



This Recommended Liability Determination was followed by a Recommended Order and Decision in the 2nd Quarter of 2002.

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
MICHAEL BAKER,)	
)	
Complainant,)	
)	Charge No.: 1999CA0319
and)	EEOC No.: 21B983098
)	ALS No.: 10940
VILLAGE OF NILES,)	
)	
)	
Respondent.)	

RECOMMENDED LIABILITY DETERMINATION

On July 26, 1999, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Michael Baker. That complaint alleged that Respondent, Village of Niles, discriminated against Complainant on the basis of a mental handicap by harassing him.

A public hearing was held on the allegations of the complaint on October 12, 2000. Subsequently, the parties filed posthearing briefs. Both parties were given leave to file reply briefs, but only Complainant took advantage of that opportunity. In addition, Complainant filed a motion to strike parts of Respondent's posthearing brief, and Respondent filed a written response to that motion. The matter is ready for decision.

FINDINGS OF FACT

Those facts marked with asterisks are facts to which the

parties stipulated. The remaining facts are those which were determined to have been proven by a preponderance of the evidence at the public hearing on this matter. Assertions made at the public hearing which are not addressed herein were determined to be unproven or were determined to be immaterial to this decision.

1. Respondent, Village of Niles, hired Complainant, Michael Baker, on November 28, 1988 as a part-time courtesy bus driver.*

2. Complainant became a full-time courtesy bus driver on September 4, 1990.*

3. On December 27, 1990, Complainant was involved in a bus fire.* Complainant safely evacuated the passengers from the bus, but he was trapped for a period of time on the bus.

4. Complainant took a leave of absence after the bus fire.*

5. Complainant suffered post traumatic stress disorder as a result of the bus fire. He displayed symptoms of anxiety and depression.

6. Respondent was aware of the extent of Complainant's emotional difficulties. It was through Respondent's efforts that Complainant was referred to Dr. Geoffrey Shaw, a psychiatrist.

7. Dr. Shaw first met Complainant at Lutheran General Hospital. Complainant had been hospitalized because of his anxiety and nervousness.

8. Complainant made several attempts to return from

medical leave. When he tried to drive a bus, however, he suffered a relapse and had to return to medical leave.*

9. As a bus driver, Complainant reported directly to the transportation supervisor. For part of 1998, Wally Cichanski was the transportation supervisor. Cichanski reported to the fleet manager, Mike Haws.

10. Complainant returned to work on light duty on March 16, 1998.*

11. Nearly every day, and perhaps as often as several times a day, Mike Haws called Complainant "crazy." In addition, Haws frequently told Complainant that he "should have died" in the bus fire.

12. Complainant complained about Haws's statements to Cichanski.

13. Haws once told Cichanski that Complainant should have burned up with the bus.

14. Haws's remarks had very strong negative effects on Complainant's emotional state.

15. Complainant would have been able to return to work without restrictions earlier if not for the effects of Haws's remarks.

16. Complainant should be compensated in the amount of \$20,000.00 for the emotional distress caused by Respondent.

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.* (1996) (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant's Motion to Strike is granted.

4. Complainant proved by a preponderance of the evidence that Respondent harassed him on the basis of his mental handicap.

DISCUSSION

Liability

Respondent, Village of Niles, hired Complainant, Michael Baker, on November 28, 1988 as a part-time courtesy bus driver. Complainant became a full-time courtesy bus driver on September 4, 1990.

On December 27, 1990, Complainant was involved in a bus fire. He safely evacuated the passengers from the bus, but he was trapped for a period of time on the bus. Complainant took a leave of absence after the bus fire.

Complainant suffered post traumatic stress disorder as a result of the bus fire. He displayed symptoms of extreme anxiety and depression, including nightmares and flashbacks to the bus fire incident. He made several attempts to return from medical leave. When he tried to drive a bus, however, he suffered a relapse and had to return to medical leave.

During his attempts to return to work, the treatment he

received on the job was contributing to Complainant's problems. As a bus driver, Complainant reported directly to the transportation supervisor. For part of 1998, Wally Cichanski was the transportation supervisor. Cichanski reported to the fleet manager, Mike Haws. Nearly every day, and perhaps as often as several times a day, Mike Haws called Complainant "crazy." In addition, Haws frequently told Complainant that he "should have died" in the bus fire.

Eventually, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discriminated against Complainant by harassing him because of a mental handicap.

Before proceeding to the merits of Complainant's claim, there is a posthearing motion which requires a ruling. After the initial posthearing briefs were filed, Complainant filed his Motion to Strike. That motion seeks to strike two alleged facts contained in Respondent's posthearing brief.

