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 ORDER AND DECISION

This matter comes to me following the issuance of a Recommended Liability Determination (entered on September 15, 2015) that Respondent violated section 5-102(A) of the Human Rights Act (775 ILCS 5/5-102(A)) when it refused Complainants' request to host a same-sex, civil union ceremony on Respondent's premises due to their sexual orientation. The parties subsequently participated in a damages hearing, and Complainants have filed a brief on the issue of damages, as well as a petition seeking fees and costs associated with the prosecution of the instant matter. Respondent has not filed a response to either document, although the time for doing so has expired. Accordingly, this matter is ready for a decision.

Contentions of the Parties

In their brief on the issue of damages, Complainants seek an award that will reimburse them for their emotional damages that they incurred after they learned that Respondent would never host their civil union ceremony because of their homosexual sexual orientation. In this regard, Complainants submit that the facts of their case are analogous to the $75,000 and $60,000 emotional distress awards that an Oregon lesbian couple received under circumstances where a cake-maker refused their request to bake a cake for their wedding ceremony. Complainants also seek an attorneys' fee award of $50,000 and costs of $1,218.35,

arising out of 981.20 hours of work by seven attorneys in this matter. The requested fee constitutes a reduction from the $340,228.75 in fees that the seven attorneys had generated in the instant case.

Findings of Fact

1. All of the Findings of Fact contained in the Recommended Liability Determination entered on September 15, 2015 are incorporated into this Order.

2. On March 1, 2011, the Department of Human Rights received four Charges of Discrimination from Complainants. Of the four Charges of Discrimination, two formed the basis of the instant consolidated action, and two formed the basis of Complainants' alleged experience with a different bed and breakfast (Beall Mansion Bed and Breakfast) in Alton, Illinois, where Complainants similarly contended that the respondent had turned down their request to host a civil union ceremony. The facts at issue in the Beall Mansion Bed and Breakfast charges of discrimination occurred prior to the allegations contained in the instant consolidated case.

3. On November 1, 2011, the Complaints in the instant consolidated action (ALS No. 11-0703C), as well as Complainants' complaints against Beall Mansion Bed and Breakfast (ALS Nos. 11-0705 and 11-0707) were filed. Complainants eventually settled their lawsuits in the Beall Mansion Bed and Breakfast Complaints, and a Final Order and Decision was entered with respect to both complaints on April 17, 2012. The record does not indicate what, if anything, Complainants received for settling their lawsuits against Beall Mansion Bed and Breakfast, or whether Complainants' attorneys had received any fees/costs as a result of such settlement.

4. Complainant Todd Wathen suffered actual damages in the form of emotional distress in the amount of $15,000 arising out of Respondent's refusal to host his civil union ceremony.

5. Complainant Mark Wathen suffered actual damages in the form of emotional distress in the amount of $15,000 arising out of Respondent's refusal to host his civil union ceremony.

6. On or before February 11, 2011, Betty Tsamis began her representation of both Complainants, albeit with respect to the Beall Mansion Bed and Breakfast cases, and at some point between February 18, 2011 and February 28, 2011 assisted Complainants with the filing of the Charges of Discrimination in the instant case. Ms. Tsamis continued in her representation of Complainants in the instant matter up until the present day. Ms. Tsamis graduated from the University of Denver Law School with honors in 2001 and is the founder and managing partner of Tsamis Law Firm, P.C.

7. At all times pertinent to the instant case, Ms. Tsamis charged Complainants $350.00 per hour and performed 67 hours in legal tasks on behalf of Complainants in this matter. Neither the hourly rate nor the number of hours is opposed by Respondent, although Tsamis asserted an additional 5 hours on tasks associated with Complainants' action against Beall Mansion Bed and Breakfast.

8. John Knight began his representation of Complainants in this matter in October of 2011 and has continued his representation of Complainants to the present day. Mr. Knight graduated from the University of Chicago in 1988 and has served as the Director of the Lesbian Gay Bisexual Transgender and HIV Project (LGBTHIV) of the Roger Baldwin Foundation of ACLU, Inc. since March of 2004. He is also a Senior Staff Attorney for the LGBTHIV Project of the American Civil Liberties Union Foundation and since 1995 has provided trial and appellate representation in civil actions involving federal and state statutory and constitutional issues concerning transgender rights, marriage for same-sex couples, employment discrimination, government benefits, housing discrimination, parental rights, corrections, and health insurance and family leave rights for lesbian and gay male state employees.

9. Mr. Knight performed 233.35 hours in legal tasks on behalf of Complainants in this matter. Mr. Knight seeks an hourly rate of compensation of $450 per hour. Neither the hourly rate nor the number of hours is opposed by Respondent.

