STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MEGGAN SOMMERVILLE,	)	
	)	Charge No.: 2011CN2993
Complainant,	)	2011CP2994
	)	EEOC No.: N/A
and	)	ALS No.: 13-0060C
	)	
HOBBY LOBBY STORES, INC.,	)	
	)	
	)	
Respondent.	)	

ORDER

This matter comes before the Illinois Human Rights Commission (the *"Commission"*) pursuant to a Supplemental Recommended Order and Decision ("*SROD"*) by Administrative Law Judge William J. Borah (*"ALJ Borah"*) that was issued on October 4, 2017, the Complainant's Exceptions to the SROD, the Respondent's Exceptions to the SROD, and each party's Response.

WHEREFORE, IT IS HEREBY ORDERED THAT:

The Commission **DECLINES** review of the Complainant's and Respondent's exceptions in the above-captioned matter. The SROD entered on October 4, 2017 has become the order of the Commission.

I. Nature of the Case

Megan Sommerville (the *"Complainant"*), a transgender female, has worked for Hobby Lobby Stores, Inc. (the *"Respondent"*) since July 1998. In 2007, Complainant began the medical process of transitioning from male to female. Additionally, Complainant removed the male name from her employee nametag. Respondent changed Complainant's personnel records and benefits information to identify her as a woman. Complainant began to appear at work in traditionally feminine dress and make-up and Respondent's employees and managers referred to Complainant by her new, chosen name. In 2009, Complainant underwent medical treatment at Howard Brown Health Center which resulted in her receiving female secondary sex characteristics, including breasts and the removal of facial hair.

On July 9, 2010, Complainant notified Edward Slavin, store manager, of her intent to use the women's restroom. Slavin denied the request and told Complainant that she had to produce evidence that she legally changed her sex or binding legal authority which mandated that Respondent allow her to use the women's restroom.

Subsequently, Complainant legally changed her name to "Meggan Renee Sommerville" and obtained a social security card with her new name. Complainant produced to Anna Lee Miller, Respondent's Human Resources Specialist, a copy of the Illinois Human Rights Act, copies of her new driver's license and social security card, and proof of her court ordered name change. Complainant also provided a letter from the Clinic Director at Howard Brown Health Center which stated that

Complainant is a transgender female, described her transition process, and supported Complainant's use of the women's restroom. After several months, Respondent still denied Complainant's request to use the women's bathroom.

Complainant began using the women's restroom at nearby businesses. On occasions when she could not make it to another business, she would use Respondent's women's restroom. On several occasions, Respondent disciplined Complainant for using its women's restroom, including issuing Complainant a written warning on February 23, 2011. Furthermore, Adam Woolridge, Respondent's District Manager, instructed other employees to report Complainant if they observed her enter the women's restroom.

Respondent later told Complainant that she could use the women's restroom if she produced proof of surgery. In 2014, Respondent told Complainant that she could use the women's restroom if she produced a revised birth certificate.

On February 28, 2013, Complainant filed two separate complaints with the Commission alleging that Respondent discriminated against her because of her sexual orientation, related to gender identity, by refusing to allow her to use the women's restroom. One complaint was brought under the employment provision of the Illinois Human Rights Act. The second complaint was brought under the public accommodations provision. The cases were consolidated on May 23, 2015.

II. Commission Proceedings

The parties filed cross motions for summary decision and the Illinois Department of Human Rights filed an opposition brief to Respondent's motion. The case was assigned to Administrative Law Judge William J. Borah (*"ALJ Borah*). On May 15, 2015, ALJ Borah issued a Recommended Liability Decision (the *"RLD"*) in which he concluded that Respondent violated both the employment and public accommodations provisions of the Act. After a damages hearing, ALJ Borah issued a Recommended Order and Decision (*the "ROD"*) in which he recommended, among other relief, an award to Complainant of $220,000 for emotional distress damages.

ALJ Borah considered several factors in determining the emotional distress award. He recommended found that Respondent caused Complainant's emotional distress, that the discrimination continued for several years, and that Respondent was aware of Complainant's emotional distress. ALJ Borah also found that Respondent's preconditions for Complainant to use the women's restroom (legal authority, surgery, birth certificate) were, "disingenuous and a pretense to obstruct, delay, and frustrate."

ALJ Borah found that Respondent subjected Complainant to intimidation and embarrassment by monitoring her bathroom usage and issuing discipline when she used the Respondent's women's restroom. ALJ Borah found Complainant's testimony credible that she suffers daily anxiety about using the bathroom and fears for her safety when she must use the men's restroom.

He then concluded that Complainant suffered long, and continuous emotional distress and the Respondent was, "liable for the distress, anguish, anxiety, humiliation, fear, and embarrassment caused by its ongoing entrenched policy of banning Complainant, as well as the delay, threats, and intimidation that accompanied Respondent's discriminatory behavior, and enforcement of it. ALJ Borah then recommended an award of $220,000 for emotional distress damages.

Both parties filed exceptions to the ROD. On July 28, 2017, the Commission issued a Remand Order which adopted in part and did not adopt in part ALJ Borah's ROD. The Commission adopted ALJ

Borah's finding that Respondent violated the Act. The Commission did not reject the ALJ's finding that Complainant is entitled to some award for emotional distress but found that the ROD lacked specificity regarding the factual basis for his conclusion that an emotional distress award of $220,000 is reasonable. The Commission then remanded the matter to the Administrative Law Section, "solely for the purpose of further findings and recommendations on the issue of the appropriate amount of the emotional distress damages award…"

On October 4, 2017, ALJ Borah entered a Supplemental Recommended Order and Decision to address the issue on remand. ALJ Borah incorporated his findings of fact from the RLD and ROD and made the following additional findings:

1. After Complainant submitted the documents that made up the legal basis for her request, she contacted Miller five or six times over several months, with no response.
2. Because of the ban, Complainant had to "structure her life around the bathroom."
3. Complainant had recurring dreams of being assaulted or ridiculed by men in restrooms.
4. To limit her bathroom trips, Complainant monitored her fluid intake which led to dehydration, headaches, fatigue, muscle cramps, and gastric problems.
5. Complainant sought mental health treatment at Howard Brown Health Center.
6. Complainant felt "segregated" after Respondent built a unisex restroom in December 2013.
7. Multiple individuals observed the Complainant was upset or emotional when discussing work or her inability to use the women's restroom.
8. Respondent's request that Complainant change her birth certificate was a "known impossibility" in the State of Illinois at the time.

ALJ Borah found that Respondent was aware of Complainant's weakened emotional state from the time it denied her request to the present. He found the Respondent observed her oral and written requests, protests, crying, and restroom maneuvering. He then found that Complainant's physical pain, humiliation, anguish, and worry were "caused by, and then used by Respondent in its systematic ploy and managerial strategy against her." ALJ Borah summarized his basis for the emotional distress award by stating:

> "Cumulatively, the conduct of Respondent was so malicious, continuous, and purposeful as to rise to the level beyond the bounds of tolerable behavior. It justifies a substantial award to compensate Complainant for her emotional damage…Respondent is liable for the distress, anguish, anxiety, humiliation, fear, and embarrassment Complainant suffered every day due to Respondent's intentional acts. As in Windsor, Respondent still has not acknowledged its discriminatory behavior, which compounds the damages."

ALJ Borah then confirmed his original recommendation of $220,000 for emotional distress damages.

III. Standard of Review

Upon review of Exceptions to a ROD, "the Commission must uphold the factual findings of the Administrative Law Judge unless they are against the manifest weight of the evidence. Under this manifest weight standard of review, it is not the Commission's function to substitute its judgment as to findings of fact or witness credibility…. It is not the Commission's function to reweigh the evidence…or

to make independent determinations of fact…" Clarence Archibald and State of Illinois, Department of Corrections, IHRC, ALS No. 2638, 1992WL721940, *3 (September 16, 1992).

IV. Exceptions and Responses to Supplemental Recommended Order and Decision

A. Complainant's Exceptions to the Supplemental Recommended Order and Decision

On November 1, 2017, Complainant filed its Exceptions to the SROD. Complainant argues that she is entitled to prejudgment interest and that her damages should be calculated from the date of the ROD until Respondent allows Complainant to use the women's restroom.

B. Respondent's Response to Complainant's Exceptions

On November 17, 2017, Respondent filed its Response to Complainant's Exceptions to the SROD. Respondent asserts that Complainant misused the exceptions process by failing to challenge the ALJ's ruling in the SROD and by requesting relief that Complainant should have sought in its Exceptions to the ROD.

C. Respondent's Exceptions to the Supplemental Recommended Order and Decision

On November 17, 2017, Respondent filed its Exceptions to the Supplemental Recommended Order and Decision. Respondent first argued that ALJ Borah mischaracterized its position when he concluded that Respondent was giving Complainant the "run around" when asking her to provide proof of legal authority, surgery, or changed birth certificate to support her request. Respondent asserts that its position has been consistent that Complainant had to demonstrate having legally changed sex or provide binding legal authority requiring Respondent to provide Complainant with access to the women's restroom.

Respondent went on to provide three arguments in support of its contention that the emotional distress award was unreasonable. First, Respondent argued that the award was not supported by the evidence in the record. Respondent argues that ALJ Borah did not provide evidentiary support for the award, but provided a biased, one-sided narrative in Complainant's favor. Respondent noted that ALJ Borah ignored testimony of four of Respondent's witnesses, failed to conduct remand proceedings, and failed to cite to any record evidence in support of his conclusion.

Second, Respondent argues that ALJ Borah's decision is not supported by Commission precedent. Respondent asserts that the Commission has never granted more than $120,000 in emotional distress damages. Respondent goes on to compare several Commission cases in which Respondent asserts the discrimination was of comparable nature and duration, but the Complainants received less damages than ALJ Borah proposes.

