STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
TODD WATHEN and MARK WATHEN,	)	
	)	
Complainants,	)	CHARGE NO: 2011SP2489
	)	2011SP2488
	)	EEOC NO: N/A
and	)	ALS NO: 11-0703C
	)	
WALDER VACUFLO, INC.,	)	
	)	
Respondent.	)	

RECOMMENDED LIABILITY DETERMINATION

This matter comes to me on cross-motions for issuance of a summary decision. Both parties have filed a response to the other party's motion, and both parties have filed a reply to the responses in their motions. Accordingly, this matter is ready for a decision.

Contentions of the Parties

In the instant consolidated Complaint, Complainants allege that they were denied equal enjoyment of Respondent's bed and breakfast facilities on account of their homosexual orientation when Respondent refused their request to host a same-sex civil union ceremony on Respondent's premises. In its motion for issuance of a summary decision, Respondent asserts that: (1) neither Complainant has standing to bring the instant lawsuit since Complainants never specifically asked it to host a same-sex civil union ceremony, but rather made a general inquiry into Respondent's policy about hosting such a ceremony; (2) it is not a place of public accommodation at least for purposes of providing accommodations for weddings or civil unions; and (3) any application of the public accommodations provisions of the Human Rights Act under the particular facts of this case would violate terms of the Illinois Religious Freedom Restoration Act (RFRA), as well as violate Article I, Section 3 of the Illinois Constitution, the Free Exercise

Clause of the First Amendment to the Unites States Constitution, the Free Speech Clauses of the First Amendment to the Unites States Constitution/Article 1, Section 4 of the Illinois Constitution, Respondent's freedom of expressive association rights under the First Amendment to the United States Constitution/Article I, Section 5 of the Illinois Constitution. This is so, according to Respondent, because forcing it to host a same-sex civil union ceremony that publicly communicates messages that conflict with its sincerely held religious beliefs would violate its and its owners' statutory and constitutional rights.

In their motion for issuance of a summary decision, Complainants maintain that they have standing to bring the instant discrimination claim where the undisputed facts show that Respondent's owner, upon Complainants' inquiry into Respondent hosting a civil union ceremony, told Complainants that Respondent would not hold a "same-sex civil union" ceremony due to the owner's belief that "homosexuality is wrong and unnatural based upon what the Bible says about it." As such, Complainants maintain that Respondent violated the Human Rights Act's ban on sexual orientation discrimination when it refused to allow them to hold their civil union ceremony at its bed and breakfast, even though Respondent provided similar wedding services for heterosexual couples. Moreover, Complainants submit that the RFRA offers Respondent no defense to this lawsuit since the instant case concerns only private parties. They also contend that Respondent's constitutional claims are without merit either because Respondent cannot rely upon the religious beliefs of its shareholders/owners to justify the discrimination that occurred in the instant case, or because allowing them to hold a civil union ceremony at Respondent's bed and breakfast does not substantially burden the religious exercise of Respondent or its shareholders/owners, and because any burden is otherwise justified by the state's compelling interest in preventing discrimination through the uniform enforcement of the Human Rights Act.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. Complainants, Mark and Todd Wathen, are homosexual men who have lived together in a committed relationship since January of 2003.

2. In January of 2011, the Illinois General Assembly passed a law (i.e. the Illinois Religious Freedom Protection and Civil Union Act) (RFPCUA) making it possible for individuals of the same sex to enter into a civil union. At all times pertinent to the instant case, section 5 of the RFPCUA provided that: "[t]his Act shall be liberally construed and applied to promote its underlying purposes, which are to provide adequate procedures for the certification and registration of a civil union and provide persons entering into a civil union with the obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses." Moreover, section 20 of the RFPCUA provided that: "[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law."

3. At some point after the passage of the RFPCUA, Complainants began to look for a suitable place to hold their civil union ceremony to take place shortly after the June 1, 2011 effective date of the RFPCUA.

4. At all times pertinent to the instant Complaint, Respondent, Walder Vacuflo, Inc., d/b/a TimberCreek Bed and Breakfast, was a for-profit Subchapter S corporation. Moreover, at all times pertinent to the instant Complaint Respondent was not a church, did not have a religious mission statement, and was not organized and operated exclusively for educational, scientific or charitable purposes.

5. At all times pertinent to the instant Complaint, Respondent offered to the public sleeping accommodations and breakfast meals and advertised its services on its website. It also offered guests a Jacuzzi, over-sized beds, laundry facilities, a business center and a kitchen. In addition, Respondent offered to host both religious and civil weddings and also

invited the public to reserve its facilities for birthday celebrations, anniversaries, bridal showers, business meetings and family gatherings.

6. At all times pertinent to the instant Complaint, Respondent served approximately 1,200 guests per year and hosted 49 opposite-sex weddings in 2011. At all times pertinent to the instant Complaint, Respondent did not keep records as to the individual officiating at the wedding ceremonies or whether the wedding ceremony was religious in nature.

7. At all times pertinent to the instant Complaint, James and Elizabeth Walder each owned 50 percent of Respondent-corporation. Moreover, Respondent had three officers, including James Walder as President, Wilma Walder (relationship to either James or Elizabeth Walder unclear) as Vice-President, and Elizabeth Walder (wife of James Walder), as Secretary/Treasurer.