10. Ingrid Bergstrom began her legal representation of Complainants in September of 2012 and continued her representation of Complainants through August of 2013. Ms. Bergstrom is a 2012 graduate of the University of Chicago Law School and performed the instant legal services while serving as a legal fellow at the Roger Baldwin Foundation of ACLU, Inc.

11. Ms. Bergstrom performed 271.25 hours on legal tasks on behalf of Complainants in this matter. Ms. Bergstrom seeks an hourly rate of compensation of $225 per hour. Neither the hourly rate nor the number of hours is opposed by Respondent.

12. Bharathi Pillai began her legal representation of Complainants in November of 2015 and has continued her representation of Complainants to the present day. Ms. Pillai is a 2009 graduate of the New York University School of Law and is currently a General Civil Liberties Fellow at the Roger Baldwin Foundation of ACLU, Inc.

13. Ms. Pillai performed 56.6 hours on legal tasks on behalf of Complainants in this matter. Ms. Pillai seeks an hourly rate of $225 per hour. Neither the hourly rate nor the number of hours is opposed by Respondent.

14. Mr. Clay Tillack began his representation of Complainants in the instant case, as well as in the Beall Mansion Bed and Breakfast cases in February of 2012 and has continued to represent Complainants in the instant matter until the present day. Mr. Tillack is a 1982 graduate of the University of Texas Law School and is currently a partner in the Chicago law firm of Schiff Harden, LLP, with a law practice that focuses on complex commercial litigation, intellectual property and franchise law.

15. Mr. Tillack performed 228.25 hours on legal tasks on behalf of Complainants. Mr. Tillack's hourly rate at the time he performed his services was $702.29 per hour, although

Complainants are seeking only $475 per hour for his services in the instant petition. Neither the proposed hourly rate nor the number of hours is opposed by Respondent.

16. Mr. Tal C. Chaiken began his representation of Complainants in the instant case in March of 2013 and continued such representation through December of 2013. Mr. Chaiken is a 2012 graduate of the University of Chicago Law School and was an associate attorney in the Schiff Harden, LLP law firm at the time of his representation of Complainants.

17. Mr. Chaiken performed 110.25 hours on legal tasks on behalf of Complainants. Mr. Chaiken charged his clients $335 per hour at the time he rendered his services to Complainants, although Complainants are seeking only $225 per hour for his services in the instant petition. Neither the proposed hourly rate nor the number of hours is opposed by Respondent.

18. Mr. Robert Middleton began his representation of Complainants in the instant case in November of 2015 and continues his representation of Complainants to the present day. Mr. Middleton is a 2014 *cum* laude graduate of Northwestern University School of Law and is currently an associate attorney with Schiff Hardin LLP in its general litigation and environmental law groups.

19. Mr. Middleton performed 9.5 hours on legal tasks on behalf of Complainants. Mr. Middleton charged his clients $375 per hour at the time he rendered services on behalf of Complainants, although Complainants are seeking only $170 per hour for his services in the instant petition. Neither the proposed hourly rate nor the number of hours is opposed by Respondent.

20. Complainants are seeking a total of $1,218.35 in costs associated with the prosecution of the instant case, although the law firm of Schiff Harden, LLP reports an additional $10,867.76 in disbursements/charges associated with the instant matter.

Conclusions of Law

1. A prevailing complainant may recover reasonable attorneys' fees and costs as to only those claims at issue in the Complaint.

2. The Commission will not search the record to find a reason to deny a specific entry in a fee petition, where the petition otherwise appears to be valid on its face and the opposing party has not challenged the entry.

3. A prevailing complainant is entitled to provable damages including emotional distress for only those violations of the Human Rights Act at issue in the Complaint.

4. A representative of respondent may testify regarding his intent/motivation with respect to his conduct *vis a vis* the complainant, where a complainant is seeking emotional damages arising out of such conduct, and where such testimony gives a context on the issue as to whether the representative's conduct was outrageous.

Discussion

Preliminary matters

Complainants have filed a motion seeking to correct certain typographical errors contained in the transcript of the public hearing on the issue of damages. Specifically, Complainants proffer the instant corrections:

1. Tr. pg. 4, line 4: "Walter" should be "Walder;"
2. Tr. pg. 4, line 17: "Dorothy" should be "Bharathi;"
3. Tr. pg. 7, line 6: "Wathen" should be "Wathens;"
4. Tr. pg. 7, line 15: "happened" should be "happen;"
5. Tr. pg. 7, line 21: "weekend together and a peaceful" should be "weekend together in a peaceful;"
6. Tr. pg. 18, line 3: "exited" should be "excited;"
7. Tr. pg. 25, lines 1, 2, and 15: "vial" should be "vile;"
8. Tr. pg. 26, line 8: "vial" should be "vile;"
9. Tr. pg. 39, lines 4, 6, and 8: "Bill" should be "Beall;"
10. Tr. pg. 48, lines 5: "Environment mental" should be "Environmental;"
11. Tr. pg. 68, lines 14 and 15: "vial" should be "vile;"