Finally, Respondent argues that ALJ Borah failed to address whether Complainant sufficiently proved that Respondent caused her emotional distress, and that he just assumed that Respondent was the cause. At the damages hearing, Complainant testified to several ongoing stressful events including her troubled marriage, divorce, suicide attempt, issues with her children, and dire financial circumstances. Respondent asserts that ALJ Borah erred in failing to mention these issues and considering whether one or more was the cause of Complainant's emotional distress.

D. Complainant's Response to Respondent's Exceptions

On December 7, 2017, Complainant filed its Response to Respondent's Exceptions to the Supplemental Recommended Order and Decision. First, Complainant disputes Respondent's contention that ALJ Borah did not cite to the evidentiary record and lists multiple sections of the SROD in which ALJ Borah referred to the testimony of both parties' witnesses and to documentary evidence, such as Complainant's letters to Respondent's management.

In response to Respondent's argument regarding precedent, Complainant cited ISS International Service System, Inc. v. Illinois Human Rights Commission, 272 Ill.App.969 (1st Dist. 1995), for the proposition that there is no limit on the amount of noneconomic damages that may be awarded under the Act. Complainant distinguishes many of the cases cited by Respondent in its Exceptions to the SROD; and Complainant also notes that in one of the cases cited by Respondent, Windsor Clothing Store v. Illinois Human Rights Commission, the Appellate Court rejected citing past cases of the Commission with lower damages to decide excessiveness of the current award.

Finally, Complainant argues that she sufficiently proved that Respondent's actions were the cause of her emotional distress. Regarding the other possible sources of emotional distress, Complainant argues that it is, "a settled principle that the perpetrator of a civil rights violation takes its victim in the condition which he or she is found," citing several cases to support its argument that her additional stress does not limit or mitigate her damages.

Discussion

Complainant's Exceptions

The Commission finds that the Complainant's Exceptions are not persuasive. Complainant does not raise any exceptions to ALJ Borah's recommended emotional distress award but argues that Complainant is entitled to prejudgment interest and additional relief as Respondent has continued to prohibit Complainant from using the women's restroom. Under the Commission's Procedural Rules, a party may, "file with the Commission written exceptions, supported by argument, to the ***findings and recommended order*** of the Administrative Law Judge." 56 Ill. Admin. Code § 5300.920 (emphasis added). Here, the only issue on remand to ALJ Borah was the factual basis for his recommended emotional distress award. As a result, ALJ Borah made no findings or recommendations in the SROD on the issue of prejudgment interest or additional relief. The Commission finds that Complainant did not raise any exceptions to the findings or recommendation in the SROD and that the Commission resolved the issue of other forms of relief in its Remand Order. For these reasons, the Commission declines to review Complainant's Exceptions. It should be noted, however, that the Commission is not reaching a conclusion on Complainant's entitlement to additional relief or prejudgment interest; only that these issues are outside of the scope of the Commission's Remand Order.

Respondent's Exceptions

The Commission finds that Respondent's exceptions are not persuasive. The probative factors in determining the amount of an emotional distress award in a totality of the circumstances analysis are the nature of the violation that caused the injury, its effects, the injury itself, and the duration of the suffering experienced by the complainant. See ISS International v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E. 2d 592 (1st. Dist. 1995). In the SROD, ALJ Borah addressed these factors and found that Respondent caused the emotional distress, that Complainant was subjected to discrimination every day for over five years, that Complainant had to alter her life around her bathroom usage, that Complainant suffered physical and emotional distress, that Respondent observed Complainant's distress, and that Respondent used discipline and changed its requirements to prevent Complainant from using the women's restroom.

As to the issue of precedent, ALJ Borah noted in his SROD that determining the amount of an award is an "act of judgment and discretion." Furthermore, there is no statutory damage cap. The appellate court has merely instructed the Commission to keep emotional distress awards within "reasonable parameters." Kuhlman and the Korner House, IHRC, ALS No. 9696, November 24, 1997. Furthermore, the Appellate Court was clear in Windsor, that ALJ Borah is not bound to recommend an award that is in line with prior cases. See Windsor Clothing Store v. Illinois Human Rights Commission, 2015 IL App (1st) 142999, 41 N.E.3d 983 (1st Dist. 2015). So, even though ALJ Borah's recommended award is unprecedented, the lack of precedent is not a sufficient basis for the Commission to reverse or modify the award.

Under the manifest weight standard, the Commission must grant deference to ALJ Borah's findings of fact. Here, ALJ Borah made several findings regarding the duration of Complainant's suffering, the burden of Respondent's refusal to allow her to use the women's' restroom, and the physical and emotional effects of that refusal on Complainant. In its Exceptions, Respondent argues that ALJ Borah did not consider evidence or favored Complainant's testimony over Respondent's witnesses. However, it is the role of the Administrative Law Judge to make findings of fact and determine witness credibility. Respondent's Exceptions lack sufficient detail to persuade the Commission that the ALJ's findings are against the manifest weight of the evidence. For these reasons, the Commission sees no basis to reverse or modify the SROD.

THEREFORE, IT IS HEREBY ORDERED:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Supplemental Recommended Order and Decision, entered on **October 4, 2017** has become the Order of the Commission.

2. This Order is final and appealable.

STATE OF ILLINOIS)
) **Entered this 10th day of April 2019.**
HUMAN RIGHTS COMMISSION)

Interim Chair Cheryl Mainor

Commissioner Michael Bigger

Commissioner Patricia Bakalis Yadgir

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MEGGAN SOMMERVILLE,	)	
	)	
Complainant,	)	**Charge Nos.: 2011CN2993**
	)	**2011CP2994**
	)	**EEOC No.: N/A**
	)	**ALS No.: 13-0060C**
HOBBY LOBBY STORES,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED LIABILITY DETERMINATION

This matter comes to be heard on the parties' cross motions for summary decision. Both parties filed responses and replies. The Illinois Department of Human Rights filed an opposition brief to Respondent's motion. The matter is ready for decision.

The Department is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following material facts were derived from uncontested sections of the record. The findings did not require, and were not the result of, credibility determinations.

1. On February 28, 2013, Complainant, Meggan Sommerville, filed two separate complaints with the Illinois Human Rights Commission against Respondent, Hobby Lobby Stores. One complaint cited Article 2 of the Illinois Human Rights Act, employment, and the second, Article 5, public accommodation. Both complaints named sexual orientation discrimination, related to gender identity, as the protected class. The cases were consolidated on May 23, 2013.

2. In July 1998, Respondent hired Complainant as an employee. In 2000, Complainant was transferred to Respondent's East Aurora store, No. 237.

3. Complainant was present on Respondent's premises both as an employee and as a customer. The general public and employees utilize the store's restrooms, which are designated by gender.

4. Since 2007, Complainant implemented a procedure toward transitioning from male to female. In 2009, Complainant had medical treatment from health care providers and other services at Howard Brown Health Center, which resulted in female secondary sex characteristics, including breasts and absence of facial hair.

5. Complainant is a transsexual who presents and identifies as female.

6. In February 2010, Complainant removed the male name from her employee nametag, without objection from Respondent, as not to confuse the customers with the noticeable physical manifestations of the transition.

7. On July 9, 2010, Complainant formally informed Respondent through Edward Slavin, store manager, of her male to female transition and her intent to use the women's restroom.

8. Respondent changed Complainant's personnel records and benefits information to identify her as female. Complainant appears at work in feminine dress and make-up. Employees and employers refer to Complainant by her chosen female name.

9. However, Respondent did not consent to Complainant's use of the store's designated women's restroom, until Complainant produced legal authority mandating its use to her.

10. On July 12, 2010, Complainant had her name legally changed to "Meggan Renee Sommerville," by order of the Circuit Court of Kendall County, Illinois.

11. On July 29, 2010, the State of Illinois issued its driver's license identifying Complainant as female.

12. In July 2010, Complainant obtained a new social security card with her female name.

13. In July 2010, Complainant produced to Anna Lee Miller, Respondent's Human Resources Specialist, a copy of the Illinois Human Rights Act, related statutes from Iowa and Colorado, a copy of her revised Illinois driver's license, her social security card, and her court ordered name change. The material submitted also included a letter dated July 21, 2015, from Kristin Koglovitz, Clinic Director of Howard Brown Health Center, who identified and verified Complainant as a female transgender individual, described the transition process, and advocated Complainant's use of the women's restroom at Respondent's store.

14. On July 30, 2010, Miller instructed Complainant to communicate with Respondent's legal office and, despite the information submitted, she was not permitted to use the women's restroom.

15. Complainant used the women's facilities at nearby businesses.

16. On February 23, 2011, Complainant was given a written warning for entering Respondent's women's restroom.

17. During the course of litigation, Respondent changed its precondition for the use of the women's facilities from producing legal authority to surgery. In 2014, Respondent modified its condition option to changing her birth certificate.

18. In December 2013 or January 2014, Respondent had built a "unisex" restroom for Complainant's use.

19. As of this Recommended Liability Determination, Complainant is still not permitted to use Respondent's women's restroom facilities as an employee or customer.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. Complainant established direct evidence of sexual related identity discrimination by Respondent preventing Complainant's access and use of the women's restroom at Respondent's store.

DISCUSSION

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Human Rights Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove her case as if at a hearing, the non-moving party must provide some factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on her pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill.App.3d at 392, 642 N.E.2d at 490. Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to her case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist.1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

Summary of Issues

Complainant is a transsexual, who presents and identifies as female, was and is denied access to Respondent's women's restroom at its store, both in her capacity as an employee and a customer. Complainant alleges such disparate treatment is contrary to the Act in terms and conditions of Complainant's employment and a denial of the full and equal enjoyment of a public accommodation.

Respondent contends the Act does not require it as an employer or as a public accommodation to permit Complainant, a transgender person, to use its store's restroom other than the one designated for her birth gender, male, or until she undergoes anatomical surgery.

