



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
NELSON RUIZ,)	
)	
Complainant,)	
)	Charge No.: 2002CP2216
and)	EEOC No.: N/A
)	ALS No.: 12247
OSCO DRUG, INC.,)	
)	
Respondent.)	

RECOMMENDED LIABILITY DETERMINATION

On October 27, 2003, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Nelson Ruiz. That complaint alleged that Respondent, Osco Drug, Inc., discriminated against Complainant on the basis of his ancestry when it denied him the full and equal enjoyment of Respondent's facilities.

A public hearing was held on the allegations of the complaint on November 8 through November 10, 2004. Following the hearing, the parties were given the opportunity to file posthearing briefs. Only Respondent took advantage of that opportunity. Complainant did not file a posthearing brief. In addition, Respondent has moved for an award of fees. Complainant did not respond to that motion and the time for filing such a response has passed. The matter is ready for decision.

FINDINGS OF FACT

Facts numbers one and two are facts that were stipulated by the parties or admitted in the answer to the complaint. The remaining facts were determined to have been proven by a preponderance of the facts at the public hearing in this matter. Assertions made at the public hearing that are not addressed herein were determined to be unproven or were determined to be immaterial to this decision.

1. Complainant, Nelson Ruiz, is Hispanic.

2. Respondent, Osco Drug, Inc., is a retail operation in the business of selling pharmaceuticals, groceries, and photography processing services.

3. At all times relevant to this matter, Respondent operated a store in Mount Prospect, Illinois.

4. From September of 2001 through January of 2002, Complainant shopped at Respondent's Mount Prospect store approximately two to three times per week.

5. Respondent's Mount Prospect store shared space with a Jewel grocery store. Customers shopping at the Osco could check out at the Jewel registers and vice versa.

6. Complainant shopped at Respondent's Mount Prospect store virtually every Friday and Saturday evening. He regularly purchased beer and dog food.

7. Complainant almost always chose to make his purchases at the Osco registers because the lines were shorter at the Osco registers than at the Jewel registers.

8. Respondent has a Preferred Card program which provides discounts to customers on certain products, allows for check cashing privileges, and gathers marketing information on customers' spending habits.

9. Complainant has never owned or applied for a Preferred Card.

10. Complainant's wife, Colleen Cecchini, has a Preferred Card. Although he seldom carried it, Complainant occasionally used his wife's card.

11. Respondent never refused to allow Complainant to use his wife's permanent Preferred Card.

12. Respondent once refused to allow Complainant to use a temporary Preferred Card issued in his wife's name.

13. Respondent occasionally changed its procedures for handling situations when customers forgot to bring their Preferred Cards.

14. The initial briefs in this matter were due from the parties on March 4, 2005. On March 7, 2005, Respondent's counsel received a letter from Complainant's counsel. The date

on that letter was March 3, 2005. The letter indicated that Complainant had given his attorney authority to voluntarily dismiss this action.

15. Complainant has not filed any motion to dismiss this action.

CONCLUSIONS OF LAW

1. Complainant is an “aggrieved party” as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter “the Act”).

2. Respondent’s Mount Prospect store is a “public accommodation” as defined by section 5-101(A) of the Act and Respondent is an “operator” as defined by section 5-101(B) of the Act. Accordingly, Respondent is subject to the provisions of the Act.

3. Complainant failed to establish a *prima facie* case of discrimination on the basis of his ancestry.

4. Respondent articulated a legitimate, non-discriminatory reason for its actions.

5. Complainant failed to prove that Respondent’s articulated reason is a pretext for unlawful discrimination.

6. Complainant’s failure to give notice of his intention to dismiss this case unreasonably delayed this matter and caused Respondent to incur unnecessary expense.

7. Complainant’s conduct requires an appropriate sanction.

DISCUSSION

Respondent, Osco Drug, Inc., is a retail operation in the business of selling pharmaceuticals, groceries, and photography processing services. For a number of years, Respondent has operated a store in Mount Prospect, Illinois.

Complainant, Nelson Ruiz, is a man of Hispanic ancestry who lived for a time in Mount Prospect. From September of 2001 through January of 2002, Complainant shopped at Respondent’s Mount Prospect store approximately two to three times per week. Complainant shopped at that store virtually every Friday and Saturday evening. Although his purchases sometimes varied, he nearly always purchased beer and dog food.

In March of 2002, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discriminated against Complainant on the basis of his ancestry by denying him equal enjoyment of Respondent's store.

The method of proving a charge of discrimination is well established. First, Complainant must establish a *prima facie* case of discrimination. If he does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, for Complainant to prevail, he must prove that Respondent's articulated reason is pretextual. ***Zaderaka v. Human Rights Commission***, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). See also ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 251 (1981).