12. Tr. pg. 69, line 5: "vial" should be "vile;"

13. Tr. pg. 76, line 22: "Walter" should be "Walder;"

14. Tr. pg. 77, lines 13 and 22: "vial" should be "vile;"

15. Tr. pg. 78, line 8: "vial" should be "vile;"

16. Tr. pg. 79, lines 1, 10 and 13: "vial" should be "vile;" and

17. Tr. pg. 82, line 5: "vial" should be "vile."

Given that there are no objections to the instant motion, and given that the proffered suggestions comport with my own understanding of what took place at the public hearing, I will grant the motion to modify the transcript with the above suggested corrections. Moreover, my own review of the transcript has produced two other corrections that need to take place: (1) Tr. pg. 9, line 20: "anosmous" should be "animus;" and (2) Tr. pg. 67, line 13: "home sexuality" should be "homosexuality." Accordingly, the transcript will be modified with these two additional corrections as well.

Also, during the public hearing and in their brief, Complainants have moved to strike all testimony by Jim Walder that attempted to support his argument that he did not intend to harm Complainants in any fashion when he refused to hold their (or anyone else's) same-sex, civil union ceremony. Specifically, Walder testified that his communications with Todd regarding Walder's beliefs about the homosexual lifestyle were not based on hatred or bigotry, or, for that matter, any homophobia, but rather were based on his interpretations of the Bible and on the tenets of his religion, i.e., the "great commission," that mandated that he inform others about the contents/teachings of the Bible. (Tr. at pgs. 66 to 69) Similarly, Walder suggested in one of his February 15, 2011 emails that he was not required to abide by the prohibition against discrimination based on sexual orientation under the Human Rights Act because the contents of the Bible overrides all Illinois and United States laws. However, Complainants submit that none of these explanations are germane to a determination of their emotional damages, and they cite to three cases, i.e. one appellate court case (*Ford v. Grizzle*, 398 Ill.App.3d 639, 924 N.E.2d 531, 338 Ill.Dec. 325 (5th Dist. 2010)) and two Commission decisions (*Estate of G.S and Baksh*,

IHRC, ALS No. 2818, June 26, 1996 and *Porter and Treasure Island Foods, Inc.*, IHRC, ALS No. 11593 February 7, 2003) to support their argument that any lack of intent to harm on the part of Walder does not have a tendency to make it more or less probable that either Complainant experienced pain, humiliation or anxiety, or that his actions and words had a bearing on the determination as to whether his conduct was outrageous.

None of the cases cited by Complainants, though, address this issue or support their arguments with respect to the admissibility of evidence regarding Walder's motivation as it pertains to a calculation of emotional damages. Specifically, the Appellate Court in *Ford* merely affirmed a jury's verdict in favor of the defendant in a negligence case, and thus the court, of necessity, did not address the issue of the plaintiff's alleged damages, let alone address the issue raised by Complainants' counsel at the public hearing. Indeed, the terms "emotional damages," "intent" or "motivation" do not appear anywhere in that opinion. Similarly, counsel's citation to the Commission's decision in *Baksh* does not advance Complainants' claim, where counsel's description of the case, i.e., "Commission gave respondent's allegedly benevolent motivations no consideration in awarding complainant emotional damages," suggests that the administrative law judge in that case actually admitted evidence of the respondent's "benevolent motivations" into the record during the damages phase of the public hearing, but ultimately found them not to be persuasive.

Indeed, although one would not have known from the contents of Complainants' brief, the Commission's decision in *Baksh* was ultimately *reversed* by the Appellate Court in *Baksh v. Human Rights Commission*, 304 Ill.App.3d 995, 711 N.E.2d 1187, 238 Ill.Dec. 313 (1st Dist. 1999), petitions for leave to appeal Nos. 89849 and 89850 denied October 6, 1999, after the court found that a dentist office is not a place of public accommodation. As such, I do not know what, if anything, Complainants' counsel want me to take from the observations made by the Commission in *Baksh*, which had awarded complainant a relatively insignificant $8,000 in emotional damages when a dentist refused to treat complainant in 1986 due to complainant's HIV status because the dentist had a fear that he might contract the disease. In any event, the

mere fact that we know from the decision why the dentist refused to clean the teeth of the complainant suggests that Walder should be given an equal chance to explain why he refused services to our Complainants.