Act's Interpretation

"The Illinois Human Rights Act is remedial legislation that must be construed liberally to effectuate its purpose." Nuraoka v. Illinois Human Rights Commission, 252 Ill.App.3d 1039, 625 N.E.2d 251 (1st Dist. 1993) citing, Nielsen Co. v. Public Building Commission of Chicago, 81 Ill.2d 290, 410 N.E.2d 40 (1980).

A primary rule of statutory construction is to give effect to the words selected by the General Assembly and its intent. "No word or paragraph should be interpreted so as to be rendered meaningless." Boaden v. Illinois Department of Law Enforcement, 171 Ill.2d 230, 664 N.E.2d 61 (1996); Sangamon County Sheriff's Department v. Illinois Human Rights Commission et al., 233 Ill.2d 125, 908 N.E.2d 39, (2009), citing Wade v. City of North Chicago Police Pension Board, 226 Ill.2d 485, 877 N.E2d 1011 (2008). The best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. Id., citing Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 886 N.E.2d 1011 (2008).

Discrimination Defined

Section 1-102(A) of the Act provides that it is the "public policy" of this State to "secure for all individuals within Illinois the freedom from discrimination against any individual because

of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, *sexual orientation*, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." (Emphasis added.) [1]

Section 1-103 (O-1) of the Act defines "sexual orientation," in pertinent part, as "gender related identity, whether or not traditionally associated with the person's designated sex at birth."

Section 2-102(A) of the Act provides it is a "civil rights violation" for "any employer ...to segregate...discipline ...terms, privileges or conditions of employment on the basis of unlawful discrimination ..."

Section 5-102 (A) of the Act provides it is a "civil rights violation" to "deny or refuse to another the full and equal enjoyment of the facilities... and services of any public place of accommodation."

Statutory Interpretation

Article 2, Employment

Respondent's first statutory argument is that the Act does not address whether a transgender employee has the right to use a restroom other than the restroom associated with the person's sex at birth, "thus, leaving the matter to the employers' discretion." [2]

The opposite is correct; Article 2, employment, is meant to be broad with noted exceptions, which does not exclude the use of restrooms by transsexuals.

Respondent has not revealed any pertinent limitations of Section 2-102(A), Civil Rights Violations relating to Section 1-102(A), Freedom from Unlawful Discrimination or Section 1-103 (O-1), Sexual Orientation, in which sexual related identity is part. As read, sexual related

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[1] All of the statutory classes were purposely cited, as each are equally protected and enforced under the Act.

[2] Respondent cites an Article 5, Public Accommodation, clauses, Section 5/5-102(A) and 5/5-103(B) for its Article 2, Employment, argument; this statutory authority is misplaced.

identity is protected against all statutory employment civil rights violations, "whether or not traditionally associated with the person's designated sex at birth." Id.

There is no special treatment based on sexual orientation here, only the basic treatment of any employee. Section 1-101.1 of the Act. The basic right to use a restroom, as a term and condition of employment, is discussed below.

Significantly, Respondent failed to note that if the legislature wished to limit Article 2, it would have done so under Section 2-104, *Exemptions*. (Emphasis added.) It did not.

Therefore, an employee's rights under sexual orientation, including sexual related identity, is broadly interpreted and protected against all listed civil rights violations. Id.

Article 5 – Public Accommodations

Complainant averred that she was both an employee and customer of Respondent, and that the women's restroom was available to the general public. Respondent does not counter Complainants allegations, and they are accepted as true. Rotzoll, supra.

The interpretation of Article Five is limited to the facts of this case, and the issue before me.

Article 1, General Provisions and Definitions, relate to the entire Act. Thus, Section 1-102 (A), Freedom from Unlawful Discrimination; Section 1-103 (D), Civil Rights Violations; Section 1-103 (O), Sex; and Section 1-103 (O-1) Sexual Orientation, are pertinent to Article 5, Public Accommodation.

It has been established that Respondent is a statutory public accommodation and that it cannot "deny or refuse to another (customer) the full and equal enjoyment of the facilities, goods and services of any public place of accommodation." Section 5-102 (A) Enjoyment of Facilities, Goods and Services.

However, Section 5-103 (B), Facilities Distinctly Private, sets out an exemption to an Article 5 civil rights violation. "Nothing in this Article shall apply to: Any facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower

rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemption based on bona fide consideration of public policy."

Respondent contends that being anatomically correct makes a female, as that was and is Respondent's prerequisite before Complainant could be able to use the women's restroom. However, absence of male genitalia does not make a female, as that could occur by illness or injury.

Moreover, enforcement of Respondent's approach is inherently problematic. Broad customer screening could prove difficult, whether by merely asking the customer if they were transsexual or using a version of "stop and frisk" prior to the facility's use.

Section 1-102(O) reads that "Sex means the status of being male or female." However, the definition of sex must incorporate Section 1-103 (O-1), "gender related identity, whether or not traditionally associated with the person's designated sex at birth." Thus, it is not relevant what the person's sex was at the time of birth. Sex relates to a person's sexual related identity, which is discussed below.

The same reasoning is used to dismiss the third condition of Respondent's prior to Complainant's use of its women's facility. Respondent required Complainant to change her birth certificate to reflect her current sexual identity. Complainant's birth gender is academic and is not relevant here.

Discrimination Standards – Sexual Identity

It is not necessary to discuss *prima facie* elements, as this is a rare case where there is no disagreement as to Respondent's action.

Direct Method of Proof

There are two methods for proving discrimination, direct and indirect. Sola v. Illinois Human Rights Commission, 316 Ill.App.3d 528, 736 N.E.2d 1150, (1st Dist. 2000). Under the direct approach, Complainant must present sufficient evidence, direct or circumstantial, without reliance upon inference or presumption, to allow a trier of fact to decide

that her sexual related identity was a motivating factor in Respondent's alleged adverse act. Id. A review of what an employer did and/or said regarding a particular employment decision is required. Where there is direct evidence of discrimination, it is unnecessary to use the three-part analysis. Catherine Littlejohn and Wal-Mart Stores, IHRC, ALS No. 9929, November 4, 2009.

Direct evidence is unique as "it essentially requires an admission by the decision maker that his actions were based on the prohibited animus...." Davy Cady and Northeastern Illinois University, IHRC, ALS No. 10589, February 1, 2005, quoting Haywood v. Lucent Tech, Inc., 169 F. Supp.2d 890, 907 (N.D. Illinois 2001), citing Radue v. Kimberly Clark Corp., 219 F. 3d 612, 616 (7th Cir. 2000). (A notice for a teaching position required that candidates "need to be minority."); Melvin Osborne and Robert Boudreaux and Steve's Old Time Tap, IHRC, ALS No. S-11225, April 25, 2001. (The reason as to why complainants were directed to leave the tavern was based on race as they were told, "I own this place and you get your Black asses out of here.")

Analysis

The evidence in this case establishes that Respondent's decision forbidding Complainant access and use of its women's restroom violated the Act, under the direct method of proof. Respondent's motive for its decision was and is Complainant's sexual related identity, female, a decision that should have been made irrespective of her designated sex at birth, male. Respondent substantially relied on a prohibited factor in its decision. Lalvani v. Illinois Human Rights Commission, 324 Ill.App.3d 774, 755 N.E.2d 51 (1st Dist. 2001).

"There is no surer way to find out what the parties meant, than to see what they have done." Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No. 10565, August 7, 2000, quoting Brooklyn Life Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877). In this case, the facts are straightforward.

It has been established that Complainant is a transgender woman, acknowledged as such by Respondent in both words and acts. By July 2010, Complainant had been an employee of Respondent for twelve years, and her transition from male to female was advanced and apparent, as she had physical characteristics in conformity with her gender identity.

In July 2010, after Complainant's discussion with the store's manager and as a result of it, Respondent changed Complainant's personnel records and benefits information to reflect her transition to female. Employees and employers referred to Complainant as "Meggan," her chosen female name, and she performed her assigned duties in feminine dress and makeup.

However, Complainant's request for access to Respondent's women's restroom in its store was denied. Instead, Respondent created its first precondition. It demanded from Complainant presentment of legal authority that would mandate it to allow a transgender person the use of a store's designated restroom different from that of the person's birth gender.

In response, Complainant submitted a copy of her court ordered name change, along with a driver's license and a social security card reflecting that change. Moreover, a written medical explanation and verification of her transition from Howard Brown Health Center was submitted, with its recommendation that Complainant be permitted to use Respondent's facility. Finally, a copy of the Illinois Human Rights Act was presented, along with other states' laws on the topic of sexual identity.

Respondent merely directed Complainant to its legal department. To this day, Complainant is being forced to use the restrooms available in other unrelated stores or, since January 2014, a "unisex" restroom. The prohibition is enforced by threat of employment discipline. For example, in February 2011, Complainant received a written warning because of her attempt to use the women's facility.

Other Arguments

The totality of this order addresses the legal authority that mandates Respondent to grant Complainant access to its women's restroom both as employee and customer, but other arguments of significance also were raised.

Respondent added anatomical surgery to the list of preconditions it demanded of Complainant. However, nothing in the Act makes any surgical procedure a prerequisite for its protection of sexual related identity. Therefore, Respondent's unilateral surgical requirement is untenable.

Respondent also raised a concern about a woman employee expressing "discomfort" with Complainant being present in the women's restroom. However, a co-worker's discomfort cannot justify discriminatory terms and conditions of employment. The prejudices of co-workers or customers are part of what the Act was meant to prevent. Raintree Health Care Center v. Illinois Human Rights Commission, 173 Ill.2d 469, 672 N.E.2d 1136, (1996) and Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No.10565, August 7, 2000, (HIV medical condition and loss of customers); Jack Haynes and City of Springfield, Office of Public Utilities, IHRC, ALS No. 7304 (S), April 3, 1998 (unwillingness to be supervised by a black man).