8. At all times pertinent to the instant Complaint, James and Elizabeth Walder held certain religious beliefs that included the belief that: (1) sex outside of marriage is a sin; and (2) homosexuality is "wrong and unnatural." However when it came to the renting of rooms at Respondent's bed and breakfast, the Walders did not ask Respondent's guests to disclose their relationship before providing them a room, did not ask if guests were homosexual or in a same-sex relationship before renting a room, and did not prevent two men or two women from sharing a room.

9. At some point prior to February 15, 2011, Todd Wathen conducted research on the Internet in an effort to find a place to host his and Mark Wathen's civil union ceremony.

10. On or prior to February 15, 2011, Todd Wathen came across Respondent's website on the Internet. On the website, Respondent stated in part:

> **"TimberCreek is serious about hosting your wedding and reception.** We specialize in creating wonderful outdoor country weddings, memorable for you and your guests. TimberCreek is private and very secluded. We have beautiful landscaping ideal for photography and romance. We have a number of settings for ceremonies and receptions. We offer complete autonomy in selecting vendors such as caterers, florists and officiates. We extend a wide range of flexibility to our clients. Electricity, waste removal and free parking are always included." (Bold in original)

The website described at least one wedding package that called for the wedding ceremony to take place inside the Bed and Breakfast facility and also contained language that expanded the above description of "complete autonomy" to include the ability of guests to select "planners, photographers and DJs." Respondent's website also stated:

> "**TimberCreek Bed and Breakfast** is an upscale, sophisticated Bed & Breakfast...The Inn is situated at the end of a long winding lane in a secluded meadow surrounded by trees and a stream. It is the ideal setting to escape fast-paced everyday living to relax, recharge, and reconnect with each other...The Breakfast and Gathering Rooms can be reserved daily for business, church retreats, bridal showers, focus groups...TimberCreek is often bustling with weddings and receptions during the Spring, Summer and Fall months." (Bold and underline in original.)

11. On February 15, 2011, Todd Wathen, after discussing with Mark Wathen the possibility of Respondent hosting their civil union ceremony, emailed Respondent and asked the following question: "Do you plan on doing same sex civil unions starting June 1st???? Thanks, Todd." Todd Wathen's email had the word "Question" in the subject line and indicated that the email was from "The Wathens."

12. On February 15, 2011, James Walder sent Todd Wathen the following email in response to Todd Wathen's email described in Finding of Fact No. 11: "No. We only do weddings. Jim A. Walder TimberCreek Developers TimberCreek Bed & Breakfast"

13. On February 15, 2011, Todd Wathen sent to Respondent the following email that was responsive to Walder's February 15, 2011 email described in Finding of Fact No. 12:

> "[S]tarting [J]une 1st, a civil union is a wedding. [Y]ou have to get licenses at the county clerk[']s office, it is just not a marriage...but a legal wedding....so aren't you discriminating against me and my partner, because of our sexual orientation?????"

14. On February 15, 2011, James Walder sent the following email in response to Todd Wathen's February 15, 2011 email described in Finding of Fact No. 13:

> "Todd,
> Civil unions and legal marriage are not the same thing, nor do they have the same legal status. We will never host same-sex civil unions. We will never host same-sex weddings even if they became legal in Illinois. We believe homosexuality is wrong and unnatural based on what the Bible says about it. If that is discrimination I guess we unfortunately discriminate." (Underlines in original)

15. On February 15, 2011, Todd Wathen sent to Respondent the following email in response to Walder's February 15, 2011 email described in Finding of Fact No. 14:

> "On June 1st....There will be people getting [m]arried that is [sic] having a wedding, and people having [c]ivil [u]nions that will be having a wedding....You still have to get a licenses [sic] for both, and you advertise for weddings, not marriage.... Well maybe I need to contact the IL Attorney General Dept. of [C]ivil [R]ights and the State of IL Department of Human Rights, because you are a business and IL passed a law back in Jan. of 2006 for any business or employer, etc. not to discriminate against someone over there [sic] sexual orientation...and I do believe you are a business....and when you run a business...a person needs to keep their opinions to there [sic] self."

16. On February 15, 2011, James Walder sent to Todd Wathen the following email in response to Todd Wathen's email as described in Finding of Fact No. 15:

> "*Correction*
>
> Todd,
>
> The Bible does *not* state opinions, but facts. It contains the highest laws pertinent to man. It trumps Illinois law, United State law, and Global law should there ever be any. Please read John 3:16." (Italics in original)

17. By the conclusion of this email, James Walden had formed the belief that Todd Wathen and his partner were engaging in a homosexual lifestyle.

18. On February 18, 2011, Walder sent Todd Wathen the following email:

> "Hi Todd,
>
> I know you may not want to hear this, but I thought I would send along a couple of verse in Romans I detailing how the Creator of the Universe looks at gay lifestyle. It's not to[o] late to change your behavior. He is loving and kind and is ready to forgive all men their trespasses, including me.
>
> <u>For this cause God gave them up unto vile affections for even their women did change the natural use into that which is against nature. And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another, men with men working that which is unseemly and receiving in themselves that recompence [sic] of their error which was meet</u>." (Underline in original)

19. At no time on February 15, 2011 or thereafter did either Todd or Mark Wathen tell James Walder that they expected a Respondent employee to either officiate at their civil union

ceremony, perform any religious rite at their civil union ceremony or participate in their civil union ceremony.