Finally, the Commission's decision in *Porter* does not shed any light on the current dispute as to whether a respondent may testify as to his or her motivations when the issue of a complainant's emotional damages is at issue. There, the Commission awarded $6,500 in emotional damages when a parking attendant refused to allow the complainant the ability to park in Respondent's parking lot while allowing others to do so. In reviewing the analysis regarding the calculation of emotional damages, there was no discussion about any parking attendant's testimony at the damages portion of the public hearing, let alone any discussion regarding whether the testimony regarding the parking attendant's motivation in refusing to allow the complainant a parking space was admissible during the damages portion of the public hearing. Moreover, a review of all of the remaining Commission cases cited by Complainants anywhere in their brief produces the same result, since those cases were decided under circumstances suggesting that the respondent did not attempt to offer an explanation for its conduct either because the respondent had previously defaulted on the issue of liability or because the respondent had simply failed to appear at the public hearing. As such, it is understandable that the focus of any emotional damages award in these cases was necessarily based solely on what the complainant had presented during the damages phase of the public hearing.

To be sure, Complainants are correct that Walder's testimony regarding his motivation in refusing their request to host a same-sex, civil union ceremony is admissible on the issue of their emotional damages, only if it is relevant with respect to either the outrageousness of his conduct in terms of the type of discriminatory conduct, its nature, duration, frequency and severity, or the amount of emotional harm suffered by Complainants. (See, for example, *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission*, 184 Ill.App.3d 339, 541 N.E.2d 1248, 1258, 133 Ill.Dec. 810, 820, (1st Dist., 3rd Div. 1989).) In this

regard, Walder's testimony confirming what he originally said in his emails that homosexuality is "wrong" and "unnatural" based upon biblical passages, and that he was compelled via the "great commission" to inform Complainants on two occasions regarding what he thinks the Bible says about their gay lifestyle (Tr. at pg. 66 to 68) not only puts a context on what he said in the emails but, more importantly, goes precisely to the question as to whether his conduct was "outrageous" in terms of the type of discrimination, as well as the nature, duration, frequency and severity of his conduct.

Ironically, as we will see below, while Walder apparently thought that his biblically inspired beliefs regarding homosexuality were mitigating factors in the calculation of any emotional distress damages claim, much of what he had to say regarding his motivation for informing Complainants about such beliefs proved to be an aggravating factor in the calculation of emotional damages because it provided a basis as to why Complainants were particularly upset over his conduct, and why they could reasonably believe that his statements regarding their gay lifestyle were an attack on their identity. Accordingly, because Complainants' legal authority does not support their objections to Walder's testimony regarding his motivation in refusing their requests to host a same-sex civil union ceremony, and because such testimony is relevant with respect to issues regarding the type of discrimination, as well as the nature, frequency and severity of his conduct, Complainants' objections during the damages phase of the public hearing to Walder's testimony regarding his motivation in denying their requests to hold a same-sex, civil union ceremony are overruled.

The merits

In the instant case, Complainants testified that they had intended to have a civil union ceremony at Respondent's bed and breakfast that would enable them to invite around 125 guests that consisted of their close family and friends. They also wanted some of their guests to be able to stay at the bed and breakfast over a period of days to share in their celebration of this important aspect of their lives. Todd further testified that once Walder denied their request to host a same-sex, civil union ceremony, he attempted to clarify with Walder the legal basis for

their right to have a same-sex, civil union ceremony, but was only rebuffed by Walder, who responded that Respondent would never host either same-sex, civil union ceremonies or weddings, even if they became legal in Illinois. At that juncture, Todd testified that after discussing the email exchanges of February 15, 2011 with Mark, they decided to just drop the matter and let it go. (Tr. at pg. 23)

However, according to Todd, things got worse when Walder decided three days after the initial email exchange to send him another email that contained a biblical passage describing his relationship with Mark as "vile" and "unseemly." At that juncture, he felt hurt and humiliated, began to cry and tried with difficulty to communicate the contents of the email on the phone to Mark, and both Complainants thereafter experienced for a second time hurt, humiliation and anger arising out of Walder's refusal to host their same-sex civil union ceremony. As a result, he became concerned that other businesses would turn them away because of their sexual orientation, and that, as a result, both he and Mark lost their excitement at planning a same-sex, civil union ceremony and put such plans on hold. (Tr. at pg. 51) Plans for conducting a same-sex, civil union ceremony eventually resumed after Mark and Todd saw an outdoor wedding in someone's backyard and learned that an owner of a wedding shop had offered to officiate at their wedding. Mark and Todd subsequently decided to hold a ceremony in their backyard on the first weekend after the statute recognizing same-sex, civil unions became effective (as they had originally planned), but were only able to invite about 30 people due to size constraints of their home. Both Mark and Todd further testified that their backyard ceremony was not what they had originally wanted because it fell far short of the festive, full weekend with friends and family that they had originally planned.