In essence, Complainant seeks to strike the second full paragraph on page 3 of Respondent's initial brief. The basis for the motion is that the facts alleged in that paragraph were not presented at the public hearing and that they are mentioned for the first time in the brief. In its response to the motion, Respondent does not claim that the facts were presented at the public hearing. Instead, it argues that the facts are important and should be considered. Respondent's argument is meritless.

Under section 8A-102(G)(3) of the Act, testimony at a public hearing "is subject to the same rules of evidence that apply in courts of this State in civil cases." Under that standard, it is clear that a party cannot slip information into a brief when that information was not properly admitted at the hearing. Accordingly, Complainant's Motion to Strike is granted. With that matter resolved, the discussion can move to the merits of Complainant's claim in this matter.

Generally, a complainant will try to prove a charge of discrimination through indirect means. Under that approach, the complainant will first establish a *prima facie* showing of discrimination. If he does so, the respondent must articulate a legitimate, non-discriminatory reason for its actions. For the complainant to prevail, he must then prove that the 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).

That tripartite approach, though, is of little use in cases involving harassment. If a complainant can prove that he was harassed on the basis of his membership in a protected class, that alone should be enough to establish a violation of the Act. After all, there is no legitimate reason for unlawful harassment.

Racial harassment has been held to be a *per se* violation of the Act. **Hill and Peabody Coal Co.**, ___ Ill. HRC Rep. ___, (1991SF0123, June 26, 1996); **Crider and State of Illinois, Dep't**

of Veterans Affairs, 25 Ill. HRC Rep. 214 (1986). Harassment on the basis of national origin also has been held to be a *per se* violation. *Rys and Palka and ISS Int'l Service System, Inc.*, ___ Ill. HRC Rep. ___, (1985CF0850, 1985CF2238, December 28, 1990), *aff'd sub nom ISS Int'l Service System, Inc. v. Illinois Human Rights Commission*, 272 Ill. App. 3d 969, 651 N.E.2d 592 (1st Dist. 1995). There appears to be no just reason for treating harassment on some bases differently from harassment on others, so it seems fair to treat handicap harassment as a *per se* violation of the Act. The parties do not dispute that Complainant's condition constituted a mental handicap. Thus, if Haws did what Complainant says he did, that should establish a violation.

Based upon the evidence presented at the public hearing, there is little doubt that Haws did in fact harass Complainant. Complainant's own testimony on that point was clear and credible and might have been enough to carry the day even without corroboration. Complainant, though, did present corroboration. Wally Cichanski testified that Complainant complained to him about Haws's statements. Cichanski also testified that Haws once told him that Complainant should have burned up with the bus. In addition, Complainant reported Haws's statements to Dr. Geoffrey Shaw, a psychiatrist. Dr. Shaw was the person who diagnosed Complainant's condition as post traumatic stress disorder. Dr. Shaw testified to Complainant's statements to him and to the

detrimental effect those statements had on Complainant's state of mind.

Respondent maintains that Haws never made the statements in question, but that position is not supported by the record. In the face of Complainant's strong evidence, Respondent presented only Haws's half-hearted denial. On direct examination, Haws testified that he didn't recall calling Complainant names. On cross-examination, he claimed not to recall calling Complainant "the names that were discussed." Haws did concede, though, that there was a great deal of name calling going on in the workplace, and he characterized that name calling as "goofing off with people." It is quite clear that Complainant was teased and reminded of his emotional problems, probably on a daily basis, by Haws.

Respondent argues that it cannot be characterized as an uncaring employer. In support of that argument, it points out that the village referred Complainant to Dr. Shaw and that it paid for Dr. Shaw's services. Respondent misses the point.

It does not matter that Haws did not intend to cause harm. What matters is that he did in fact cause harm and that he did what he did because of Complainant's mental handicap.

Complainant was subjected to frequent harassment from a supervisor. That harassment centered upon a handicapping condition of which Respondent clearly was aware. There is no doubt that Complainant's emotional condition was the reason for

the harassment. After all, use of the term "crazy" and references to burning up on the bus were clearly tied to Complainant's particular condition and experience.

Moreover, the comments were not isolated or occasional. They were of sufficient severity and frequency to constitute an adverse term or condition of employment. Finally, there is no doubt that Complainant was seriously injured by Respondent's actions. According to Dr. Shaw, Complainant would have been able to return to work without restrictions earlier if not for the emotional effects of Haws's remarks.

Clearly, Complainant has proven that he was harassed on the basis of his handicap. His complaint should be sustained.

Damages

In his testimony, Complainant made it clear that the only relief he really wants from this litigation is the return of his job as a bus driver for Respondent. Unfortunately for him, that form of relief simply is not available in this situation.