20. By February 23, 2011, Respondent's website was changed to contain the following phrases: "We do not host civil unions," and "Civil Unions: not available at TimberCreek." Also by that time, Respondent's website was changed from "upscale, sophisticated country Bed & Breakfast" to "upscale Christian country Bed & Breakfast."

21. On March 1, 2011, Todd and Mark Wathen each filed a Charge of Discrimination alleging that Respondent denied him an equal enjoyment of Respondent's facilities on account of his sexual orientation.

22. By June 4, 2011, Complainants made alternative arrangements for a civil union ceremony and held a civil union ceremony on that date in the back yard of their home in Mattoon, Illinois.

23. On an uncertain date, Respondent on at least one occasion made its facilities available for an anniversary ceremony. Respondent did not organize the ceremony or participate in it in any way, and none of Respondent's personnel were present for the ceremony.

24. At all times pertinent to the instant Complaint, Respondent has refused to host "a few" weddings and on one occasion refused to rent its facilities to a photographer due to conflicts over payment due and other business reasons.

25. In 2011, Respondent had a total income of $121,830.55. Of that total, $70,038.60 was for "room income," $15,937.09 was for "wedding room income," and $35,854.86 was for "wedding rental income."

26. In 2012, Respondent had a total income of $173,555.15. Of that total, $92,091.15 was "room income," $24,369.96 was for "wedding room income," and $57,094.04 was for "wedding rental income."

Conclusions of Law

1. Complainants are individuals aggrieved by the denial of the full and equal enjoyment of the facilities and services of a place of public accommodation on the basis of sexual orientation discrimination prohibited by section 5-102(A) of the Illinois Human Rights Act (775 ILCS 5/5-102(A)).

2. Respondent's bed and breakfast business that includes facilities for holding weddings and receptions is a place of public accommodation as that term is defined under sections 5-101(A)(1) and (2) of the Illinois Human Rights Act (775 ILCS 5/5-101(A)(1) and (2)).

3. The futile gesture doctrine applies to Article V cases under the Human Rights Act when the record shows that a business's known and consistently enforced discriminatory policy renders it futile for an aggrieved party to make a specific request to use the business's facilities.

4. Complainants have proved by a preponderance of the evidence a *prima facie* case of unlawful discrimination based upon Respondent's denial of the full and equal enjoyment of its place of public accommodation when Respondent gave an unequivocal statement that it was unwilling to host Complainants' same-sex civil union ceremony.

5. Respondent articulated a reason for denying Complainants the use of its facilities for a civil union ceremony.

6. Complainants established by a preponderance of the evidence that Respondent's proffered reasons for denying them the use of its facilities either had a discriminatory motivation or were insufficient to excuse its denial of its facilities to Complainants.

7. Respondent may not assert before the Commission the legal defense that it was entitled under the Illinois Religious Freedom Restoration Act to discriminate against Complainants based upon protections afforded to it under said Act.

8. The Human Rights Commission lacks jurisdiction to consider freedom of speech/ freedom of association claims under the First Amendment to the United States Constitution, as well as claims under Article 3, Sections 1 and 3 of the Illinois Constitution.

Discussion

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue as to any material fact, and the moving party is entitled to a recommended order as a matter of law. (See, section 8-106.1 of the Human Rights Act (775 ILCS 5/8-106.1), and *Bolias and Millard Maintenance Service Company*, IHRC, ALS No. 2032, June 16, 1988.) Moreover, in determining whether there is any genuine issue of material fact, the record is construed most strictly against the moving party and most liberally in favor of the opponent. (See, for example, *Armagast v Medici Gallery and Coffee House*, 47 Ill.App.3d 892, 365 N.E.2d 446, 8 Ill.Dec. 208 (1st Dist., 5th Div. 1977).) Inasmuch as a summary order is a drastic method for the disposing of cases, it should only be allowed when the right of the moving party is clear and free from doubt. (See, *Susmano v Associated Internists of Chicago*, 97 Ill.App.3d 215, 422 N.E.2d 879, 52 Ill.Dec. 670 (1st Dist 1981).) Furthermore, although there is no requirement that the non-moving party prove his, her or its case to overcome a motion for summary decision, the non-moving party is still required to present some factual basis that would arguably entitle him, her or it to a judgment under the applicable law. (See, *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist, 2nd Div. 1980).)

As mentioned above, the instant case concerns a refusal by Respondent to allow Complainants to use its facilities for the purpose of conducting a same-sex civil union ceremony. In such a case alleging discrimination based on sexual orientation, or for that matter, any other protected classification, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Human Rights Act. (See, for example, *Canady and Caterpillar, Inc.*, IHRC, ALS No. S8795, March 17, 1998, and *Loyola University of Chicago v. Illinois Human Rights Commission*, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist., 3rd Div. 1986).) Under this approach, a complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden

shifts to the respondent to articulate a legitimate non-discriminatory reason for its action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination.

