

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

In The Matter Of:	)		
	)		
KENNETH CLARK,	)		
	)		
Complainant,	)		
	)		
and	)	Charge No.	2003 CF 0321
	)	EEOC No.	21BA23068
	)	ALS No.	03-059
WINDY CITY WASTE & RECYCLING, INC.	)		
	)		
Respondent.	)		

ORDER AND DECISION

April 17, 2006

The Commission by a panel of three:  
Commissioners David Chang, Marylee V. Freeman and Gregory G. Simoncini

For Complainant: Andrew W. Levenfeld, Jeffery S. Sell  
Andrew W. Levenfeld and Associates, Ltd.

For Respondent: J. Michael Condron  
Newman, Boyer and Statham, Ltd.

Illinois Human Rights Commission: James E. Snyder, General Counsel,  
Matthew Z. Hammoudeh, Asst. General Counsel.

Illinois Department of Human Rights: Raymundo Luna, Chief Legal Counsel  
The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. They are named herein as an additional party of record.

I. This matter comes before the Commission pursuant to a Recommended Order and Decision issued by Administrative Law Judge David J. Brent, exceptions and a response filed thereto. On review of Judge Brent's recommendations, the public hearing record and the exceptions and response filed by the parties and for the reasons set forth herein, the findings and recommendations of the Recommended Order and Decision are adopted, with the modification stated below.

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This order of a three-member panel is a final order of the Commission. The parties may seek review of this order by the Illinois Human Rights Commission *en banc*, or in an administrative review proceeding with the Illinois Appellate Court in accordance with procedures indicated in statute and regulation.

This order may restate language from our interim orders or the Administrative Law Judge's orders. This order includes our entire findings, to the exclusion of any interim order.

II. Nature of the Case.

Complainant Kenneth Clark (Clark) worked for Respondent Windy City Waste and Recycling, Inc. (Windy City) as a refuse collector, a truck driver. On August 8, 2002 Clark filed a Charge of Civil Rights Violation against Windy City with the Illinois Department of Human Rights (IDHR). Clark charged that Windy City terminated his employment on the basis of his race, African American.

III. Commission Proceedings.

In considering Windy City's exceptions we reviewed our procedural record closely and summarize some events in that record below.

On October 8, 2003 IDHR filed a Petition for Hearing on Damages with this Commission. The petition stated that IDHR had found Windy City in default of its investigation of Clark's charge. IDHR found Windy City liable for a violation of the Illinois Human Rights Act (IHRA).

IDHR's notice of service stated that it served copies of its petition by U.S. Mail to Clark by service upon his attorney of record, Andrew W. Levenfeld, and to Windy City at the following address (the "Blue Island address"):

Robert S. Wiersema  
President  
Windy City Waste & Recycling  
12807 South Homan  
Blue Island, IL 60406

The Blue Island address and the name Robert S. Wiersma appear on a form in the IDHR's investigation file. The form bears a signature purporting be Mr. Wiersma's, as Windy City's representative. The Commission does not review IDHR's default process, but those documents become part of our record.

The IHRA requires the Commission to grant IDHR's petition. We did not review the propriety of default and do not do so here. The Act does not permit the Commission to

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entertain a challenge to the Illinois Department of Human Rights' finding of default, 775 ILCS 5/7 - 101.1(C), *Pinkerton Security Services v. Department of Human Rights, et al.*, 309 Ill.App.3d 48, 772 N.E.2d 1148 (1<sup>st</sup> Dist. 1999).

IDHR's petition was granted. On January 14, 2004, the Commission served this order by U.S. Mail on IDHR, Clark's attorney and Windy City at the Blue Island address. Our records do not indicate that any of the copies of the Notice were returned as undeliverable.

On February 18, 2004 Judge Brent issued an order setting the matter for public hearing on March 24, 2004. The Commission served this order by U.S. Mail on IDHR, Clark's attorney and Windy City at the Blue Island address. Our records do not indicate that any of the copies of the Notice were returned as undeliverable.

On March 12, 2004 Judge Brent issued an order rescheduling the case and setting the matter for public hearing on April 20, 2004. The Commission served this order by U.S. Mail on IDHR, Clark's attorney and Windy City at the Blue Island address. Our records do not indicate that any of the copies of the Notice were returned as undeliverable.

On April 20, 2004 a public hearing was held on the issue of Clark's damages before Judge Brent. Clark and his counsel were present. Windy City was not present. Windy City states exceptions regarding its absence from this hearing that are addressed below.