In the instant case, Complainants maintain that they are entitled to a sizable emotional distress damages award because the record shows that Walder's conduct was outrageous when: (1) he refused to host their same-sex, civil union ceremony even after being informed that his refusal was discriminatory and against the law; and (2) he maintained that he would continue to disregard the mandate against discrimination based on sexual orientation under the Human

Rights Act due to his interpretation of the Bible. Moreover, they submit that their emotional distress was heightened by the fact that Walder went out of his way to insult their identity as gay men by admonishing them that it was not too late to change their "unseemly" relationship with each other and describing their love for one another as "vi[le] affections" based on "lust" and "against nature." (Tr. at pg. 24) In this regard, Complainants insist that an award of emotional damages is appropriate because the record shows that: (1) Walder's conduct and words demonstrated an overt discrimination based on their sexual orientation; (2) they reasonably believed that Walder's words and biblical references constituted an attack on their identity as gay men; and (3) they suffered humiliation, hurt and fear as a result of Walder's conduct.

The Human Rights Act specifically provides for "actual damages" that may be awarded as a remedy to a prevailing complainant (775 ILCS 5/8-104(B)), and the court in *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission*, 184 Ill.App.3d 339, 541 N.E.2d 1248, 1258, 133 Ill.Dec. 810, 820 (1st Dist., 3rd Div. 1989), expressly included emotional harm and mental suffering within its interpretation of "actual damages" as that term is contemplated under the Human Rights Act. According to the Commission's decision in *Davenport and Hennessey Forrestal Illinois, Inc.*, IHRC, ALS No. 3751, November 20, 1998, cases qualifying for an award of "emotional [distress] damages are very much the exception, [and] not the rule" because the mere existence of a "civil rights violation, without more...is insufficient to support an award for emotional damages." (See, *Davenport,* slip op. at pg. 11.) Indeed, the Commission has approved recommended awards of zero emotional distress damages in some types of discrimination claims, especially where there is evidence that the complainants were suffering from an unrelated emotional distress at the time of the discriminatory act. (See, *Kauling-Schoen and Silhouette American Health Spas*, IHRC, ALS No. 2918M, February 8, 1993.) Thus, in order to obtain an award for emotional distress, the Commission has required a complainant to make it "absolutely clear" that the recovery of his readily quantifiable pecuniary losses will not sufficiently compensate him for the civil rights violation. (*Davenport,* slip op. at p. 12.) Here, it would seem that an emotional distress award is

potentially apt because Complainants' claim for emotional distress damages is the only financial claim at issue in this case.

But if so, how much is this case worth? Complainants have referred to a few Commission cases in which emotional distress damages have fluctuated between $6,500 (*Porter*) and $15,000 (*Kilpatrick and Lifetime Fitness, Inc.*, IHRC, ALS No. 05-011, April 27, 2005) arising out of various refusals of respondents to provide services in establishments that qualified as places of public accommodations under the Human Rights Act. However, Complainants focus their emotional distress claim on a recent case out of Oregon (*In the Matter of: Sweetcakes by Melissa,* Oregon Bureau of Labor and Industries, Case Nos. 44-14, 45-14, July 2, 2015, hereinafter referred to as "Sweetcakes"), where an Oregon agency awarded $75,000 and $60,000 in emotional distress damages to a lesbian couple under circumstances where a wedding cake-maker refused to make a wedding cake on the basis of the couple's sexual orientation under circumstances where the cake-maker orally referred to a biblical passage[1] as a reason for the denial of the cake request.

Admittedly, there are some parallels between both cases, especially where Mark and Todd testified that they were disturbed by Walder's communicated belief that homosexuality is wrong and unnatural based upon his interpretation of the Bible. (Tr. at pgs. 21, 53 and 54) However, the Oregon agency noted that at least one of the plaintiffs had apparently bought into the religious argument set forth by the cake-maker, since that plaintiff had testified that the cake-maker's use of the term "abomination" meant to her that: (1) God made a "mistake" with her; (2) because of her sexual orientation, she was not supposed to exist; (3) she had no right to love or be loved; and/or (4) she had no right to have a family or go to heaven. (*Sweetcakes*, slip op. at pg. 20) In this regard, *Sweetcakes* is distinguishable since, although both Mark and Todd were disturbed about Walder's biblical justification for his refusal to host a same-sex, civil union ceremony, neither witness believed they were actually "vile" or "unseemly" individuals simply

[1] The biblical passage cited by the cake-maker was different than the biblical passage cited by Walder. Specifically, the cake-maker, in referring to Leviticus 18:22, told one of the plaintiffs: "You shall not lie with a male as one lies with a female; it is an abomination."

