▶	This Recommended Order and Decision was followed by an Order and Decision in the 2nd Quarter of 2006

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF	**)**	
	)	
Kenneth Clark,	**)**	
Complainant	**)**	
	)	**Charge No.: 2003CF0321**
and	**)**	**EEOC No.: 21BA 23068**
	)	**ALS No.: 03-059**
	)	
Windy City Waste &	**)**	
Recycling, Inc.,	**)**	
Respondent	**)**	

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission pursuant to an order of default entered by the Commission against Respondent on January 14, 2004. A public hearing on damages was conducted on April 20, 2004 at which Respondent did not appear. Both parties filed post-hearing briefs, and each in turn filed a reply brief. This matter is now ready for decision.

Statement of the Case

The Complainant was discharged from his employment with Respondent on July 30, 2002. Complainant's charge was timely submitted to the Department of Human Rights on August 8, 2002. In it, the Complainant alleged that Respondent discriminated against him on the basis of his race, black, in violation of the Human Rights Act. Despite numerous requests and extensions of time, Respondent failed to file a verified response to the charge. The Chief Legal Counsel for the Department sustained a notice of default that was followed by an order affirming the default on October 6, 2003. In response to the Petition for

Hearing to Determine Complainant's Damages filed by the Department on October 8, 2003, the Commission issued its order of default on January 14, 2004 as noted above.

Findings of Fact

1. Complainant Kenneth Clark filed his Charge No. 2003CF0321 with the Illinois Department of Human Rights on August 8, 2002 alleging that Respondent Windy City Waste & Recycling, Inc. terminated his employment due to his race, black.
2. Although it was duly served, Respondent did not file a verified response to the Charge. Subsequently, the Department's Petition for a Public Hearing on Damages was filed with the Commission on or about October 8, 2003. The Commission's Order of Default requesting that the Administrative Law Section schedule such a hearing was then issued on January 14, 2004. The public hearing, first set for March 24, 2004, was later rescheduled for April 20, 2004 at the Commission's office in Chicago.
3. Only Complainant and his counsel appeared for the public hearing on April 20, 2004. Respondent did not appear at or participate in the public hearing. However, counsel filed an appearance on behalf of Respondent on May 21, 2004 and both parties filed post-hearing briefs.
4. Complainant does not seek reinstatement to employment with Respondent, but does seek front pay in lieu of reinstatement.

5. Complainant was discharged from his employment with Respondent on July 28, 2002. He is entitled to an award of $39,845.79 as back pay. The calculation of this award of back pay is found below and is incorporated in this finding of fact. Further, Complainant is entitled to an award of front pay in lieu of reinstatement in the amount of $67,177.80.

6. Complainant has requested an award for emotional distress and, based on the evidence in the record, it is recommended that he be awarded $65,000.00 for this element of damages.

7. Complainant's counsel requests fees for 38.1 hours of work at the rate of $250.00 per hour, a total of $9,525.00. Respondent filed no response to the motion for fees.

Conclusions of Law

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

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

3. In accord with the default order entered on January 14, 2004, Respondent is liable for a violation of the provisions of the Illinois Human Rights Act that prohibit discrimination in employment based on race as alleged in this Charge.

4. Based on the default of Respondent and its failure to effectively dispute or oppose any of the requests made by Complainant with regard to an award for back pay, front pay, emotional distress and attorney fees, Complainant is entitled to an award for each of these elements of loss in order to be made whole. The details of the award are listed at the end of this recommended order and decision, and are incorporated in this finding.

5. In its post-hearing briefs, Respondent attempted to present evidence and argue the evidence as it related to the issue of liability. Those portions of Respondent's briefs that relate to liability and are not otherwise relevant to the issue of damages are stricken. All of the exhibits attached to the briefs, including the affidavit of Robert Wiersema, are stricken, in that they were not admitted into evidence at the public hearing.

6. The uncontroverted evidence of severe racial animus presented by Complainant at the public hearing indicates that owner Robert Wiersema and the managers, supervisors and employees of Respondent are in need of training as specified in the recommendations below in order to prevent a recurrence of the discriminatory conduct alleged in this case.

Discussion

A. Default

In its post-hearing briefs, Respondent attempts to present evidence and facts that are relevant to the issue of liability and are not relevant to the issue of damages. The entry of a default by the Commission when petitioned to do so by the Department of Human Rights is not open to further review until a final order is entered that can be brought before the Appellate Court. Pinkerton Security and Investigation Services v. Illinois Dept. of Human Rights, 309 Ill.App.3d 48, 722 N.E.2d 1148, 243 Ill.Dec. 79 (1st Dist. 1999). The result of a default is the determination that a respondent is liable for the discriminatory conduct alleged by the complainant in the charge brought before the Department. The only action possible before the Commission is a public hearing on damages only. In this case, Respondent not only defaulted while before the Department, it chose not to participate in the public hearing on damages at the Commission. Therefore, it did not present any evidence on the issue of damages during that hearing.

