Illinois and has seven years of litigation experience in the Court of Chancery in Cook County. She primarily represents plaintiffs in fraud cases related to real estate and business dealings.

Thus, even without Respondents' waiver of fee petition objections, I find Attorney Monteagudo's rates reasonable, and in accordance with Commission's recent orders on attorney's fees.

b. *Number of Hours Reasonably Worked*

Once the hourly rate is decided, the next step is to determine whether the hours claimed are reasonable. The total fee requested is $10,369.50, based on 53.71 hours for Attorney Monteagudo. Although uncontested by Respondents, I still must carefully examine fee statements. Complainant failed to file detailed fee statements itemizing the hours billed for services performed by Attorney Monteagudo. Thus, the fee petition is not in accordance with 56 Ill. Admin. Code §5300.765 (a) (1) and is insufficient to allow appropriate scrutiny. For the reasons set forth below, I recommend that the requested attorney's fee be reduced.

Thus, I recommend that Complainant be awarded 50% of Attorney Monteagudo's proposed fees for a total amount of **$5184.75.**

vi. Punitive damages

Complainant requested an award of punitive damages. However, such an award is not permitted under the Illinois Human Rights Act.

Recommendation

It is recommended that the Commission:

(1) order that Shell Oil Company be dismissed from the complaint, with prejudice;

(2) order that RMK Enterprises of Illinois, Inc. be dismissed from the complaint, with prejudice;

(3) order Respondents, jointly or severally, to pay Complainant back pay in the amount of $9,600.00;

(4) award prejudgment interest on the back pay award in accordance with the Illinois Human Rights Act and the Commission's procedural rules;

(5) order Respondents, jointly and severally, to pay Complainant emotional distress damages of $30,000.00;

(6) order Respondents, jointly and severally, to pay Complainant attorney's fees in the amount of $5,184.75.00;

(7) order Respondents to cease and desist from any religious discrimination, religious harassment and retaliation in the future.

HUMAN RIGHTS COMMISSION

BY:

REVA S. BAUCH
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: December 18, 2008