because of the language in the Bible text cited to them by Walder. Indeed, Todd stated the exact opposite, when he testified that: "I am happy with who I am" (Tr. at pg. 25), and "I am who I am, and, you know, I do believe in God and I don't think God makes mistakes." (Tr. at pg. 24)

Other factual/legal differences between *Sweetcakes* and the instant case preclude a finding that Complainants are entitled to a similar award for emotional damages. Specifically, unlike the Illinois Human Rights Act, the applicable Oregon law provides a separate cause of action against business owners, who, while acting on behalf of a place of public accommodation, publish an intent to discriminate on the basis of sexual orientation, and the opinion in *Sweetcakes* reflects that a portion of the emotional distress awards was based on such a violation. Moreover, one of the plaintiffs in *Sweetcakes* testified that: (1) after the cake-maker had briefly posted a copy of the her complaint on his Facebook page, she received a telephone call from a local conservative radio talk show host, who had already spoken to the cake-maker about her complaint and wanted her to give her side of the story; and (2) she was greatly distressed that potential publicity about the case would threaten their pending contested adoption of two special needs children, because certain adoption officials had previously indicated that they would have to "re-address" the placement of the children if any information about the children were to become public. (*Sweetcakes*, slip op. at pg. 21) Also, one of the plaintiffs asserted that: (1) she experienced distress by reading "hate-filled" comments posted through social media and in comment sections of various websites that were supportive of the cake-maker and critical of her position in her complaint; and (2) such criticism was also lodged by a sister of one plaintiff and by an aunt of the other plaintiff, who allegedly threatened to shoot said plaintiff in the face if she ever set foot on family property again.

However, neither of our Complainants testified to experiencing either unwanted notoriety arising out of the prosecution of this case or to "hate-filled" speech by members of the general public that was critical of their lifestyle. They also did not cite to any instance where publicity about the instant Complaints had a negative collateral consequence with members of their family. Furthermore, Complainants made no claim that a close relative threatened them with

physical violence either because of their gay lifestyle or because they had sued Respondent over the denial of services. Instead, the instant record shows that Walder communicated his denial of service in a private manner, and, as far as this record shows, did not take to the airwaves or social media to air his dispute with our Complainants. Furthermore, Todd's testimony, that his and Mark's family members were "very supportive" of their relationship (Tr. at pg. 17), and that his family members, including his children, were "very happy for us" (*Id.*), seemingly takes this case outside the contours of the emotional distress experienced by the plaintiffs in the *Sweetcakes* decision.

Finally, there is a wildcard in this case that makes this case distinguishable from the *Sweetcakes* matter. Specifically, Respondent's counsel was able to elicit from Todd the fact that a different bed and breakfast (Beall Mansion) had turned down their prior request to host their same-sex civil union ceremony, and the Commission's records show that Complainants had filed a similar charge of discrimination against Beall Mansion (on the same day that they filed two charges of discrimination against Respondent), which they ultimately settled for an undisclosed amount of money.[2] Indeed, the records kept by one of Complainants' attorneys (Ms. Tsamis) strongly indicate that she was already performing tasks on behalf of Complainants associated with the filing of a charge of discrimination against Beall Mansion prior to the time that Todd had approached Walder about hosting a same-sex, civil union ceremony.[3]

Thus, Complainants' actions with respect to the prosecution of their claim against Beall Mansion briefly suggest that both of our Complainants could be mere "testers" who would not be particularly upset by any denial of their requests to host a same-sex civil union ceremony, because, as testers, their requests for a same-sex, civil union ceremony were made with an

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[2] See, Wathen and Beal Mansion Bed and Breakfast, ALS Nos. 11-0705 and 11-0707.

[3] Although Todd and Mark denied that they had contacted any attorney prior to Walder's email on February 15, 2011 (Tr. at pgs. 35, 36, 52 and 53), Tsamis indicated in the instant fee petition that on February 11, 2011 she had "reviewed intake notes with clients; reviewed applicable IDHR procedures; reviewed applicable law; [and] analyzed potential claims under IHRA." Moreover, it is unlikely that the February 11, 2011 entry is mere a typographical error, since she also indicated that on February 14, 2011 she had begun "drafting [a] charge of discrimination and IDHR filing packet" that could only have been done with respect to Complainants' claims against Beall Mansion.

expectancy that some establishments would deny their requests. Indeed, in examining Todd's direct testimony, one would never have known that there had been a prior denial, given his statement that they were (still) very excited about the prospect of having a same-sex, civil union ceremony at the time they made the decision on February 14, 2011 to inquire about the use of Respondent's facility. (Tr. at pg. 17-18) However, I quickly dispensed with the notion that Complainants were mere testers since: (1) both individuals seemed genuine on the witness stand regarding their intent to have a same-sex, civil union ceremony near the day that such ceremonies were permitted under Illinois law; (2) Complainants stopped making inquiries after only the second refusal; and (3) unlike some testers who never intend to follow through on their requests, both Complainants actually went through and had a same-sex, civil union ceremony.