In 2014, Respondent built a "unisex" single use restroom for Complainant, which segregates only her because of her gender related identity, and perpetuates different treatment, contrary to the Act. [3]

Respondent's prohibition and/or segregation of Complainant to a "unisex" restroom is an adverse act and subjects her to different terms and conditions than similarly situated non-transgender employees. Access to restrooms, if available, is a major and basic condition of employment. DeClue v. Central Illinois Light Company, 223 F.3d 434 (7th Cir. 2000) and OSHA, Interpretation of 20 C.F.R. 1910.141 Section (c)(1)(i): Toilet Facilities (April 4, 1998)).

[3] However, the "unisex" restroom may resolve any concern by those who are allegedly uncomfortable by Complainant, by giving them the option of using it.

Therefore, I find that Respondent's decision to restrict Complainant's access to the women's restroom on account of her gender related identity violated the Act as it concerns both employment and public accommodation. I further find that the record contains direct evidence related to both counts of the complaints that the decision was based on the gender related identity of the Complainant.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Complainant is entitled to a recommended order in her favor as a matter of law.

IT IS HEREBY ORDERED:

1. Respondent's motion for summary decision is denied;
2. Complainant's motion for summary decision is granted;
3. A status hearing is set for June 25, 2015, at 10:00 a.m. when a damages hearing date will be set.

HUMAN RIGHTS COMMISSION

BY:_____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: May 15, 2015

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MEGGAN SOMMERVILLE,	)	
	)	
Complainant,	)	**Charge Nos.: 2011CN2993**
	)	**2011CP2994**
	)	**EEOC No.: N/A**
	)	**ALS No.: 13-0060C**
HOBBY LOBBY STORES,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on damages held on September 17, 2015, and September 18, 2015. Both parties actively participated in the evidentiary proceeding and filed post-hearing briefs. On May 15, 2015, a Recommended Liability Determination (RLD) was entered against Respondent, Hobby Lobby Stores, finding it liable for violating the Illinois Human Rights Act, sexual orientation discrimination, related to gender identity. The matter of damages is ready for decision.

The Illinois Department of Human Rights (IDHR) is an additional statutory agency that has issued state actions in this matter. The IDHR is therefore named herein as an additional party of record.

FINDINGS OF FACT

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

1. Complainant suffered, and is continuing to suffer emotional distress, caused by Respondent's intentional and persistent prevention of Complainant's access to its in-store

women's restroom, which is open to female employees and customers, solely because of her sexual identity, female.

2. Mandated use of Respondent's men's restroom has caused Complainant anxiety because of her need for defensive maneuvers prior to entering and fear for her safety once inside. When choosing to leave Respondent's store to use a women's restroom at a nearby restaurant, she has to consider the number of occasions, length of time, and logistics, so as not to negatively affect her employment duties. The construction of the "unisex" restroom by Respondent, in December 2013 or January 2014, further publicly segregated and humiliated Complainant.

3. On or around March 27, 2011, Complainant first retained Betty Tsamis, with offices located in Chicago, Illinois, to represent her before the IDHR.

4. The hourly rate for Betty Tsamis was $400.00.

5. Betty Tsamis logged 22.5 hours of work on this matter.

6. The requested hourly rate for Betty Tsamis was reasonable, but the number of hours expended was excessive. As such, the amount of legal fees for this matter is adjusted to $7,000.00.

7. Complainant retained the firm of Jacob Meister & Associates, located in Chicago, Illinois, to represent her before the Illinois Human Rights Commission. The hourly rate for Katherine Eder was $350.00, and she logged 530.2 hours on this matter. The hourly rate for Jacob Meister was $400.00, and he logged 125 hours. The hourly rate for Paul Fine was $250.00, and he logged 7.6 hours. The hourly rate for Kevin Ejma was $100.00, and he logged 34 hours.

8. The requested hourly rates for the attorneys and the clerk are reasonable. Certain of the hours billed are unreasonable, duplicative, and/or excessive. As such, a deduction in those hours is proper.

9. Complainant has demonstrated that she is entitled to attorneys' fees billed by Jacob Meister & Associates in the amount of $90,000.00 and costs in the amount of $50.00.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter.

2. The May 15, 2015, RLD, is incorporated herein by reference.

3. In accordance with the May 15, 2015, RLD, Respondent is liable for its violations of the Illinois Human Rights Act that prohibit discrimination based on sexual orientation, related to gender identity, in both employment and public accommodation.

4. Complainant has proven by a preponderance of the evidence that she has suffered emotional distress from the actions of Respondent of such magnitude that she is entitled to an award of emotional distress damages.

5. A prevailing complainant may recover reasonable attorneys' fees and costs.

DISCUSSION

Sexual Orientation, as Related to Gender Identity

As a result of the May 15, 2015, RLD, there has been a finding of liability against Respondent. Therefore, it is not necessary to analyze the facts with the elements of the underlying causes of action. Based on the evidence, Complainant sustained actual damages.

Actual Damages

The Act provides for an award of actual damages. Section 5/8A-104(B). Actual damages include "indemnification for inconvenience, mental anguish, humiliation, embarrassment, expenses, and deprivation of Constitutional rights." Ayers and Johnson, IHRC, ALS No. 3375 (K), October 3, 1991, quoting Moorhead v. Lewis, 432 F. Supp. 674 (N.D. Ill. 1977).

Back Wages

It is the Commission's charge to make the prevailing complainant whole. Complainant is eligible for back wages minus income set offs received through other employment during the applicable time period. Clark v. Illinois Human Rights Commission, 141 Ill.App.3d 178, 490 N.E.2d 29 (1st Dist. 1986); Brown and American Highway Technology, IHRC, ALS No.10805, January 2, 2003.

However, Complainant remains employed at Respondent. Because Complainant did not request, nor did she testify, as to any loss of income resulting from the discrimination, Complainant is not entitled to any back wages. Therefore, I recommend no award of back wages.

Out of Pocket Expenses

Complainant lost two days of pay to attend and participate in the public hearing. Complainant earns $15.50 per hour and requested compensation for the 16 hours of lost pay. Therefore, I recommend the out of pocket expenses of $248.00.

Emotional Distress

The Commission has held that if recovery of pecuniary losses will not compensate the complainant for all "actual" damages, an award which is adequate to make up for the emotional distress caused by the respondent's discriminatory conduct is in order. Smith and Cook County Sheriff's Office, Cook County Department of Corrections, IHRC, ALS No. 1077, October 31, 1985.

Complainant alleged she suffered, and is continuing to suffer mental anguish, humiliation, and embarrassment, caused by Respondent's intentional and persistent prevention of her use of the available women's restroom, solely because of her sexual identity, female. Complainant requests an award to compensate her for these on-going injuries.

The burden for the relief sought by Complainant is proof by a preponderance of the evidence. Village of Bellwood v. Illinois Human Rights Commission, 184 Ill.App.3d 339, 541

N.E.2d 1248 (1st Dist.1989); Schuler and Sears Logistics Services, Inc., IHRC, ALS No. 05-0315, September 21, 2006. The act of violating a person's civil rights, by itself, is insufficient to support an award for emotional distress damages. Garrity and Lockett, IHRC, ALS No. 6389, May 3, 1996.

Two elements of proof are needed to establish a claim for damages: 1) proof of actual harm or injury; and 2) proof that the unlawful conduct caused the harm or injury. Schuler, *supra*.

The probative factors in determining the amount of an emotional distress award in a totality of the circumstances analysis are the *nature* of the violation that caused the injury, its effects, the injury itself, and the *duration* of the suffering experienced by the complainant. (Emphasis added) ISS International v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E. 2d 592, (1st Dist. 1995); Gipson and H.P. Mechanical, Inc., and Steve Hathorne, IHRC, ALS No. 06-060C, August 3, 2007.

In Bellwood, *supra*, as here, no medical evidence was adduced during the public hearing. Although helpful, documented medical evidence or expert testimony is not required prior to awarding damages. Id.; Brown and American Highway Technology, IHRC, ALS No. 10805, January 2, 2003. It is possible to suffer demonstrable emotional distress without seeking medical treatment. Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No. 03-0059, May 17, 2005.

Analysis-Emotional Distress

The testimony of Complainant revealed that the "nature and duration" of her mental anguish, humiliation, and embarrassment began on July 9, 2010, and continues to this day. [1] The discriminatory acts of Respondent stem from its entrenched policy forbidding Complainant's

[1] Contrary to Respondent's argument, to suggest that the only way a complainant's testimony can be believed is to have corroborating evidence implies that the complainant's word is insufficient and unbelievable on its own. York and Al-Par Liquors, Inc., IHRC, ALS No. 3415, October 3, 1995. In any respect, there are facts corroborating Complainant's claim of mental distress.

access to its women's restroom. It was, and is, exclusively aimed at, and enforced against Complainant, based on her sexual identity, female.

Complainant testified about her feelings at the decision, "I [Complainant] was angry. I was shocked. I was extremely emotional, frustrated. My mind was pretty much spinning, just a whole host of emotions about... just kind of aggravated the whole situation. The use of the men's restroom, denies who I am."

In a July 2010 letter to Respondent's Human Resources, Complainant expressed her dismay and objection with its exclusionary decision. "I am not asking for preferential treatment, I am seeking equal rights as any other female in the employment of Hobby Lobby, which includes, but not limited to, the use of the women's restroom. If I were to come to be fully recognized as Meggan at work, by associates and customers, and still be required to use the men's restroom, I would be embarrassed and humiliated. ... I have to be covert any time I use the men's restroom, due to the fact that many customers have assumed I was female..." By its bar, Respondent undermined its own initial public acceptance of Complainant's transition and, in effect, relegated Complainant to merely a male employee who was permitted to wear a female costume to work, put on make-up, and be called Meggan.

Intensifying Complainant's anguish was her realization that Respondent's preconditions for access were disingenuous and a pretense to obstruct, delay, and frustrate. All conditions were strategic actions contrived to coerce Complainant into silent compliance.