While this three-step process has been used primarily in an employment discrimination setting, the Commission has also approved of its use in resolving cases alleging discriminatory denials in the use and enjoyment of public places of accommodation. (See, for example, *Davis and Ben Schwartz Food Mart*, IHRC, ALS No. 1361(B) April 7, 1986.) Typically, a *prima facie* case of a denial or refusal to afford full and equal enjoyment of a place of public accommodation requires a complainant to show that: (1) he or she is a member of a protected class; (2) he or she was denied the full and equal enjoyment of a place of public accommodation; and (3) similarly-situated individuals not within the protected classifications were afforded full and equal enjoyment of the facility. (See, *Davis,* slip op. at pgs. 7-8, and *Hornick v. Noyes*, 708 F.2d 321 (7th Cir. 1983).) While Respondent essentially does not quarrel with Complainants' contention that they are homosexuals, and thus were members of a protected classification, it nevertheless submits as an initial matter in its motion for issuance of a summary dismissal, that Complainants cannot establish that it ever denied them the use of their facilities because a close reading of the February 15, 2011 emails sent by Todd Wathen (hereinafter referred to as Todd) did not reveal that Todd ever made a specific request for such a use, but rather sought only information regarding Respondent's policy about holding civil union ceremonies, which had not become legal at the time of Todd's inquiry

A fair reading of the record, though, does not support Respondent's argument in this regard. Specifically, it is true that as an initial matter Todd only asked whether Respondent had "plan[ned]" on doing same-sex civil unions, and that Walder initially responded "No, we only do

weddings." Had the email exchange ended there, I would agree with Respondent that Todd's simple inquiry might not have given Walder any indication that Todd was seeking the use of Respondent's facilities. However, any ambiguity with respect to what Todd was asking was clarified in his follow-up email, where he expressed his opinion that a civil union was a "wedding" and specifically accused Walder of discrimination based on Todd's and his partner's sexual orientation if Respondent failed to host same-sex civil union ceremonies under circumstances where Respondent had hosted traditional weddings.

Indeed, Walder's responsive email to Todd's second email demonstrates that Walder actually believed Todd's inquiry was a request to use Respondent's facility for a same-sex civil union ceremony since Walder did not stop with his observation that "[c]ivil unions and legal marriage are not the same thing." Rather, Walder continued by addressing the issue of Todd using the facility for a same-sex civil union ceremony by stating: (1) "[Respondent] will never host same-sex civil unions[, and] [w]e will never host same-sex weddings even if they become legal in Illinois (underlines in original);" and (2) "[w]e believe homosexuality is wrong and unnatural based on what the Bible says about it[;] if that is discrimination, I guess we unfortunately discriminate." In short, Todd would not have personalized his claim that Walder was discriminating against him if he was not essentially asking to use Respondent's facilities, and Walder would not have mentioned Respondent's intention to never host same-sex civil unions or same-sex weddings, as well as lectured Todd about his homosexuality in his two additional emails on February 15, and 18, 2011, if Walder did not actually believe that Todd and his partner (Complainant Mark Wathen) were seeking to use Respondent's facilities. Moreover, as Complainants note, section 5-102(A) of the Human Rights Act also prohibits a person from refusing to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation. Accordingly, regardless of whether Walder was merely expressing Respondent's policy or responding to a specific request, his statement that

Respondent would never host a same-sex civil union fits comfortably within the "refusal" language of section 5-102(A).

Moreover, the fact that Todd made no express request to use Respondent's facilities does not require a different result. Specifically, Respondent's argument presupposes that any such request would not have been a "useless act" or a "futile gesture" on the part of Todd. In general, courts have applied the "futile gesture" doctrine in an employment setting under circumstances where an employer's known and consistently enforced discriminatory policy renders it futile for an aggrieved party to apply for a position or a promotion. (See, for example, *International Brotherhood of Teamsters v. United States*, 341 U.S. 324, 365-66 (1977), where the Court applied the futile gesture doctrine under circumstances where there was a systematic pattern and practice of racial discrimination that deterred applicants from seeking open positions, as well as *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 (7th Cir. 1985), where Seventh Circuit applied the futile gesture doctrine when excusing potential female job applicants from formally applying for the subject position where there was evidence of class-wide discrimination against women with respect to hiring individuals in the subject position.) Indeed, while the parties have not cited any Commission cases that have specifically applied the futile gesture doctrine, the Commission has previously observed that parties will not be required to perform "useless acts" where to do so would run contrary to "common sense, established principles of statutory construction and long standing precedent." (See, *Stallings and General Tire*, IHRC, ALS No. 6873(S), October 6, 1995, slip op at pg. 1.)

In applying these cases to the instant case, what Respondent must be arguing is that Todd should have insisted on Respondent booking a same-sex civil union ceremony, even after being told that Respondent would "never" hold a same-sex civil union ceremony, or for that matter "never" hold a same-sex wedding, even if it was directed to do so by Illinois law.

However, given the existence of Respondent's "consistently enforced discriminatory policy"[1] against holding same-sex civil unions or same-sex weddings, it would appear that this case is a good candidate for the application for the futile gesture doctrine since Walder made it abundantly clear in his second February 15, 2011 email that it would be pointless to ask him to schedule a same-sex civil union that would take place after June 1, 2011. Similarly, Respondent's related contention that Complainants' discrimination claim was not ripe because it could not hold a same-sex civil union at the time Todd emailed him on February 15, 2011 is without merit since: (1) Todd's first email merely asked if Walder was "plan[ning]" to do same-sex civil unions starting on the June 1, 2011 effective date for same-sex civil union ceremonies, and Walder's initial response was "[n]o;" (2) there was nothing in Todd's inquiries to Respondent that indicated that he wanted a same-sex civil union ceremony prior to the June 1, 2011 effective date of the law allowing same-sex civil unions; and (3) such an contention ignores Walder's actual statement in his second February 15, 2011 email that he would "never host same-sex civil unions" at any time. As such, I find that Complainants have standing to proceed on their claim.