Still, if Complainants are to receive any emotional damages award in this case, they have to establish that Walder aggravated any existing injury that had been generated through the recent denial by Beall Mansion of their similar request to host a same-sex, civil union ceremony. In this regard, Todd rather unhelpfully testified on cross examination that although he would be upset after each denial of a request to host a same-sex, civil union ceremony, being turned down by "one or two isn't going to make a difference." (Tr. at pg. 37) Thus, although a prior denial by a different establishment might explain why Complainants did not go through the same process and perhaps endure a similar outcome with a third establishment, Todd never did explain why he would be asking for any emotional damage award in this case if: (1) being turned down by one or two establishments "isn't going to make a difference;" and (2) Complainants had already received some sort of compensation arising out of their settlement of the Beall Mansion cases. The answer to this problem, though, must be in how Walder communicated his refusal to host a same-sex, civil union ceremony that would distinguish the circumstances of this case from the refusal at issue in the Beall Mansion cases.

In this respect, Walder had three options at the time Todd first emailed him with his inquiry on February 15, 2011 as to whether Respondent would be hosting same-sex, civil union ceremonies. Specifically, he could have said: (1) "no," without any explanation; (2) "no" with a

general reference to his religious beliefs; or (3) "no" with a citation to a biblical passage that condemns the gay lifestyle. True enough, Walder began the process of communicating his decision by merely stating "no" in his first responsive email without a clarification as to why he was refusing Todd's request. If he had left it at that, I would agree that Complainants would be unable to obtain any significant amount of emotional damages under the standards set forth by the Commission. However, Walder did not just leave it alone at a bare denial and purposefully went out of his way in subsequent emails to communicate to Complainants his disapproval of their gay lifestyle by citing to a biblical verse to back up his opinion, as well as registering his intention to discriminate against them and others because of his belief that homosexuality is "wrong" and "unnatural" based upon what the Bible says about the topic.[4] To be sure, Walder denied in his testimony that he was personally calling Complainants "vile" when the "vile affections" phrase appeared in his February 18, 2011 email. (Tr. at pg. 68) Yet, he certainly was aware that such a reference could be hurtful to Todd, since he starts off his February 18, 2011 email with the phrase: "I know you may not want to hear this[.]"

As such, I find in light of all of the above that Complainants are entitled to emotional damages at the higher end of what the Commission has awarded in the past, i.e., $15,000 for each Complainant, based upon: (1) the understandable emotional pain they endured after being told by Walder that they would not be given equal treatment as others seeking a venue to celebrate an important event in their lives; and (2) on their unrebutted testimonies that (whatever happened with their encounter with Beall Mansion) they were in a good frame of mind at the time Todd sent his initial February 15, 2011 email to Walder until Walder refused their request through a series of emails. This award is especially apt given the fact that Walder, in refusing Complainants' request to host a same-sex, civil union ceremony, went out of his way to make a statement about their lifestyle in a manner that he knew would be upsetting to Complainants. Moreover, while I will take Walder at his word that the "great commission" of his religion requires that he inform Complainants or anyone else about the teachings of the Bible,

[4] See, Walder's February 15, 2011 footnote dated "09:27:54"

this obligation necessarily has a cost to him if his unsolicited message generates an emotional distress on the person receiving his message.

Indeed, Respondent's counsel acknowledged as much in his opening statement, when he asserted that all Respondent was attempting to do was to show "love" for our Complainants, even though "sometimes love can be tough [and] can be disagreeable." (Tr. at pg. 10) Yet, Complainants never came to Walder seeking his advice on their lifestyle, but rather sought out Walder only on a secular matter having to do with the renting of a space to conduct their same-sex, civil union ceremony. Indeed, as Todd stated during the public hearing: "we didn't go to a church and ask to be married, we went to a business, and...thought the business would follow the law." (Tr. at pg. 25) Walder's testimony that he would continue to violate the provisions of the Human Rights Act that prohibit discrimination based on sexual orientation when it comes to individuals seeking same-sex, civil union and marriage ceremonies provides additional grist for a finding that Walder's conduct towards Complainants was outrageous.

With respect to other remedies at issue in this case, I agree with Complainants that Respondent should be the subject of an order that directs it to cease and desist from violating the Human Rights Act by denying same-sex couples access to its facilities and services for their civil union ceremonies, or for that matter legal marriages, where, as here, Walder expressed an intent not to abide by the Human Rights Act when it comes to requests for same sex-civil union ceremonies or marriages. Moreover, where section 8A-104(E) of the Human Rights Act (775 ILCS 5/8A-104(E)) contemplates the entry of an order directing Respondent to "admit [Complainants] to a public accommodation," I will require that, within a year after the instant decision becomes final, Respondent make its facilities available to Complainants (at their option and expense) for some sort of ceremony that celebrates their civil union under the various packages (and prices) offered by Respondent in February of 2011.