In Beasley and Arby's Restaurant a/k/a Franchise Management Systems, IHRC, ALS No. S11685, March 28, 2003, a case based on disability discrimination, the Commission found that getting the "run-around," "stringing (complainant) along," and having her "jumping through hoops" at respondent's request, when it had no intention of making good on the employment promise was "particularly egregious," and evidence of embarrassment and humiliation sufficient to support an award of emotional distress.

In addition to superfluous tasks, Complainant was also subjected to the intimidation of employment discipline and the shame of being exclusively and publicly monitored by Respondent. Michael Homes, co-manager, said, "What I was told was if I saw Meggan (Complainant) use the female restroom, that I was to let management know, meaning Edward (Slaven) at the time or Adam (Woolridge)." Respondent's order was enforced by deed. On February 23, 2011, Complainant was formally disciplined for entering the women's restroom. Complainant took the opportunity to use the disciplinary form to again express her emotional anguish and objection over Respondent's exclusive decision.

Complainant also credibly testified that she suffered and is still suffering from the daily anxiety of just going to the restroom. She was "on guard," retreating from entering the men's restroom if a man goes in, or once in, remaining in the stall until the male or males leave the facility. "I was embarrassed, humiliated to be a woman in the men's restroom." Complainant also felt for her safety. "I was afraid at times of what somebody might do to me when I was in there...I feared everything from being laughed at to being physically assaulted." (The men's restroom is available to both customers and employees.)

Besides defensive tactics, logistic preparation was also necessary. Complainant had to be cognizant of her fluid intake during the day. She had to be aware of the number of trips from the store, when choosing the female restroom at Culver's restaurant, located about 100 yards away. Related to these trips, Complainant had to be attentive to the amount of time away from her employment duties. "I [Complainant] ended up having to structure my life around how often I would be able to use the restroom."

The "Unisex" bathroom Respondent constructed in December 2013 or January 2014, further acted to publicly segregate and isolate Complainant. Other employees or customers had the option of using the "unisex" restroom or the restroom of their sexual identification. Complainant was relegated to either the unisex or the men's restroom. As a result, Complainant was made to "feel less than human."

Other witnesses observed Complainant's demeanor. Melessa Riemer, Service Manager, observed her "upset" behavior. Slavin testified that Complainant was "emotional," and "very upset and broke down crying," both during his meeting announcing Respondent's decision forbidding her to enter the women's restroom and when she was disciplined. Complainant's parents also described Complainant's distraught state. [2]

In summary, Complainant credibly explained, "Anytime I had to be at work, I felt humiliated." "The use of the men's restroom, denies who I am." Such feeling manifested itself in being "emotionally devastated." "I felt segregated. I felt as though there were the guys, the gals and then me. It was like having something ripped out of me. It affected me almost all the time."

Emotional Distress Damages

Complainant seeks an emotional damages award of $350,000.00. It is difficult to quantify such emotional distress damages. Contrary to the parties' assertions, emotional distress awards are not well suited to ready mathematic calculation. Ultimately, determining the amount of an award is an "act of judgment and discretion." Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No. 03-059, May 17, 2005.

Determining an appropriate award of monetary damages for emotional distress has proven to be difficult when one tries to base the figure solely upon other Commission cases. That is because it is difficult to measure with precision the monetary value of a particular individual's distress versus the distress felt by another individual. Damages for emotional distress are based upon the level of distress felt, not the source of that distress. Kuhlman and The Knorner House, IHRC, ALS No. 9696, November 24, 1997.

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[2] Although not required, as suggested by Respondent, Complainant did not use Respondent's "Open Door" availability with upper management, because she "Felt any communication with management or Human Resources would fall on deaf ears and she was getting the run-around."

For example, in Kilpatrick and Lifetime Fitness, Inc., IHRC, ALS No. 05-011, April 27, 2005, the Commission awarded complainant $15,000.00 for a single public incident of race discrimination that had embarrassing repercussions. In Simpson and Dewey's Restaurant, et al, IHRC, ALS No. 1989, June 30, 1987, the Commission noted that an "outright denial of service is a clear-cut and ugly violation of the Act, particularly when [other] patrons continued to be served." Even refusing to serve a cup of soup caused actionable emotional distress in the amount of $5,000.00. See, Marcus Blakemore and Glen's Restaurant, IHRC, ALS No. 1743 (K), November 3, 1987. (The ages of the cases are noted.)

Here, Complainant was purposely denied access to the restroom because of her sexual identity, female. It is the essence of who she is. As she testified, "I still have to deny my gender when I'm forced to use the men's restroom, and that's denying who I am."

As discussed in the RLD, Respondent chose to resurrect the antiquated and long abandoned schemes of "separate, but equal" and outright segregation. No amount of bathroom breaks, raises, promotions, or the availability of the newly constructed "unisex" restroom, can substitute for barring Complainant from a facility that is open to all the public, but her, or any other transgender. Discrimination is not less hurtful because it is based upon sexual identity, as opposed to any other protected class.

Respondent is liable for the distress, anguish, anxiety, humiliation, fear, and embarrassment caused by its ongoing entrenched policy of banning Complainant, as well as the delay, threats and intimidation that accompanied Respondent's discriminatory behavior, and enforcement of it.

Therefore, given the evidence that Complainant suffered long and continuous emotional distress I find that an award of $220,000.00 for emotional distress damages is fair and reasonable under all of the circumstances presented by this case.

Cease and Desist

Since there has been a finding of liability against Respondents, it is recommended that Respondent be ordered to cease and desist from violating the Act in the future. Section 8A-104(A) of the Act.

Sensitivity Training

Respondent is insensitive toward the protected class of sexual orientation, related to gender identity. Its public segregation of Complainant not only created a poisonous work environment for her, but for all employees as they, too, may be subjected to Respondent's selective enforcement of the Act. Therefore, although the Act does not specifically provide that an order may include sensitivity training, it is recommended that all of Respondent's management who have employment and public accommodation decision making authority with its stores located within the State of Illinois, receive training from the Department of Human Rights (or its designee), in order to eliminate the pervasive effects of the sexual identity animus displayed by Respondent.

Termination of Public Contracts

In light of the finding of liability against Respondent, it is recommended that any public contracts currently held by Respondent be terminated. Respondent should also be barred from participating in any public contract for three (3) years. See, Section 8-109(A)(1) and (2) of the Act.

Public Accommodation Admittance/Services

In light of the finding of liability against Respondent, it is recommended Respondent be ordered to allow Complainant admittance to its women's restroom, a public accommodation Section 8A-104(E) of the Act, and to extend to Complainant the full and equal enjoyment of its facilities and accommodation of its women's restroom. See, Sections 8A-104(E) and (F) of the Act.

Attorneys' fees

Section 8A-104(G) of the Act provides to a prevailing complainant all or a portion of the costs, including reasonable attorneys' fees, incurred in maintaining the action. As the Commission has recognized, the purpose for the Act's provision for an award of attorneys' fees is to facilitate litigation brought by aggrieved parties, who are often penurious, with meritorious claims under the Act. For this reason, the Commission has directed that this provision of the Act is to be liberally construed. Slamar and Roadway Express, IHRC, ALS No. 1472, November 25, 1986. Although excessive, inaccurate, duplicative, or otherwise unwarranted fees must be cut, at the same time, awards of fees must be adequate to ensure that competent counsel will be attracted to represent clients in cases brought to enforce the Act. Bard and Cassidy Tire Company, IHRC, ALS No. 3095, May 4, 1990. To these ends, the Commission has regularly admonished its judges to scrutinize any fee petition to ensure that the amount awarded is fair and reasonable. Walsh and Village of Oak Lawn, IHRC, ALS No. 321, March 25, 1982, rev'd on other grounds sub nom. Village of Oak Lawn v. Illinois Human Rights Commission, 133 Ill. App.3d 221, 478 N.E.2d 1115 (1st Dist. 1985).

The burden is upon the party making the fee request to justify the amount being sought. Id. Complainant has petitioned for attorneys' fees of $247,120.00, plus costs of $1,092.23.

Hourly Rates

When considering a fee petition before the Commission, the first task is to establish a reasonable hourly rate. Clark, supra. Here, Complainant seeks to recover $350.00 per hour for the time of her principal attorney, Katherine Eder; $400.00 per hour for Jacob Meister; $250.00 for associate attorney Paul Fine; and $100.00 for summer law clerk Kevin Ejma. The original attorney, Betty Tsamis, who is not affiliated with the Meister firm, is requesting $400.00 per hour.

Affidavits of Jacob Meister and Betty Tsamis, and other documents have been provided by Complainant to support those requests.

Attorneys Jacob Meister, Katherine Eder and Betty Tsamis, are experienced attorneys, concentrating in the area of employment discrimination law in general, and specifically in legal matters of the GLBT (Gay, Lesbian, Bi-sexual, Transgender) communities. Their hourly rates, as well as those of the associate attorney and the summer law clerk's billed amounts are also reasonable. None of the suggested rates were objected to by Respondent.

I find the hourly rates reasonable for the experience the attorneys and clerk have in the geographical area of Chicago, Illinois.

Therefore, I recommend that the Commission base its award on the attorneys' rates cited above.

Number of Hours for Services Performed by Attorneys

Once the Commission determines an appropriate hourly rate, it must determine the number of hours reasonably devoted to the matter.

Standards for an award of reasonable attorneys' fees are set out in Clark, *supra*, which allows for an upward or downward adjustment of the fees petitioned. It has even been held that a request for attorney's fees can be completely denied when the claim is "manifestly unreasonable." Clark citing Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980).

Analysis - Attorneys' Fees

On February 28, 2013, two complaints were filed by Complainant, one citing Article 2 of the Act, Employment, and one citing, Article 5, Public Accommodation. Both complaints named sexual orientation discrimination, related to gender identity, as the protected class. The cases were consolidated on May 23, 2013.

A public hearing on damages was held on September 17, 2015, which carried over for an estimated two hours on September 18, 2015.