Respondent, though, in focusing on the second element of a *prima facie* case of Complainants' discrimination claim, submits that although it is a place of public accommodation when it comes to the portion of its business providing sleeping rooms for its guests (and presumably the next morning breakfasts), it is not a place of public accommodation when it comes to providing space for civil union ceremonies or for that matter same sex weddings, because: (1) it never offered same-sex civil union ceremonies to any member of the public; and (2) its wedding ceremony/reception facilities did not qualify as a place of public accommodation because it routinely screened potential customers for their use. (See, for example, *Gilbert v. Illinois Department of Human Rights*, 343 Ill.App.3d 904, 799 N.E.2d 465, 278 Ill.Dec. 747 (1st

[1] Walder even conceded in his second February 15, 2011 email that Respondent's refusal to host to host same-sex civil unions or same-sex weddings could be a form of discrimination.

Dist. 4th Div. 2003).) Moreover, it submits that businesses are not required to offer particular services that they would not otherwise offer by virtue of the fact that they offer some services to the public. As such, according to Respondent, it cannot be guilty of discrimination under Article V of the Human Rights Act since the instant record shows that neither same-sex nor opposite-sex couples were able to book a civil union ceremony at its facility.

Respondent's arguments in this regard, though, can be rejected on many levels. First, as a factual matter, Respondent's contention that it provided equal treatment to individuals seeking civil union ceremonies does not square with what actually transpired between Todd and Walder during the February 15, 2011 emails. Specifically, Todd limited his initial inquiry to "same sex" civil unions, and Walder's second email from the same date made it clear that Respondent's prohibition regarding civil union ceremonies covered only "same-sex" civil union ceremonies, since, immediately after declaring that Respondent would never host same-sex civil unions or weddings, Walder explained in the next sentence that: "[w]e believe homosexuality is wrong and unnatural based on what the Bible says about it." Indeed, there was no mention of a prohibition of opposite-sex civil unions in any of Walder's responsive emails at issue in this case, when he easily could have offered a such a non-discriminatory rationale if that was the case. Moreover, where Walder expressly conceded in his second February 15, 2011 email that what he was saying about same-sex civil unions and homosexuality was discriminatory, Respondent's current claim that it has at all times afforded Complainants equal treatment because it was not allowing civil union ceremonies for anyone rings hollow under the instant record.

Similarly, I agree with Complainant that Respondent has not provided any facts that would justify its claim that there is a meaningful distinction between providing its facilities and services for opposite-sex weddings as opposed to civil union ceremonies. Specifically, Walder did not use this justification in any of his February 15 and 18, 2011 emails as a reason why Respondent could not allow Complainants to use Respondent's facilities for their civil union

ceremony and instead justified his refusal based upon his interpretation of the Bible. More important, Respondent has not indicated what, along with the provision of space, chairs, tables, tablecloths, electricity, tents, garbage removal and free parking as depicted in the wedding section of its website, it would need to do to accommodate a same-sex civil union ceremony that it does not already provide to an opposite-sex wedding (or for that matter to any other celebratory event) so as to minimally support its contention that providing facilities and services for a same-sex civil union ceremony was outside the scope of the services it already provided to other guests. Thus, for all of the above reasons, I find that a same-sex ceremony was within the scope of services Respondent already provided to other guests that used Respondent's facility and further find that Walder's statement in his second February 15, 2011 email indicating that Respondent would never schedule a same-sex civil union ceremony constituted a denial of the full and equal enjoyment of a place of public accommodation for purposes of satisfying the second element of Complainants' discrimination claim.

Respondent's citation to *Gilbert* for the proposition that it is not a place of public accommodation because it "prescreened" individuals prior to allowing them to use their facilities for weddings does not require a different outcome. In *Gilbert*, the court addressed an issue as to whether a business, which taught and certified individuals in scuba diving, was a place of public accommodation where such a business was not specifically enumerated in the list of public accommodations mentioned in the Human Rights Act. There, in noting that the respondent directed its prospective customers to submit a medical form that was used to determine whether the prospective customer was required to obtain a medical clearance from a physician before taking a scuba diving class, the court in *Gilbert* found that the respondent was not a place of public accommodation because it did not "provide its services 'as if one individual was no different from the next.'" (*Gilbert*, 799 N.E.2d at 469, 278 Ill.Dec. at 751, citing *Cut 'N Dried Salon v. The Department of Human Rights*, 306 Ill.App.3d 142, 239 Ill.Dec. 61, 713 N.E.2d 592 (1st Dist., 4th Div. 1999).) Indeed, the court in *Cut 'N Dried*, in finding that an

insurance agency was not a place of public accommodation, talked about a screening process where the price that the customer paid for the service (i.e., insurance coverage) was based on an applicant's individual medical and other characteristics and distinguished its holding from instances where a business provides overnight accommodations, entertainment, recreation or transportation under circumstances where one customer is treated no differently than the next. (*Cut 'N Dried*, 713 N.E.2d at 595, 239 Ill.Dec. at 64.)