On May 21, 2004 J. Michael Condron entered an appearance on behalf of Windy City. From that date orders served on Windy City have been served to Mr. Condron.

On July 14, 2005 Windy City filed a reply to Clark's post-hearing brief before Judge Brent (Windy City's Reply to Clark's Post-Hearing Brief). On June 24, 2005 Windy City filed a post-hearing brief before Judge Brent (Windy City's Post-Hearing Brief).

On January 19, 2006 Judge Brent issued a Recommended Order and Decision.

Judge Brent made findings of fact regarding issues of damages. Those findings are sustained and incorporated into our order. Judge Brent made recommended conclusions of law. Those recommendations are adopted.

In one recommended finding of law Judge Brent restated that Windy City was liable for a violation of the IHRA, by virtue of IDHR's default. We restate that also.

In addition we find, as a matter of law, that Windy City is not liable to pay a civil penalty for its violation of the IHRA. The IHRA allows the Commission to order a civil penalty, payable to the State of Illinois, upon a violation of the Act's prohibition of discrimination in housing, including discrimination in housing based on race. 775 ILCS 5/8B-101. The Commission does not have such authority upon a finding of discrimination in

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employment. Through a scrivener's error, Judge Brent's recommendation was unclear on that point.

IV. Exceptions and Extraneous Motions.

A. Windy City Motions.

1) Motion To Stay.

Windy City filed a motion asking the Commission to stay its proceedings. The motion was filed without leave of the Commission. The Commission can hardly stay the proceedings and consider Windy City's exceptions at the same time. Windy City did not include a statutory basis for the Commission to stay its proceedings. The motion is stricken.

2) Motion To Reconsider and Order Settlement Conference.

Windy City filed a motion asking the Commission to reconsider the recommended order and to order the parties to participate in a settlement conference. The motion was filed without leave of the Commission. The motion does not make clear what Windy City seeks in asking for reconsideration, how that differs from the exception process, or by what authority we would grant the motion.

Further, the parties to cases under the IHRA are always free to discuss settlement or to enter into settlement of their dispute. The Commission encourages settlement discussion at every level of our proceedings and will assist in settlement discussion when requested by all parties. However, the Commission will not order the parties to settle. The motion is stricken.

B. Exceptions.

Windy City filed exceptions to Judge Brent's recommendations. The IHRA grants a party the right to file exceptions to a recommended order and decision. Clark filed a reply to those exceptions.

1) Failure To Attend Public Hearing.

Windy City argues that the recommended order should be vacated because:

“(I)t never received the appropriate notice of all the hearings and proceedings scheduled in this matter. Respondent contends that it did become aware of the public hearing scheduled for April 20, 2004 and in fact Mr. Wiersma and his secretary came to the receptionist's desk for said hearing and were told that they could not attend the hearing.”

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a) Claim that the State Prohibited Attendance.

The argument makes a serious allegation: That our staff prohibited a party, who was present and at our reception desk, from attending a public hearing. If true, we would take a number of responses, including consideration of extraordinary remedies for the parties.

The claim is not supported by an affidavit or statement under oath from Mr. Wiersma or the unidentified secretary. No detail or facts were stated.

We examined the allegation and record carefully to determine whether further inquiry was warranted. We did not conduct a factual inquiry outside of the record.

The public hearing was held April 20, 2004. The record includes two pleadings filed by Windy City after the public hearing: Windy City's Reply to Clark's Post-Hearing Brief and Windy City's Post-Hearing Brief. Both of these pleadings discuss the public hearing and were drafted by an attorney. Neither of these pleadings state any claim that Windy City was prohibited from attending the public hearing by our staff.

The public at large is permitted at our public hearings.

It would be extraordinary that a party would be prohibited from attending a public hearing. It would also be extraordinary that a party's attorney would file two briefs after that making no complaint or reference to such an incident. Even in these exceptions it was raised with a single sentence. The day of the public hearing or somewhere over the months, it seems a party would raise high the roof beams if this had happened.

Because of its gravity, we do not lightly dismiss this claim. But on examination of the record it has no merit. It is an entirely naked allegation and there are not *bona fides* for further inquiry.

b) Claim of Failure of Notice.

Windy City argues that the Commission should vacate the recommended order because it did not receive the appropriate notice of all the hearings and proceedings.

The claim is not supported by an affidavit or statement under oath. The claim is artfully vague as to how Windy City "did become aware of the public hearing" yet also "never received the appropriate notice" of the proceedings.