Katherine Eder logged 530.2 hours at $350.00 per hour; Jacob Meister logged 125 hours at $400.00; Paul Fine, 7.6 hours at $250.00; Kevin Ejma 34 hours at $100.00, and Betty Tsamis, 25.25 hours at $400.00. The total amount of fees petitioned is $247,120.00.

Final Determination-Attorneys' Fees and Costs

Complainant's principal attorneys aver that their expertise and their firm's concentration in the area of employment law, specifically GLBT issues, justify their higher hourly rate. However, the amount of time logged in by them in this case runs contrary to that experience. Especially, as here, Respondent all but admitted the pled allegations from the start of the case. Discovery issues were not out of the ordinary, and were resolved. A dispositive motion was filed and a favorable decision resulted in the avoidance of a trial on liability, with all its preparation and post hearing briefs. The public hearing on damages only took one day and about two and one-half hours the following day, with limited witnesses, and no experts.

Complainant cannot have it both ways. They cannot claim expertise and then bill as if they had none.

Research was too abundant; much of it seemed for the researcher's own education or edification, rather than for the case litigated. In Kuhlman and Korner House, IHRC ALS No. 9696, November 24, 1997, the judge commented, "It is unclear precisely why such research was needed or whether that information was ever used in Complainant's case."

Inter-office communication should be an effective and economic tool, saving both time and legal fees. It is not a means to double or triple legal fees.

Complainant's attorneys' billing invoices are inadequate for the total amount petitioned and charged. The attorneys' billing uses vague terms like "tending to," "review," "drafting," "revising," "edits," "reviewing," and "finalize," quite abundantly throughout the invoice print out listings, without describing the content of the activities. In numerous instances, these presumed legal services are grouped together with other actions, including clerical, travel, and filing, to extend or fill in blocks of time. Further, large blocks of time are made up of repeated work. Travel time or time spent organizing files or conferring with a client on the status of the case is clerical or worth less than time spent on trial or in the performance of substantive legal functions. Allen and Aero Services International, Inc., IHRC, ALS No. 3150(R), June 26, 1996;

Davenport and Hennessey Forrestal Illinois, Inc., IHRC, ALS No. S-3751(R), November 20, 1998; Booth and Brooks Precision, Inc., IHRC, ALS No. 10886, June 25, 2003.

Complainant's counsel artfully submitted an inflated time log that reached upwards of an estimated quarter of a million dollars in fees. As a result, I must adjust the petitioned fees downward to a fair figure, more in line with the discrimination case and the expertise claimed. Respondent should not be responsible for disproportional fees.

In Prem T. Lalvani and Cook County Hospital, IHRC, ALS No. 4809, January 30, 1998, "In a situation such as this, where an item-by-item accounting of excessive or non-essential entries would be virtually impossible, the federal courts have adopted the 'arbitrary but essentially fair' method of simply reducing the total number of hours by a percentage that appears to be accurate overall." Id, citing Pachowicz and Aero Testing and Balancing Systems, Inc., IHRC, ALS No. 1412, March 31, 1988, aff'd on appeal sub nom, Aero Testing and Balancing Systems, Inc. v. Illinois Human Rights Commission, 185 Ill.App.3d 956, 541 N.E.2d 1229 (1st Dist. 1989); Cline and Consumers Systems, IHRC, ALS No. 4944R, October 2, 1997.

Complainant's $247,120.00 petition for attorneys' fees is excessive and unreasonable, and an adjustment is necessary.

The resolution is to follow the "arbitrary but essentially fair" method of simply reducing the total amount of attorneys' fees to a level that appears to be accurate, fair and reasonable overall.

Accordingly, I have carefully looked at the amount and have weighted the factors cited in Clark. All doubts in the calculation of attorney's fees must be resolved in favor of Respondent. Lemery and Balmoral Racing Club, Inc., IHRC, ALS No. 11835, February 1, 2006. Complainant should be awarded $90,000.00 attorneys' fees for the work before the Commission.

Ms. Betty Tsamis's fee is adjusted from $10,000.00 to $7,000.00, for many of the same reasons.

Costs

Complainant has also included a request for reimbursement of $1,092.23 for copying, postage, parking, and taxis, as well as $50.00 for witness fees.

Commission precedents hold that failure to present evidence that copying, postage, and miscellaneous expenses are routinely billed to the clients, leads to the presumption that those expenses were incorporated into the attorney's hourly fee. Bordner and Hirsch, IHRC, ALS No. 5664, September 30, 1998. Except for the witness fees, all requests for costs are denied.

Therefore, it is recommended that Complainant receive a total of $50.00 for the allowable costs associated with the matter.

RECOMMENDATION

Based upon the foregoing, it is recommended that the RLD be sustained and that an order be entered awarding Complainant, Meggan Sommerville, the following relief:

1. Order Respondent to pay Complainant $248.00 as reimbursement for out of pocket expense;

2. Order Respondent to pay Complainant $220,000.00 as compensation for emotional distress;

3. Order Respondent to cease and desist from sexual orientation discrimination, sexual identity, in employment and public accommodation;

4. Order Respondent's managers, who are involved in employment and public accommodation decisions of stores located within the state of Illinois, to receive training from the Department of Human Rights (or its designee) on the Act, specifically on sexual orientation, sexual identity discrimination;

5. Order Respondent to permit Complainant access to its women's restroom;

6. It is recommended that any public contracts currently held by Respondent be terminated; Respondent should also be barred from participating in any public contract for three (3) years;

7. Order Respondent to pay Complainant $90,000.00, as attorneys' fees for services performed by Jacob Meister and Associates;

8. Order Respondent to pay Complainant $7,000.00 for legal services performed by Betty Tsamis;

9 Order Respondent to pay Complainant $50.00 for costs.

HUMAN RIGHTS COMMISSION

BY:_____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINSTRATIVE LAW SECTION

ENTERED: February 2, 2016

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MEGGAN SOMMERVILLE,	)	
	)	Charge No.: **2011CN2993**
	)	**2011CP2994**
Complainant,	)	ALS No.: **13-0060C**
	)	
and	)	
	)	
HOBBY LOBBY STORES, INC.,	)	
	)	
Respondent.	)	

REMAND ORDER

The Commission by a panel of three: Commissioners Diane M. Viverito[1] presiding, Michael Bigger, and Amy Kurson.

On review of the Recommended Order and Decision of Administrative Law Judge William J. Borah.

For Complainant:	Jacob Meister Jacob Meister & Associates 2129 North Western Avenue Chicago, Illinois 60647
For Respondent:	Sonya Rosenberg Neal, Gerber & Eisenberg LLP Two North LaSalle Street, Suite 1700 Chicago, Illinois 60602
Illinois Human Rights Commission:	Donyelle L. Gray, General Counsel Byron M. Wardlaw, Assistant General Counsel

This matter comes before the Illinois Human Rights Commission (*"Commission"*) pursuant to a Recommended Order and Decision (*"ROD"*) by Administrative Law Judge William J. Borah (*"ALJ Borah"*) that issued on February 2, 2016, and which incorporated by reference a Recommended Liability Determination ("RLD") by ALJ Borah that issued on May 15, 2015, the Complainant's Exceptions to the ROD, and the Respondent's Exceptions to the ROD.

On review of ALJ Borah's recommendations, the public hearing record, the exceptions filed by both the Complainant and the Respondent, and each respective response thereto, and for the reasons set forth herein, the Commission adopts ALJ Borah's recommendation that the Respondent's actions constituted a violation of the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* (the "Act"),

[1] This Order is entered in conformity with a vote cast by Commissioner Viverito during her term.

as a matter of law and that the Respondent shall be held liable, that the Respondent shall cease and desist from future violations of the Act, and that the Respondent shall permit the Complainant access to its women's restroom. The Commission also adopts ALJ Borah's recommendation that Sommerville be awarded $90,000.00 for attorneys' fees to Jacob Meister & Associates and $7,000.00 to Attorney Betty Tsamis, for a total award of $ 97,000.00 in attorneys' fees. The Commission further adopts ALJ Borah's recommendation of awarding the Complainant $50.00 for costs of witness fees. Finally, the Commission adopts all other recommendations of the ALJ not expressly rejected by the Commission herein.

The Commission does not adopt ALJ Borah's additional injunctive relief recommendations, namely, that all members of the Respondent's management team who have employment and public accommodation decision making authority receive sensitivity training from the Department of Human Rights or its designee, that any public contracts currently held by Hobby Lobby be terminated, and that Hobby Lobby be barred from participating in any public contract for three years.

The Commission also does not adopt ALJ Borah's recommendation as to the emotional damages award amount because the Commission finds that the recommendation lacks specificity regarding the factual basis to conclude that an award of $220,000.00 in emotional distress damages is fair and reasonable. Therefore, this matter shall be **REMANDED** back to the Administrative Law Section for further findings on the emotional distress award.

WHEREFORE, IT IS HEREBY ORDERED THAT:

The Recommended Order and Decision is **ADOPTED, IN PART, AND NOT ADOPTED, IN PART.** The matter will be **REMANDED** back to the Administrative Law Section for further proceedings as herein instructed.

I. Nature of the Case

In July 1998, the Respondent, Hobby Lobby Stores, Inc. (the *"Respondent"* or *"Hobby Lobby"*) hired the Complainant, Meggan Sommerville (the *"Complainant"* or *"Sommerville"*), and subsequently transferred her to its East Aurora Store, No. 237 in 2000. Beginning in 2007, Sommerville began the process of transitioning from male to female. In fact, in 2009, Sommerville underwent medical treatment, which resulted in female secondary sex characteristics, such as breasts and the removal of facial hair. Sommerville is a transgender female who presents and identifies as female. In addition to undergoing medical treatment and publically identifying as female, Sommerville changed her employee nametag to eliminate any confusion from other employees and without objection from Hobby Lobby; had her name legally changed to "Meggan Renee Sommerville" by order of the Circuit Court of Kendall County, Illinois; received a new driver's license from the State of Illinois; obtained a new social security card with her newly chosen female name; formally informed her direct supervisor, Mr. Edward Slavin, of her male to female transition; and the Respondent changed Sommerville's personnel records and benefits information to identify her as female.