However, following the public hearing, Respondent did choose to file a post-hearing brief in response to the record established at the public hearing. The brief filed by Respondent includes argument and purported exhibits that are relevant only to the issue of liability. In that liability in this matter was determined by the entry of a default order against Respondent, those portions of the briefs regarding liability and all of the exhibits attached to the initial brief are stricken and will not be considered for any purpose concerning this Recommended Order and Decision.

B. Damages

Back Pay -- The first element of damages to be considered is Complainant's request for back pay. Complainant was discharged on July 28, 2002. At that time, he was being paid $19.50 per hour and he worked a 40-hour week with 15 to 20 hours of overtime per week at a rate of time-and-a-half of his regular hourly rate. Tr. 9. The hourly rate was confirmed on his final earnings statement as presented in evidence at the public hearing. CX-1. The award for back pay in this case will be calculated on the basis of a weekly salary consisting of 40 regular hours at $19.50 per hour ($780.00) and 17.5 overtime hours at $29.25 per hour ($511.88), or $1,291.88 per week (this is $5,598.15 per month).

Following his discharge, Complainant was unemployed for about one month. It is recommended that he receive back pay of $5,598.15 for this month of unemployment. He was then employed full time by Recycling Systems Incorporated from late August, 2002 through December, 2003 at which time he was "laid off" with no reason specified in his testimony. Tr. 20. During 2003, Complainant earned $58,286.48 from Recycling Systems (CX-2), or $4,857.21 per month. During his 16 months of employment at Recycling Systems, Complainant earned $740.94 less each month than he was making at Respondent. Therefore, his back pay for these 16 months is a total of $11,855.04. Complainant was unemployed at the time of the public hearing on April 20, 2004. Therefore, for the period of January, 2004 through April, 2004, a period of 4 months, his back pay is $22,392.60. The total back pay award recommended for Complainant as calculated above is $39,845.79.

While the calculation of back pay is always somewhat speculative, the task is made even more difficult when, as in this case, a respondent has failed to provide information through the discovery process or participation in the public hearing that would make the task more direct. It is the Commission's general principle that any ambiguity in this process be resolved against the respondent as it is the source of the discriminatory conduct. Clark v. Human Rights Comm'n, 141 Ill.App.3d 178, 183, 490 N.E.2d 29, 95 Ill.Dec. 556 (1st Dist. 1986). This principle must be rigorously followed when a respondent has withheld information that could possibly contribute to a more informed calculation of back pay. Therefore, it is recommended that Complainant be awarded back pay in the amount of **$39,845.79**.

Emotional Distress -- Complainant also requests compensation for the emotional distress he suffered due to the discriminatory conduct of Respondent. It has been long established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill.App.3d 339, 355, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). In this case, Complainant testified at the public hearing to the pain and stress he experienced due to the discriminatory actions of Respondent. The steady stream of racially charged comments made by Respondent's owner, Robert Wiersema, distressed him. These included the frequent use of the word "nigger" in the presence of Complainant and references to Complainant as "nigger boy" "whenever (Complainant) would come in." Tr. 13. Wiersema also

referred to Martin Luther King, Jesse Jackson and rappers as "niggers." Tr. 13. During his period of employment, these references led Complainant to believe that Wiersema did not like blacks, including himself. Complainant was also given the oldest or most defective trucks in Respondent's fleet when he was sent out to collect refuse. During this time, Complainant's spouse wanted him to get a different job. When he could not immediately do so, it caused arguments and tension in his home life. Tr. 18. The experience during his employment at Respondent caused Complainant to be "messed up in the head" even after his employment was terminated and the situation at home was only "a little better" even at the time of the public hearing. Tr. 19.

The record in this matter reveals that Complainant suffered immediate, severe and ongoing emotional distress because of the racially motivated discrimination he suffered at the hands of Respondent. The degree of emotional distress, which was apparent even as Complainant testified at this public hearing, was significantly over and above that which would be expected from "the mere fact of a civil rights violation" and is therefore compensible under the Human Rights Act. Harris and Vinylgrain Industries of Illinois, _____ Ill. H.R.C. Rep. _____ (Charge No. 1996CA1087, August 1, 2001). At the public hearing, Complainant requested an award of $65,000.00 for the emotional distress occasioned by Respondent's violation of the Act. Tr. 38. This request is, of course, uncontroverted by any evidence on the part of Respondent, and this lack of countering evidence alone supports an award in the amount requested, although the nature of the conduct alleged and Complainant's reaction to it could

very well support an award of this magnitude in a contested case. It is recommended that Complainant be awarded **$65,000.00** for emotional distress.