With respect to their petition for fees and costs, Complainants contend that their seven attorneys expended a total of 981.20 hours at rates that vary between $170 to $475 per hour.[5] In addition, Complainants' lead counsel at the damages hearing (John Knight) wrote off all time provided by five other attorneys who collectively spent an additional 77 hours providing legal services on behalf of Complainants. In their petition, Complainants' counsel have attached affidavits indicating that all of the respective hourly rates were in accordance with what others with similar experience in the Chicago legal market charge for their services, and I would note that Respondent has not filed a response to the instant petition. Thus, in view of the lack of any objection, I find that the instant hourly rates sought by Complainants' counsel are reasonable. With respect to the number of hours spent on the instant matter, it would seem that the roughly 1,000 hours spent by seven attorneys for a case that never reached a hearing on liability is a bit excessive, and Complainants have offered to reduce their claim of $340,228.75 in fees to a total of $50,000. This roughly eighty-five percent reduction in total fees is certainly reasonable, even when the five hours that Tsamis devoted to Complainants' claims against Beall Mansion are deducted, and again, Respondent has not filed an objection to Complainants' proposal. As such, I will award Complainants a total of $50,000 in attorneys' fees and leave it up to Complainants to divide the fee award among their attorneys. The same ruling applies to Complainants' request for $1,218.35 in costs, to which Respondent has not filed an objection. Complainants have not sought any other remedies in their brief, and thus no other remedy will be recommended.

Recommendation

Based on the forgoing, I recommend that:

1. Respondent pay each Complainant $15,000, which represents damages for the emotional distress arising out its refusal to host their same-sex, civil union ceremony;

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[5] Actually, some of Complainants' counsel asserted greater hourly rates in their affidavits (i.e., Clay Tillack's hourly rate was $702.29, instead of the $475 per hour, Tal Chaiken's hourly rate was $335 per hour, instead of $225 per hour, and Robert Middleton's hourly rate was $375, instead of the $170 per hour) than what was sought in the instant fee petition.

2. Respondent be directed to cease and desist from violating the Human Rights Act by discriminating on the basis of sexual orientation when denying same-sex couples access to its facilities and services for their civil union ceremonies and/or marriages;

3. Within one year after this decision becomes final, Respondent be directed to grant Complainants access to its facility by hosting (at Complainants' option and expense) a ceremony celebrating Complainants' civil union under one of the wedding packages and prices offered by Respondent in February of 2011;

4. Respondent pay Complainants $50,000 in attorneys' fees;

5. Respondent pay Complainants $1,218.35 in costs.

HUMAN RIGHTS COMMISSION

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

ENTERED THE 22ND DAY OF MARCH, 2016

STATE OF ILLINOIS)
) ss
COUNTY OF SANGAMON)

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

AFFIDAVIT OF SERVICE

Samantha Judd, being first duly sworn, on oath states that on March 22, 2016, she served a copy of the foregoing **RECOMMENDED ORDER AND DECISION** on each person named below by depositing same in the U.S. Mail Box at the Stratton Office Building, Springfield, Illinois properly posted for first class mail, addressed as follows:

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BY U.S. MAIL TO:

BETTY TSAMIS
TSAMIS LAW FIRM, P.C
1509 W BERWYN, SUITE 201E
CHICAGO, IL 60640

JOHN KNIGHT
HARVEY GROSSMAN
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 NORTH MICHIGAN AVE, SUITE # 2300
CHICAGO, IL 60601

CLAY A TILLACK
SCHIFF HARDIN LLP
233 SOUTH WACKER DRIVE, SUITE 6600
CHICAGO, IL 60606

JASON CRADDOCK
19 S LASALLE, SUITE 604
CHICAGO, IL 60603

BY INTEROFFICE MAIL TO:

NGOZI OKORAFOR
CHIEF LEGAL COUNSEL
ILLINOIS DEPT OF HUMAN RIGHTS
100 W RANDOLPH ST SUITE 10-100
CHICAGO IL 60601

DONYELLE GRAY
GENERAL COUNSEL
ILLINOIS HUMAN RIGHTS COMMISSION
100 W RANDOLPH ST SUITE 5-100
CHICAGO IL 60601

(SIGNATURE OF AFFIANT)

Subscribed and sworn to before me
this 22nd day of March, 2016.

NOTARY PUBLIC

OFFICIAL SEAL
GAIL A KRUGER
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:06/22/16