However, when Sommerville informed Mr. Edward Slavin and management at Hobby Lobby of her intent to use the women's restroom, her request was denied. Irrespective of the litany of

information, legal documentation and correspondence from Kristin Koglovitz, Clinic Director at Howard Brown Health Center, who identified and verified Meggan as a transgender female, including a description of the medial procedure undertaken transitioning Sommerville to female, the Respondent yet refused to allow Sommerville to use the women's restroom. Hobby Lobby's position was that Sommerville was required to produce evidence that she had legally changed her sex, not just gender identification, or, in the alternative, produce binding legal authority which mandated that Hobby Lobby allow Sommerville to use the women's restroom as a transgender female. Ultimately, Sommerville began visiting neighboring businesses in order to use the women's restroom, oftentimes risking her job security for being off premises during scheduled work hours.

On February 28, 2013, Sommerville filed two separate complaints with the Commission against Hobby Lobby naming sexual orientation discrimination related to gender identify as the protected class. The first complaint alleged Hobby Lobby's violation of Article 2 of the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* (the *"Act"*) based on employment discrimination. The second complaint alleged Hobby Lobby's violation of Article 5 of the Act based on public accommodation discrimination. Both complaints were ultimately consolidated.

II. Proceedings

This matter was assigned to ALJ Borah. Both parties filed Motions for Summary Decision, and on May 15, 2015, ALJ Borah entered a Recommended Liability Determination (*"RLD"*), denying Hobby Lobby's Summary Decision Motion, and finding that Hobby Lobby, in fact, discriminated against Sommerville based on her gender-related identity by prohibiting her use of the women's restroom, both as an employee, as well as a member of the general public.

In analyzing whether Hobby Lobby violated provisions of the Act by denying Sommerville access to the women's restroom, ALJ Borah interpreted the terms of the Act as related to this cause. Relying on Nuraoka v. Illinois Human Rights Commission, 252 Ill. App. 3d 1039, 625 N.E.2d 251 (1st Dist. 1993), ALJ Borah asserted that the Act is remedial legislation that must be construed liberally to effectuate its purpose. In addition, ALJ Borah ruled that a primary rule of statutory construction is to give effect to the words selected by the General Assembly and its intent. And the best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. *See* Sangamon County Sheriff's Department v. Illinois Human Rights Commission, et al., 233 Ill.2d 125, 908 N.E.2d 39 (2009), *citing* Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 886 N.E.2d 1011 (2008).

ALJ Borah explored Section 1-102(A) of the Act, which clearly provides that it is the public policy of the State to secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, *sexual orientation*, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations. *See* 775 ILCS 5/1-102(A) (*emphasis added*).

Next, ALJ Borah detailed "sexual orientation" as defined in the Act. Pursuant to Section 1-103(O-1), "sexual orientation" is defined as actual or perceived heterosexuality, homosexuality,

bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. *See* 775 ILCS 5/1-103(O-1). ALJ Borah established that pursuant to Sections 2-102(A) and 5-102(A), it is a civil rights violation for an employer to segregate, or discipline on the terms, privileges or conditions of employment on the basis of unlawful discrimination, or to deny or refuse to another the full and equal enjoyment of the facilities and services of any public place or accommodation, respectively. *See* 775 ILCS 5/2-102(A); *see also* 775 ILCS 5/5-102(A).

ALJ Borah concluded that Sommerville established direct evidence of gender-related identity discrimination where Hobby Lobby restricted her use of the women's restroom at its store. Specifically, Sommerville argued that such disparate treatment is contrary to the terms of the Act with respect to the terms and conditions of her employment and a denial of the full and equal enjoyment of a public accommodation.

In closing, ALJ Borah found that Hobby Lobby's decision to restrict Sommerville's access to the women's restroom on account of her gender-related identity violated the Act as it concerns employment and public accommodations as a matter of law. Therefore, ALJ Borah denied Hobby Lobby's Motion for Summary Decision, granted Sommerville's Motion for Summary Decision, and set this matter for a hearing on damages.

On February 2, 2016, ALJ Borah entered a Recommended Order and Decision (hereinafter, the *"ROD"*). In the ROD, ALJ Borah concluded that pursuant to the RLD, Hobby Lobby is liable for its violations of the Act that prohibits discrimination based on sexual orientation, related to gender identity, in both employment and public accommodation. In addition, as a result of these violations, Sommerville proved by a preponderance of the evidence that she suffered, and continues to suffer, emotional distress from Hobby Lobby's actions, which entitles her to an award of emotional distress damages, as well as recovery of reasonable attorneys' fees and costs.

ALJ Borah noted that the Act provides for an award of actual damages. *See* 775 ILCS 5/8A-104(B). In addition, pursuant to Ayers and Johnson, IHRC, ALS No. 3375 (K), October 3, 1991, actual damages include indemnification for inconvenience, mental anguish, humiliation, embarrassment, expenses, and deprivation of Constitutional rights. With respect to emotional distress, ALJ Borah noted that the Commission does allow for an award of emotional distress where recovery of pecuniary losses will not compensate a complainant for all actual damages. *See* Smith and Cook County Sheriff's Office, Cook County Department of Corrections, IHRC, ALS No.: 1077, October 31, 1985.

In order to prevail on an award for emotional distress, a complaining party must prove two elements, namely, proof of actual harm or injury; and proof that the unlawful conduct cased the harm or injury. *See* Schuler and Sears Logistics Services, Inc., IHRC, ALS No.: 05-0315, September 21, 2006. Applying these standards to our case, ALJ Borah noted that Sommerville testified that the nature and duration of her mental anguish, humiliation, and embarrassment began on July 9, 2010 and continues to the present day. ALJ Borah concluded that Sommerville credibly testified of her humiliation, emotional devastation, segregation, fear and feelings of worthlessness as a result of Hobby Lobby's acts of discrimination.

In determining the amount of emotional distress damages, ALJ Borah noted the difficulty in quantifying such an award. He stated that emotional distress awards are not well suited to ready mathematic calculations, and ultimately, determining the amount of an award is an act of judgment and discretion. *See* Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No.: 03-059, May 17, 2005. In addition, ALJ Borah stated that damages for emotional distress are based upon the level of the distress felt, not the source of the distress. *See* Kuhlman and The Knorner House, IHRC, ALS No.: 9696, November 24, 1997. ALJ Borah found Hobby Lobby liable for the distress, anguish, anxiety, humiliation, fear, and embarrassment caused by its ongoing entrenched policy of banning Sommerville from the women's restroom, as well as the delay, threats, and intimidation that accompanied Hobby Lobby's discriminatory action and enforcement of that action. Thus, ALJ Borah recommended an award of $220,000.00 for emotional distress.

Regarding the attorney's fees, the Complainant sought attorneys' fees in the amount of $ 247,120.00, and costs in the amount of $ 1,092.23. ALJ Borah determined that certain of the hours billed were unreasonable, duplicative, and/or excessive, and recommended a reduction. Ultimately, ALJ Borah recommended a total award of attorneys' fees in the amount of $ 97,000.00 and costs in the amount of $ 50.00.

III. Standard of Review

The Commission must consider whether or not the ALJ's factual determinations were against the manifest weight of the evidence. 775 ILCS 5/ 8A-103(E)(2). The Commission reviews a question of law *de novo* and is empowered to modify, reverse, or sustain the ALJ's recommendations in whole or in part. 775 ILCS 5/8A-103(E). The Commission considers the Charge of Civil Rights Violations and the Complaint filed, the Respondent's Answer to the Complaints, the Recommended Liability Determination and the Recommended Order and Decision handed down by the ALJ, the Complainant's Exceptions, the Respondent's Response, the Respondent's Exceptions and the Complaint's Response thereto.

IV. Complainant's Exceptions

On February 26, 2016, Sommerville filed her Exceptions to the Recommended Order and Decision. In her Exceptions, Sommerville argues that although she prevailed on all her claims against Hobby Lobby, the ROD awards her less than one-third of her requested attorneys' fees to less than 200 hours total.

In her Exceptions, Sommerville points out that Hobby Lobby's lead attorney, Sonya Rosenberg, recorded a total of 412 hours alone on this matter. However, ALJ Borah cut Sommerville's counsels' hours to less than 200 hours, which is 212 hours less than just one of Hobby Lobby's counsel's hours. Sommerville argues that Hobby Lobby's lead counsel's hours should serve as a logical yardstick from which to determine the reasonableness of the time expended by her attorneys.

Next, Sommerville argues that the award of attorneys' fees should be measured against the results obtained, citing Hensley v. Eckerhart, 461 U.S. 424 (1983). She argues that as a case of first impression in Illinois and in light of Sommerville's burden of proving discrimination by a

preponderance of the evidence, she achieved success in this matter, prevailing on both her discrimination claims under Articles 2 and 5 of the Act. Also, due to Sommerville's success and the impact this decision will have on national policy and how instrumental this action will be in changing institutional discrimination against transgender individuals, the Complainant argues that such a profound reduction in fees, given the far reaching impact of this litigation, is hard to reconcile.

Next, Sommerville argues that the length of the litigation justifies the number of hours reported. The hours recorded were used to file two successful Requests for Review before the Commission; draft the Complaint; complete significant legal research; respond to Hobby Lobby's requests for settlement negotiations and demands; conduct contentious discovery; draft and respond to cross motions for summary decision; prepare for the damages hearing; and draft the post-hearing brief and petition for fees. As a result, Sommerville argues that the record support the calculation of hours expended. The time expenditures were adequately supported, reasonable and necessary.