To establish his *prima facie* case of discrimination, Complainant had to establish three elements. He had to prove 1) that he is in a protected class, 2) that he was denied full enjoyment of Respondent's facilities, and 3) that others not within his protected class were given full enjoyment of those facilities. ***Davis and Ben Schwartz Food Mart***, 23 Ill. HRC Rep. 2 (1986). There is no dispute that Complainant's Hispanic ancestry places him into a protected class. That fact establishes the first element of his *prima facie* case. The remaining two elements, however, were hotly contested at the public hearing.

To evaluate the second element, it is necessary to consider exactly what enjoyment Complainant alleged he was denied. The parties spent considerable time at the public hearing presenting evidence on Respondent's policies on the sale of alcoholic beverages. Complainant tried to argue at the hearing that Respondent "carded" him because he was Hispanic. He also claimed that Respondent inappropriately denied alcohol sales to others of Hispanic origin.

However, the complaint in this matter only alleges that Respondent discriminated against Complainant by following him around the store and refusing him Preferred Card discounts. Thus, the alcohol related testimony was not material in this matter. There was an allegation relating to alcohol sales in the initial charge filed with the IDHR. That allegation, though, was not part of the complaint IDHR filed in this forum. Thus, it appears that IDHR did

not find substantial evidence to support the alcohol sales allegation.

Complainant's allegations about being followed around the store are easy to address. The allegations themselves were vague and not terribly convincing. At most, he testified that he was watched from time to time during his shopping. More importantly, though, the behavior he described was so minor that it could not materially have affected Complainant's shopping experience. There was no allegation that Respondent's employees attempted to prevent Complainant from going anywhere in the store or from purchasing anything offered for sale on the shelves. Complainant's speculation that he was considered a potential shoplifter is just that – speculation. The behavior he described, without more, is insufficient to support a finding of discrimination.

The only issue, then, is whether Complainant was denied discounts under Respondent's Preferred Card program. On this record, there is at least an argument that he was. He conceded that, when he produced his wife's permanent card, he received the advertised discounts. However, when he did not have her card, he did not receive the discounts. Complainant testified that he had seen other shoppers who did not have cards with them. According to his testimony, when others did not have their cards, Respondent's cashiers would either use the store's courtesy card for the customers or the cashiers would ask the customers for their phone numbers and use the phone numbers to look up the customers' Preferred Card numbers.

In addition, there was a single incident in which Complainant was denied the use of a temporary card issued to his wife. Unlike the plastic permanent cards, the temporary cards were made of paper. When Complainant tried to use his wife's temporary card, the cashier noticed that the card was not in his name and refused to allow him to use it to obtain a discount.

Those incidents arguably qualify as denials of Complainant's full enjoyment of Respondent's facilities. As a result, they establish the second element of his *prima facie* case.

To complete his *prima facie* case, Complainant had to prove that Respondent have full

enjoyment of its facilities to someone who was similarly situated to Complainant but who was not in his protected class. Complainant failed to meet that burden.

Complainant said that he witnessed situations in which Respondent's cashiers would ask for customers' phone numbers in order to look up Preferred Card numbers. He also testified that the cashiers would sometimes use the store's courtesy card to allow customers to access Preferred Card discounts. That testimony was corroborated by other witnesses. Respondent concedes that similar incidents had occurred. There was no testimony, however, to establish that the customers involved in those incidents were similarly situated to Complainant.

Complicating the issue is the fact that Respondent occasionally changed its policies on how Preferred Card discounts were to be handled when the cardholder did not physically have the card at the time of purchase. There was evidence that suggested that Complainant might not have been aware of the specific appropriate store policies in effect at the time of particular incidents.

In essence, Complainant's claim boils down to his assertion that he was not given the same privileges as non-Hispanic Preferred Card holders. The simple fact, however, is that Complainant was not a Preferred Card holder. Complainant conceded at the public hearing that he has never held a Preferred Card in his own name. In fact, he has never even applied for a Preferred Card. When asked on cross-examination why he had never applied for a card, he responded, "You know what? I – I don't know why." (Transcript, page 99.)

Because Complainant was not a Preferred Card holder, his real comparatives would be non-Hispanic shoppers without Preferred Cards. He presented no evidence whatsoever to establish the treatment of such shoppers. As a result, he failed to establish the third element of his *prima facie* case.

The failure to establish a *prima facie* case dooms Complainant's claim. Without evidence that other non-cardholders were allowed to take discounts, there is no way to

conclude that Complainant's ancestry was a factor in his treatment. Therefore, Complainant cannot win his case and the complaint in this matter should be dismissed.