Front Pay -- During the public hearing and in his post-hearing briefs, Complainant has requested front pay in lieu of reinstatement in an amount approximately equivalent to one year of his salary with Respondent. Tr. 21. It should be noted here that a front pay is rarely granted by the Commission, and only in cases "where reinstatement is impossible or extremely difficult." Banks and Railway Livery & Taxi, Ltd., _____ Ill. H.R.C. Rep. _____ (Charge No. 2003CF1031, August 30, 2004). This case, however, is one of those that amply supports the proposition that "reinstatement is impossible or extremely difficult." Complainant credibly testified to the disturbing, racially poisonous environment created by the owner of Respondent and the devastating emotional effects the constant stream of opprobrium spewed by Wiersema wrought on him and his family. The Commission's preferred remedy of reinstatement is not appropriate in this case and it is recommended that Complainant's request for front pay in lieu of reinstatement in the amount of one year's salary (**$67,177.80**) be granted.

Civil Penalty -- During the public hearing, Complainant requested that a civil penalty in the amount of $10,000.00 be imposed on Respondent. Tr. 12. As was pointed out at the conclusion of the public hearing, a civil penalty is only available in housing discrimination cases and not in cases founded in the racial discrimination provisions of the Human Rights Act. Tr. 26. Therefore, no recommendation for a civil penalty will be made in this case.

Training -- The uncontroverted testimony of Complainant concerning the racial insensitivity displayed by Robert Wiersema is described above. It is apparent that the indiscriminate use of racial epithets and related actions by Wiersema not only created a poisonous work environment for Complainant, but for all employees of Respondent. Therefore, it is recommended below that all employees of Respondent receive training from the Department of Human Rights (or its designee) in order to eliminate the pervasive effects of the racial animus displayed by the owner.

Attorney's Fees and Costs -- Complainant's counsel submitted his Motion (Petition) for Attorneys' Fees on August 6, 2004. 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 case, 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. H.R.C. Rep. 193 (1982).

Although Respondent participated in the post-hearing briefing of this matter, it chose not to submit a response to the motion for fees. The Commission case of Baker and Village of Niles, _____ Ill. H.R.C. Rep. _____ (Charge No. 1999CA0319, April 29, 2002) is only among the most recent in a long line of cases holding that if the respondent does not contest the particulars of a petition for fees and costs, all issues related to the petition are waived.

Here, Complainant's counsel is claiming an hourly rate of $250.00 per hour for his work in this matter. The declaration filed by counsel with the motion amply supports the granting of this hourly rate. The motion also includes a statement of the hours expended by counsel in prosecuting this case on behalf of Complainant. A total of 38.1 hours are claimed in the line items listed by counsel in his statement. The requested hourly rate is well within the current range of hourly rates approved by the Commission in other cases and none of the tasks reflected in the statement of hours appears to contravene any policy of the Commission concerning attorney fees. For these reasons, and based on the failure of Respondent to contest the requested fees, the petition should be allowed in full. It is recommended that Complainant be awarded **$9,525.00** *(counsel stated in the motion that the request for fees was $9,465.00; it is assumed a calculation error is the cause of the discrepancy*) as the fee earned by Complainant's counsel. There is no request for costs in the motion and none will be recommended.

* * *

Other elements of the award, as permitted by the cited section of the Act and the Commission's procedural rules, or otherwise not requiring additional analysis, are specified in the recommendation summary below.

Recommendation

It is recommended that the default entered against Respondent be affirmed, that Respondent accordingly be found liable for a violation of the

Human Rights Act as alleged in the complaint and that Complainant be awarded the following relief:

A. That Respondent pay Complainant back pay in the amount of $39,845.79;

B. That Respondent pay Complainant interest on all elements of this 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, to accrue until payment in full is made by Respondent;

C. That Respondent pay to Complainant $65,000.00 for emotional distress;

D. That Respondent pay to Complainant the amount of $67,177.80 as front pay in lieu of reinstatement;

E. That any public contract currently held by Respondent be terminated forthwith and that Respondent be barred from participating in any public contract for three years in accord with Sections 8-109(A)(1) and (2) of the Human Rights Act. 775 ILCS 5/8-109(A)(1) and (2).

F. That Respondent cease and desist from any discriminatory actions with regard to any of its employees and that Respondent, its managers (including, but not limited to Robert Wiersema), supervisors and employees be referred to the Department of Human Rights Training Institute (or any similar program specified

by the Department) to receive such training as is necessary to prevent future civil rights violations, with all expenses for such training to be borne by Respondent;

G. That Complainant's personnel file or any other file kept by Respondent concerning Complainant be purged of any reference to this charge and litigation;

H. That Respondent pay to Complainant a total of $9,525.00 as attorney's fees; and,

I. If it is determined that Respondent is no longer in business under the name shown in the caption of this case, but is functioning through a successor business organization or through one or more of its principals personally, all elements of this award are understood to be entered against any such successor or individual as otherwise defined by the precedents of the Commission or other applicable law.

HUMAN RIGHTS COMMISSION

ENTERED: BY:_____

DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

January 13, 2006

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