Accordingly, Respondent's citation to *Gilbert* in support of its argument seems inapt since, unlike the scuba diving business at issue in that case, Respondent's business as either an inn or restaurant are specifically mentioned as "places of public accommodation" under sections 5-101(A)(1) and (2) of the Human Rights Act (775 ILCS 5/5-101(A)(1), (2)). As such, *Gilbert* is distinguishable on this basis alone. Moreover, the record shows that Respondent only asked its customers for a name, address, telephone number, email and credit card number and only turned down "a few" customers based not on the information obtained during the "screening process" at issue in the instant case, but rather on other factors, such as use of foul language, the making of unreasonable demands, the display of a poor attitude, and the existence of a conflict over when payments were due. (Respondent's response to Interrogatories Nos. 16 and 42) Thus, *Gilbert* is also distinguishable since the five basic questions that was actually asked by Respondent to screen its applicants, which generally concerned the establishment of the identity of the customer and his or her ability to pay, are nothing like the detailed inquiries about the individual characteristics of potential customers made by the respondent in either *Gilbert* or *Cut 'N Dried* that concerned a customer's peculiar medical characteristics or his or her physical ability to partake in the services provided by the respondent.

True enough, there is nothing under the Human Rights Act that would preclude all businesses, including those specifically mentioned as places of public accommodation in section 5-101(A), from screening/excluding customers, who do not have the ability to pay for the

services rendered by the business or, for that matter, who display unruly manners. Yet, if screening on the customer's ability to pay for the service or for the customer's unruly attitude takes a business outside the contours of section 5-101(A) as Respondent seemingly suggests, no business would be included in that section. More important, such a stance would stand on its head the observation made by the *Cut 'N Dried* court that the provision of overnight accommodations (and for that matter food and drink) are typically given under circumstances where one individual is no different than the next. As such, I must reject Respondent's contention that its minimal screening function with respect to offering its facilities to host weddings precludes it from being considered a place of public accommodation under the instant record.

As to the third element of their discrimination claim, Complainants need only establish that other similarly-situated individuals outside their protected classification were treated more favorably. Again, Respondent submits that Complainants cannot establish this element because it did not offer civil union ceremonies to any couple regardless of their sexual preference. However, as noted above, I found that a same-sex civil union ceremony that was the focus of Todd's inquiry was within the same scope of services Respondent provided to opposite-sex weddings, and thus Complainants are entitled to use guests seeking Respondent's provisions of services for their wedding ceremonies as suitable comparatives for their discrimination claims. In this regard, the record shows that Respondent allowed guests seeking to use its facilities for weddings on 49 occasions in 2011, an amount that would more than satisfy the definition of a "goodly sample" of disparate treatment to support an inference of discrimination on the basis of sexual orientation, where: (1) Walder flatly refused to schedule any same-sex civil union ceremonies; and (2) Respondent provided the space and other related services associated with a wedding ceremony to heterosexual couples. (See, *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1141 (7th Cir. 1997).)

Moreover, aside from the evidence of disparate treatment contained in this record, Complainants have provided direct evidence of Walder's discriminatory animosity towards their sexual orientation, and that such animosity played an operative role in Respondent's refusal to schedule same-sex civil unions at its facility. Specifically, Walder declared in his second and third February 15, 2011 emails that: (1) Respondent would never host same-sex civil union ceremonies or same-sex weddings even if directed to do so by Illinois law; (2) homosexuality was "wrong and unnatural" based upon the Bible; and (3) the Bible "contains the highest laws pertinent to man." Moreover, not content to leave the issue of Todd's homosexuality alone, Walder cited to two Bible verses in his February 18, 2011 email to Todd that informed him that it was "not to[o] late to change your behavior." As such, based on what had actually occurred during the February 15-18, 2011 email exchanges between Walder and Todd, the record is clear that Complainants have successfully established all three elements of their discrimination claim under section 5-102(A) of the Human Rights Act arising out of Respondent's refusal to host same-sex civil union ceremonies, and that Complainants' homosexuality was the only reason that Respondent was not going to host a proposed civil union ceremony on its premises.

Somewhat surprisingly, Respondent's counsel asserts that Walder's views on homosexuality are completely irrelevant to the instant case. (Respondent's reply brief at pg. 11) But how can that be so? As far as this record shows, Walder was serving as Respondent's president at the time of the instant February 15 and 18, 2011 email exchanges with Todd, and, as Respondent's president, Walder was (according to Respondent's by-laws) "the principal executive officer" of Respondent who was "in charge of" Respondent's business. (See, Article IV, section 4 of Respondent's by-laws.) Moreover, Respondent's ties to Walder's religious views regarding homosexuality were amply demonstrated by Respondent's amended response to Complainant's Interrogatory No. 32, which declared that Respondent was controlled by James and Elizabeth Walder, "whose religious beliefs cannot be separated from the operation

of" Respondent. As such, Walder certainly had the authority to decide on behalf of Respondent whether it was going to host same-sex civil union ceremonies, and if he did not have such authority so as to make his thoughts on homosexuality irrelevant, Respondent has not proffered any other individual who could speak for the corporation or decide whether it was going to host same-sex civil unions. Indeed, the stance by Respondent's counsel is fundamentally at odds with all of Respondent's First Amendment and Religious Freedom Restoration Act claims that emphasize and equate the religious views of Walder with the religious views of the corporate Respondent. Thus, not only are Walder's views on homosexuality relevant in this case, they are dispositive in a finding that Complainants have established a viable claim of discrimination under section 5-102(A) for Respondent's refusal to host same-sex civil union ceremonies.