The record includes a number of documents served to Windy City at the Blue Island address. Mr. Wiersma provided the Blue Island address to IDHR. None of the documents were returned as undeliverable.

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Windy City's Reply to Clark's Post-Hearing Brief and Windy City's Post-Hearing Brief were both filed after the public hearing. Neither of these pleadings state any claim that Windy City did not receive notice of the public hearing or any other documents.

A series of properly addressed and posted orders were mailed to Windy City at an address that it provided. These orders are considered served.

2) Back Pay and Front Pay.

Windy City argues that Judge Brent's recommended orders of back pay and front pay should not be adopted. Windy City's argument is based on an affidavit from a Mr. Calvin King.

The IHRA does not permit a party to introduce evidence following the public hearing or during the consideration of exceptions. We review exceptions based on the public hearing record alone.

The affidavit of Calvin King is not part of the public hearing record and is not considered. Windy City has provided no other basis of argument. Windy City does not otherwise take exception to the back pay and front pay findings. The recommended orders of back pay and front pay are adopted.

3) Emotional Distress.

Windy City argues that Judge Brent's recommended order of \$65,000 in emotional distress damages is excessive. They argue that Clark did not provide evidence on which such an award could be based, such as medical treatment. Judge Brent simply awarded the amount requested by Clark.

Clark states that there "was more than enough uncontroverted evidence" and that Clark's emotional distress was apparent to Judge Brent during the public hearing.

The term "actual damages" in the context of the Act contemplates compensation for emotional harm and mental suffering. *Arlington Park Race Track Corp. v. Human Rights Comm'n.*, (1990) 199 Ill. App. 3d 698, 557 N.E.2d 517, 145 Ill. Dec. 747. An award of damages under such circumstances must be kept within reasonable parameters. *Village of Bellwood Fire & Police Comm'rs v. Human Rights Comm'n.*, (1989) 184 Ill. App. 3d 339, 541 N.E.2d 1248.

In determining the reasonable parameters of an award for emotional damages the Commission considers the totality of circumstances. We consider the nature of the violation that caused the injury and its effects. The Commission also closely examines the injury itself. *ISS International v. Human Rights Comm'n.*, (1995) 272 Ill. App. 3d 969, 651 N.E. 2d 592, 209 Ill. Dec. 414.

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Judge Brent reviewed Windy City's conduct, as established by Clark's uncontroverted testimony at the public hearing.

Clark endured frequent abusive racial remarks about him and other African Americans. These included the frequent use of the word "nigger" to describe others and direct reference to him as "nigger boy". Robert Wiersma and Windy City managers' remarks treated all African Americans with equal scorn: Those, like Clark, in his employ, and those he likely never even met, such as Martin Luther King, Jr.

This racially abusive conduct was "opprobrious, continuous or outrageous". *Village of Bellwood Bd. of Fire and Police Comm'n*, 184 Ill. App. 339, 541 N.E. 2d 1248 (1<sup>st</sup> Dist. 1989). In fact the conduct was opprobrious, continuous *and* outrageous.

Clark testified about the emotional effects of this conduct and that the effects endure. He testified that he was "messed up in the head" and things were "a little better" at the time of the public hearing. Further, Judge Brent, who had the capacity to observe Clark, indicated that Clark's emotional distress was apparent.

Windy City is correct that the burden of proof of damages was on Clark, even if they were not present. Also it is correct that medical bills are a frequent and helpful source of proof of emotional distress damage. That is not the sole basis for calculating award.

A standard that required a complainant to have medical bills might encourage the generation of unnecessary medical bills. It is possible to suffer demonstrable emotional distress without seeking medical treatment.

Emotional distress awards are not well suited to ready mathematic calculation. Ultimately, determining the amount of an emotional distress award is an act of judgment and discretion.

Judge Brent's recommendation is based on: Examination of the totality of circumstance in the record, the nature and extent of the civil rights injury, its demonstrable effects and the administrative law judge's determination of credibility. The recommendation articulates his consideration of these issues and the factual basis of his recommendation. We believe that is a correct basis for a recommendation of emotional distress damages under the Illinois Human Rights Act. The recommendation is adopted.

The findings of the Recommended Order and Decision are sustained. The recommendations of that order are adopted.

**IT IS HEREBY ORDERED THAT:**

1. Respondent pay Complainant back pay in the amount of \$39,845.79;