That finding, however, does not end this discussion. The initial briefs in this matter were due from the parties on March 4, 2005. On March 7, 2005, Respondent's counsel received a letter from Complainant's counsel. The date on that letter was March 3, 2005. The letter indicated that Complainant would not be filing a posthearing brief in this matter and that he had given his attorney authority to voluntarily dismiss this action. Complainant, of course, has a right to abandon his claim. However, he did not inform Respondent of his intent to abandon his claim until after Respondent had finished and filed its posthearing brief. As a result, Respondent incurred attorney's fees that should not have been necessary. Respondent asks that Complainant be held responsible for those fees.

Surprisingly, Complainant filed no response to Respondent's request. Perhaps just as surprisingly, despite his attorney's letter, Complainant has not filed any motion to dismiss this action. Apparently, Complainant does not contest the allegations made by Respondent in its motion.

Once Complainant decided that he was not going to contest this matter any further, he should have notified Respondent of that decision. It could not have been difficult to reach Respondent's counsel. A simple telephone call might have saved considerable time and effort. Yet, Complainant's counsel opted to write a letter. That letter was not delivered until **after** Respondent's counsel had completed and filed Respondent's posthearing brief. That inexplicable decision certainly resulted in unnecessary expense to Respondent.

Complainant's approach in this case is clearly sanctionable. This situation is similar to that in ***Virkler and MCI Telecommunications Corp.***, ___ Ill. HRC Rep. ___, (1995CA2460, August 3, 2000). In ***Virkler***, shortly before the public hearing, the complainant moved for a stay so he could take his claim to federal court. That motion was denied because it came so soon before the scheduled hearing. The complainant then appeared for the public hearing, but made

only a cursory attempt to prove his case. He testified on his own behalf, but made no effort to call other witnesses because he did not want to have to duplicate his federal court efforts. Moreover, he elected not to file an ordered posthearing brief because he preferred to his claim considered by the federal court. Meanwhile, the respondent had to incur its own attorney's fees by filing a posthearing brief.

The administrative law judge in the ***Virkler*** case denied the respondent's motion for sanctions, but a panel of the Human Rights Commission reversed the judge's ruling. According to the panel's decision, under those circumstances, the judge's ruling was an abuse of discretion. The panel noted that a dismissal at the Commission would not jeopardize the complainant's right to proceed in federal court. In addition, once the complainant opted not to make a genuine effort to prove his case, there was no way that there would be basis for the judge to rule in his favor. In effect, by not moving to dismiss the case at that point, the complainant engaged in conduct that unreasonably delayed the proceedings, in violation of section 5300.750(e) of the Commission's procedural rules. The Commission ordered that the complainant pay all of Respondent's attorney's fees, costs, and expenses after the point at which the complainant made the decision not to try to win the case.

The ***Virkler*** rationale appears to apply in this case. In both cases, the complainants chose not to try to win before this forum. Both cases should have been dismissed earlier than they were. Both cases had respondents who incurred unnecessary expenses because of the complainants' unreasonable actions. As a result, both cases require appropriate sanctions. Under ***Virkler***, denial of a sanction would be an abuse of discretion.

However, on the existing record, it is impossible to determine the appropriate sanction. To aid in that determination, Respondent needs to file a motion with documentation of its expenses. It would be unfair to sanction Complainant for failing to dismiss a case before he actually made the decision to abandon it. Because March 3, 2005 appears to be the day that Complainant decided to abandon his claim, Respondent's motion should be limited to expenses

incurred on and after that date.

RECOMMENDATION

Based upon the foregoing, Complainant failed to prove by a preponderance of the evidence that Respondent discriminated against him on the basis of his ancestry. Therefore, it is recommended that the complaint in this matter ultimately be dismissed in its entirety, with prejudice.

However, it is clear that Complainant and his counsel engaged in conduct that unreasonably delayed the proceedings in this matter, in violation of the Commission's procedural rules. Thus, it is recommended that Complainant and his counsel be subject to an appropriate sanction. The appropriate sanction in this case would be payment of the fees and other expenses incurred by Respondent as a result of the inappropriate behavior.

As a result, IT IS HEREBY ORDERED:

A. With regard to attorney's fees and costs incurred on or after March 3, 2005, Respondent may file a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1982), said motion and affidavit to be filed by Respondent within 21 days after the service of this Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees;

B. If Complainant contests the amount of requested attorney's fees, he must file a written response to Respondent's motion within 21 days of the service of said motion; failure so to do will be taken as evidence that Complainant does not contest the amount of such fees;

C. All other issues pertaining to this matter are stayed pending issuance of a Recommended Order and Decision with the issue of attorney's fees resolved.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 10, 2005