However, Respondent submits that even if Complainants could establish a technical violation of section 5-102(A) of the Human Rights Act, the Commission could not enforce such a finding since, as the record shows, Respondent made a business decision not to host same-sex civil unions because of sincerely held religious beliefs by its owners regarding the sanctity of marriage between a man and a woman. As such, Respondent insists that forcing it to host an inherently expressive event, such as a same-sex civil union ceremony that publically communicates messages conflicting with its sincerely held religious beliefs, would violate: (1) Respondent's and its owners' free exercise of religion rights under the Illinois Religious Freedom Restoration Act, Article I, Section 3 of the Illinois Constitution, and the Free Exercise Clause of the United States Constitution; (2) Respondent's and its owners' freedom from compelled speech or expression under the Free Speech Clause of the First Amendment of the United States Constitution and Article I, Section 4 of the Illinois Constitution; and (3) Respondent's and its owners' freedom of expressive association rights under the First Amendment to the United States Constitution and Article I, Section 5 of the Illinois Constitution.

However, under the Commission's decision in *Langley and Illinois Secretary of State*, IHRC, ALS No. 5288(S), April 23, 1999, Respondent's constitutional arguments can be set aside for now since: (1) Respondent seeks to find that section 5-101(A) as applied to Respondent under the instant case is unconstitutional; (2) the Commission's authority to act is circumscribed by the language contained in the Human Rights Act; and (3) there is nothing in the Human Rights Act that gives the Commission the authority to enforce any clause of the federal or state constitutions. (*Langley*, slip op. at pg. 5) This is not to say, though, that Respondent will not have an opportunity to raise such a claim in any appeal to the Appellate Court, and thus it is enough to say that Respondent has preserved his first amendment claims for any appellate review.

The resolution of Respondent's Religious Freedom Restoration Act (RFRA) defense, though, requires a separate analysis. Section 15 of the RFRA (775 ILCS 35/15) provides that the "[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is (i) in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." Moreover, section 20 of the RFRA states that a person "may assert [an RFRA violation] as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government." In the instant case, Respondent asserts that: (1) the RFRA prohibits a governmental agency such as the Department of Human Rights from substantially burdening a person's exercise of religion; and (2) an application of the non-discrimination provisions contained in section 5-102(A) would violate the RFRA because section 5-102(A) would impermissibly force Respondent and its owners to engage in activities that are forbidden by their sincerely held religious beliefs.

Complainant, though, contends that the provisions of the RFRA simply do not apply in the instant lawsuit because: (1) by its own terms, section 35 of the RFRA prohibits only the

"government" from substantially burdening a person's exercise of religion; and (2) the instant Complaint is a lawsuit that pertains to only private parties. (See, for example, *Marshaw v. Richards*, 368 Ill.App.3d 418, 857 N.E.2d 794 (1st Dist., 5th Div. 2006), where the court found that the RFRA was not applicable in a lawsuit between various members of a church to determine who were the rightful members of the church's board of directors.) In viewing the current status of the instant Complaint, I agree that neither the Department of Human Rights nor the Commission itself is a "party" at this juncture of the instant lawsuit in the sense that neither agency has initiated an action[2] against the Respondent. Indeed, Complainants make a valid point when they assert that they should not be required to step in the shoes of the Department or the Commission in order to provide sufficient legal support for section 5-102(A) from any constitutional or statutory challenge, since the Attorney General would be in the best position to make any such arguments.

However, Respondent also makes a valid point in the sense that our Complainants are attempting to enforce the provisions section 5-102(A) of the Human Rights Act in an effort to seek a recovery from Respondent. Thus, this case is distinguishable from *Marshaw* where, unlike the Commission in the instant proceeding, the circuit court in that case had no stake in the outcome of the case and was not adjudicating the viability of any statute. Moreover, it would appear that under section 20 of the RFRA Respondent should be able to file a "claim or defense" to the dictates of section 5-102(A) at some point during these proceedings, since Complainants are essentially basing their claim for recovery on that statute. Accordingly, because the Commission will be a party in any appeal of this case to the Appellate Court and would be represented by the Attorney General at that time, I find that Respondent's claims under the RFRA should be resolved in that forum.

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[2] Recall that it was Complainants who filed the instant Complaints on their own behalf with the Commission.

Yet, even if I am wrong on the issue as to whether Respondent can assert a defense under the RFRA in any proceeding before the Commission, I would find that Respondent has not established a violation of the RFRA, since it failed to factually support any claim that forcing it to host same-sex civil union ceremonies would cause a substantial burden on its exercise of religion (or the exercise of religion on the part of the Walders), even if I could attribute the religious views of the Walders to the corporate Respondent. For example, while the Walders explain that they cannot host a same-sex civil union ceremony because such an event "publicly glorify[ies] and endorse[s] homosexual conduct and same-sex relationships in violation of Biblical teachings condemning such conduct and relationships (see, Respondent's cross-motion, page 8)," the Walders have not explained how this is so, if all they would be doing is supplying the tables, chairs, tablecloths, rental space, tents, electricity, garbage removal and free parking in order to accommodate such a ceremony. In this respect, and given the declaration in Respondent's website that guests, when planning a wedding, have "complete autonomy" in terms of selecting the caterers, florists, wedding cakes, officiates, planners photographers and DJs," it is not all that clear that the Walders or any of their like-minded employees would be required to even be present at such a ceremony if all the details/tasks associated with the ceremony have been assigned to others selected by the guests. Indeed, there is no testimony that Complainants even asked the Walders to participate in any way in their same-sex civil union, and the record otherwise contains evidence that at least on one occasion, Respondent made its facilities available for an event (i.e., an anniversary ceremony), which it did not organize or participate, and for which none of its personnel were present. If that is true, and the presence of Respondent's employees is not mandatory at the events it hosts, Respondent has not explained how providing a space for any ceremony is somehow a *sub silencio* endorsement of anything that goes on during the event.