When Complainant filed his initial charge of discrimination with the Illinois Department of Human Rights (IDHR), he raised three issues. He alleged that he had been harassed, that he was denied a position, and that he was discharged by Respondent. After its investigation, the IDHR filed a complaint based only upon the harassment allegation. The remaining claims were dismissed for lack of substantial evidence.

Under section 5/7A-102(G)(1) of the Act, once the time for

investigation has run, the IDHR "shall either issue and file a complaint . . . or shall order that no complaint be issued and dismiss the charge without any further right to proceed." In the instant case, the IDHR determined that the claims regarding discharge and the denial of a position should be dismissed. Once that determination was made, those claims were over. At that point, Complainant's only remedy was to file a timely Request for Review. There is no indication in the record that any such request was filed. Accordingly, the Commission has no authority to order Respondent to place Complainant into a bus driver position.

Perhaps because of his preoccupation with the reinstatement issue, Complainant failed to present evidence that would allow an award of backpay. As noted above, Complainant's return to permanent work was delayed by the harassment he received. Ideally, there should be some compensation for that missed time. Unfortunately, Complainant did not provide any evidence as to how much compensation he should be given. He provided no information on how many weeks of work he missed or how many hours he would have worked each of those weeks. He also failed to provide any information on his hourly rate of pay. In short, there is no evidence in the record on how much time he missed or how much money he made when working. Under these circumstances, any backpay award would be pure speculation. As a result, it is recommended that Complainant not be awarded backpay.

That is not to suggest that Complainant is without remedies. It is clear that he suffered considerable emotional distress as a result of the harassment he received. It is entirely appropriate to compensate him for that distress.

Emotional distress damages are difficult to assess with precision because each case is highly dependent upon its own particular facts. In the instant case, though, in light of the extent of the psychological damage sustained, it is clear that the award should be substantial.

As discussed above, Complainant's distress was so extreme that he had to receive treatment from Dr. Shaw, a psychiatrist. Dr. Shaw testified that he first met Complainant in September of 1997 at Lutheran General Hospital. Complainant had been admitted to the hospital because of his extreme anxiety. Dr. Shaw treated Complainant for over a year, finally writing a return to work letter in November of 1998. During the time of his treatment with Dr. Shaw, Complainant suffered extreme anxiety, nervousness, and insomnia. He was unable to work full-time at any point during that period, although he made several brief attempts at part-time work.

In *York and Al-Par Liquors*, ___ Ill. HRC Rep. ___, (1986CF0627, June 25, 1995), a sexual harassment case, the Commission awarded the complainant \$12,000.00 in emotional distress. That award was considered appropriate despite the fact that there was "no indication of specific damage to the

complainant's psychological well-being." **York** slip op. at 16. An award of \$15,000.00 was made in **Wheeler and Richard Liebovitz, County Clerk, Rock Island County, ___ Ill. HRC Rep. ___,** (1991CF0460, October 29, 1997). Like **York, Wheeler** was a sexual harassment case in which there was no medical evidence. Certainly, medical evidence should justify a larger award. Moreover, in both **York** and **Wheeler**, the complainants were still able to work during the periods of harassment.

On the other hand, the compensable emotional distress in **York** and **Wheeler** was due entirely to the actions of the respondents. In the instant case, much of Complainant's distress was due to the post traumatic stress disorder caused by the bus fire. The harassment Complainant received did not cause his condition. Instead, it aggravated a pre-existing condition.

In light of the record as a whole, it is recommended that Complainant be awarded \$20,000.00 in emotional distress damages. That amount should provide Complainant fair compensation for the aggravation of his condition caused by Respondent's actions.

In addition, Respondent should be ordered to cease and desist from further harassment on the basis of handicap. This type of situation should not be allowed to recur.

Finally, Respondent should be required to pay Complainant's reasonable attorney's fees and costs. That amount will be determined after review of the parties' written submissions on that issue.

RECOMMENDATION

Based upon the foregoing, Complainant proved by a preponderance of the evidence that Respondent harassed him on the basis of his mental handicap. Accordingly, it is recommended that the complaint in this matter be sustained and that an order be entered awarding Complainant the following relief:

A. That Respondent pay to Complainant the sum of \$20,000.00 as compensation for the emotional distress resulting from Respondent's discriminatory actions;

B. That Respondent cease and desist from further harassment on the basis of handicap;

C. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred in prosecuting his claim, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank**, 4 Ill. HC Rep. 193 (1982), said motion and affidavit to be filed 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;

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

E. The recommended relief in paragraphs A and B is 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 30, 2001