Moreover, the record suggests that if Mark and Todd had gone to Respondent's Bed and Breakfast on the evening after their same-sex civil union ceremony and asked to rent a sleeping room, Respondent would have rented them the room because, as Respondent puts it, it does not act as "sex police" over its guests. (Respondent's response to Interrogatory No. 8.) Indeed, Respondent admits that it does not ask about the relationship status of guests seeking to stay in its sleeping rooms and concedes that it allows two individuals of the same sex to stay in the same room. (Respondent's response to Complainants' Interrogatory No. 39) Yet, given the likelihood that some of Respondent's same sex guests renting rooms are homosexuals, the fact that Respondent would rent a sleeping room to Complainants, or any other homosexual couple, is somewhat surprising since the Walders have previously explained that their "religious faith forbids them from supporting romantic relationships between persons of the same sex." (Respondent's response to Complainants' Interrogatory No. 8) In this respect, I would find that Respondent loses on its RFRA claim since Respondent has not shown how, according to its own business model, renting a room to a homosexual couple would not be a substantial burden on the exercise of its religion (although it would violate its religious beliefs to do so), but providing a space for same-sex couples to conduct a civil union ceremony would be a substantial burden on the exercise of its religion where, as far as this record suggests, in both cases all that Respondent would be required to do is to provide a space for its same-sex guests to conduct an activity.

Finally, I would note that the Seventh Circuit, in *Grace Schools v. Burwell*, Nos. 14-1430 and 14-1431 Cons. (September 4, 2015) has recently addressed a similar claim where, a number of religious not-for-profit organizations challenged the implementation of the "contraceptive mandate" contained in the Patient Protection and Affordable Care Act (ACA) by arguing that the enforcement of the mandate would impose a substantial burden on their free exercise of religion in violation of the federal Religious Freedom Restoration Act of 1993.

Specifically, said organizations maintained that an accommodation under ADA regulations, which allowed them to opt out of the contraceptive mandate by filling out a form that declared their religious objection to the contraceptive mandate or by notifying the government directly of their religious objection to the contraceptive mandate, gave them no relief and violated the federal Religious Freedom Restoration Act because: (1) the end result of the accommodation was the eventual inclusion of the contraceptive mandate into the health plans of their employees; and (2) the accommodation caused them to be conduits to the provision of the same contraceptive services to which they had objected. However, the Court of Appeals found that the instant accommodation did not serve as a conduit for the provision of contraceptive services, since the provision of contraceptive services was by operation of federal law and not by any actions that the organizations might be required to take in order to assert their religious objections. (*Grace Schools*, slip op. at pg. 38)

The same result should apply in the instant case, where Respondent has similarly asserted a "conduit" theory with respect to its defense under the RFRA. Specifically, it submits that to compel it to host same-sex civil union ceremonies would be tantamount to compelling it to use its expressive First Amendment rights to convey (and thus implicitly endorse) the message that two individuals in love can enter into a relationship that mimics marriage in contravention to certain passages in the Bible. (Respondent's reply brief at pg. 19) Yet even if Respondent's religious views in this regard were sincerely held, its complaint is not with section 5-102(A) of the Human Rights Act, but rather with the Illinois Religious Freedom Protection and Civil Union Act (RFPCUA), because it is that statute which grants same-sex couples the right to hold a same-sex civil union ceremony which Respondent finds to be objectionable. As such, the requirement in section 5-102(A) of the Human Rights Act that Respondent treat homosexual couples seeking a space and other related services to hold a same-sex civil union ceremony in the same manner that it would treat heterosexual couples seeking to hold a traditional marriage

ceremony cannot be a "trigger" or "conduit" for anything that Respondent finds to be objectionable in this case because it is the operation of the RFPCUA that is the cause of the provision of services that Respondents finds to be objectionable. Indeed, Respondent has not contended that treating individuals equally conflicts with any of its religious beliefs. Accordingly, Respondent loses on its RFRA defense in the instant Human Rights Act lawsuit because it is not making a religious statement of any sort when all it is doing is providing a space and related services for heterosexual or same-sex couples seeking to use its facilities.

Determination

For all of the above reasons, Respondent's motion for issuance of a summary decision is **denied**, and Complainants' motion for issuance of a summary decision is **granted**. Moreover, both parties shall make themselves available for a telephone conference call on **September 28, 2015** at **9:30 a.m.** for the purpose of setting up a date for a hearing on Complainants' damages and the submission of a fee petition by Complainants' counsel.

HUMAN RIGHTS COMMISSION

BY: Michael R. Robinson
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 15TH DAY OF SEPTEMBER, 2015

FILE NO: 11-0703c
CHARGE NO: 2011SP2489
2011SP2488
EEOC NO: N/A
CASE NAME: TODD & MARK WATHEN vs
WALDER VACUFLO, INC

MEMORANDUM OF SERVICE

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The undersigned certifies that on September 15, 2015, she served the foregoing ORDER on each person named below by depositing in the U.S. mail box at the Wm. G. Stratton Bldg., Springfield, Illinois, properly posted for first class mail, addressed as follows:

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