With respect to costs, Sommerville argues that the affidavit of Jacob Meister clearly states that the firm routinely bills fee-paying clients for copying costs, postage and parking costs. Thus, because the costs requested by Sommerville's counsel are routinely billed to clients, the requested costs are reasonable, compensable and should be awarded.

Finally, Sommerville argues that she is entitled to damages from the date of the ROD until Hobby Lobby ceases its discrimination.

V. Respondent's Response to Complainant's Exceptions to Recommend Order and Decision

On March 25, 2016, the Respondent filed Respondent's Response to Complainant's Exceptions to the Recommend Order and Decision. In the response, Hobby Lobby noted that the purpose of discretionary attorney's fee awards under the Act is not to provide a windfall to prevailing attorneys. *See* Lemery and Balmoral Racing Club, Inc. ALS No: 11835, 2006 ILHUM LEXIS 27 (2005). Here, however, the Respondent argues that Sommerville demands for costs amount to a quarter of a million dollars in fees. The Respondent agrees that ALJ Borah correctly recognized that the Complainant's counsel artfully submitted an inflated time log, which warranted adjusting the petitioned fees downward to a fair figure.

VI. Respondent's Exceptions

On March 21, 2016, Hobby Lobby filed Respondent's Exceptions to the Recommended Order and Decision of the Administrative Law Judge and Appendix of Exhibits. In its Exceptions, Hobby Lobby argues that the emotional damages award is excessive and unprecedented. Hobby Lobby cites numerous cases to demonstrate that the Commission has never awarded damages for emotional distress in the amount of $220,000.00. Since there is no precedence to rely on, Hobby Lobby concludes that such an award is excessive and inappropriate. Specifically, Hobby Lobby cites cases with similar facts and issues; in its comparison, Hobby Lobby identifies cases where it alleges that the victim or aggrieved party experienced a significantly more severe nature of distress for a longer duration. These complainants, however, received only fractions of the amount ALJ Borah recommends be awarded to Sommerville.

In addition, Hobby Lobby argues that Sommerville failed to establish that its decision to prohibit her from use of the women's restroom caused her the alleged emotional distress as oppose to various other outside and unrelated circumstances. In reliance on Kauling-Schoen, 1993 ILHUM LEXIS 357, Hobby Lobby avers that Sommerville bears the burden to establish and prove causation between the civil rights violation and the alleged emotional distress. The Respondent argues that Sommerville has the duty to show that Hobby Lobby's violation of the Act and its prohibition of allowing her access to the women's restroom directly caused her emotional distress. Hobby Lobby concludes that the lack of evidence to support attribution to it serves to defeat her claim for emotional distress damages.

The Respondent also argues that ALJ Borah failed to address the issue of causation altogether. For example, in Kauling-Schoen, ALS No. 2918(M), 1993 ILHUM LEXIS 357, the court held that the complainant must be able to show that there is a cognizable aggravation of a preexisting condition cause by the civil rights violation. In addition, in Chrysler v. Darnall, 238 Ill.App.3d 673 (1st Dist. 1992), the court concluded that damages must be proved to be recovered, and the plaintiff has the burden of proving causation of her alleged injuries. Here, however, the Respondent argues that ALJ Borah simply concluded that Sommerville's alleged emotional distress was caused by Hobby Lobby.

Hobby Lobby next takes exception with ALJ Borah's recommendation of non-monetary relief, which it argues violates the Act. Pursuant to Section 8A-104, the Act provides a list of categories of relief the Commission can impose due to violations of the Act. See 775 ILCS 5/8A-104. Hobby Lobby argues that this list does not include sensitivity training, termination of public contracts, and a bar from participating in public contracts for a term of three years. Therefore, Hobby Lobby urges the Commission to deny these non-monetary, injunctive forms of relief.

Hobby Lobby next argues that Sommerville should not receive any award for attorneys' fees. Citing Clark and The Champaign National Bank, 4 Ill. HRC. Rep. 193, 200 (July 2, 1982), Hobby Lobby argues that the Act provides that reasonable attorneys' fees may be awarded; a party is not automatically entitled to recover all its claimed fees.

VII. Sommerville's Response to Hobby Lobby's Exceptions to Recommended Order and Decision

On April 21, 2016, Sommerville filed Complainant's Response to Respondent's Exceptions to Recommended Order and Decision. In her Response, Sommerville argues that the emotional distress damages awarded by ALJ Borah were proper. First, Sommerville argues that there is no limit on the amount of noneconomic damages that may be awarded under the Act. Sommerville points to the matter of ISS International Service System, Inc. v. Illinois Human Rights Commission, 272 Ill. App. 3d 969 (1st Dist. 1995), where the court chastised the Commission for failing to award adequate amounts for emotional distress and cautioned the Commission to examine more closely the injury caused by the offending party. Sommerville argues that when courts determine appropriate damages for emotional distress, they look at the nature and duration of the suffering. With respect to the nature of the emotional distress, Sommerville argues that Hobby Lobby's discriminatory actions were degrading, humiliating, blatant and unreasonable. In addition, she argues that Hobby Lobby's actions

of forcing her to use the "unisex" restroom isolated and segregated her from other persons of her gender, which made her feel less than human and caused her to fear for her safety.

Regarding the duration of the emotional distress, Sommerville argues that she was subjected to Hobby Lobby's discriminatory terms in thousands of instances for approximately six years. Sommerville calculated the number of times she generally uses the restroom per day as a factor in determining the number of times she experienced Hobby Lobby's discriminatory terms. In total, Sommerville argues that the number of times she experienced discrimination at the hands of Hobby Lobby until the present day is over 4,000 times. Sommerville also argues that she, in fact, established that Hobby Lobby's discrimination directly caused, and continues to cause, her emotional distress.

VIII. Discussion

A. Complainant's Request for Attorneys' Fees and Costs

It is axiomatic that an award of attorney's fees is not supposed to create a windfall for a prevailing attorney. "The purpose of the fee award is to provide an effective means of access to the judicial process to victims of civil rights violations who might not otherwise have the means to retain counsel." Regina Kimbrough and School District of Markham/Chateaux Elementary School and Warren Fortineaux, IHRC, ALS No.: 10397, 2003 WL 24127498, January 9, 2003. Commission ALJs are to scrutinize fee petitions carefully to ensure that the requested amount is fair and reasonable. Jewel Bordner and Chairpeople, Inc., Chairman Upholstery, Inc., and Stephen Hirsh, IHRC, ALS No.: 5664, 1998WL834649, September 30, 1998, *citing to* Walsh and Village of Oak Lawn, 3 ILL. HRC. Rep. 130 (1982), rev'd on other grounds sub nom., Village of Oak Lawn v. Human Rights Commission, 133 Ill. App. 3d 221, 478 N.E. 2d 1115 (1st Dist. 1985). Further, regarding costs, "failure to present evidence that copying, postage, attorney travel time, and miscellaneous expenses are routinely billed to fee-paying clients leads to the presumption that those expenses were incorporated into the attorney's hourly fee." Regina Kimbrough, * 5; *see also* Maddox and Saint Paul Federal Bank ___ Ill. HRC. Rep. (1985CF2644, August 20, 1993); Niguette and McQuire, 45 Ill. HRC Rep. 159, 186 (1988); and Agoot and Freeman United Mining Co., 31 Ill. HRC Rep. 261, 278 (1977).

In this case, ALJ Borah found the hourly rate to be reasonable; however, he determined that the requested amount of $247,120.00 in attorneys' fees and costs of $ 1,092.23 for copying, postage, parking, and taxis, as well as $ 50.00 for witness fees, was excessive. He recommends reasonable attorneys' fees in a total amount of $ 97,000.00 and $ 50.00 as the only allowable costs.

In support of this recommendation, ALJ Borah pointed out that vague language was used in the billing invoices without adequate description of the activities actually performed in furtherance of the litigation; charges for repeated work; and the intermingling of legal services with non-legal work, such as clerical work, travel, and filing. As ALJ Borah pointed out, doubts in calculation of attorney's fees are resolved in favor of the Respondent. Lemery and Balmoral Racing Club, Inc., IHRC, ALS No. 11835, February 1, 2006.

Based on these facts, which are amply supported by the record, and Commission precedent, the Commission finds that the ALJ's recommendation regarding the Complainant's attorneys' fees

and costs is neither against the weight of the evidence nor contrary to law. Therefore, the Commission shall adopt the ALJ's recommendation.

The Complainant shall be awarded a total of $ 97,000.00 in attorneys' fees and $ 50.00 in costs.

B. Injunctive Relief

ALJ Borah recommended that in addition to compensatory damages, certain injunctive relief be ordered: **(1)** sensitivity training for all of Respondent's management who have employment and public accommodation decision-making authority with its stores located within the State of Illinois; **(2)** termination of any public contracts currently held by the Respondent; **(3)** a three-year ban from participating in any future public contracts; and **(4)** an order to cease and desist from violating the Illinois Human Rights Act in the future.

As there has been a finding of liability against the Respondent, the Commission adopts the recommendation that the Respondent cease and desist from future violations of the Act.

However, the Commission finds that the additional injunctive relief recommended by ALJ Borah—sensitivity training, suspension of existing public contracts, and a three-year ban from participating in future public contracts—is not warranted by the record and is against the manifest weight of the evidence. The record demonstrated that the civil rights violation complained of occurred at the Respondent's East Aurora, Illinois, store, No. 237. There is no evidence of a state-wide pattern and practice of discrimination on the basis of gender-identity at any other Illinois stores owned and operated by the Respondent. The record shows that the employees, including Sommerville's direct supervisor and members of the human resources department, complained of all worked in the same East Aurora, Illinois store.

The purpose of the Act is to secure all persons freedom from unlawful discrimination. *See* 775 ILCS 5/1-102(A). Although hearing officers have the discretion to recommend injunctive relief, the record and the evidence in the case must support such an award. The Commission believes given the evidence in this case, that the finding of liability against the Respondent, the cease and desist order, and the compensatory damages that the Respondent has been ordered to pay, furthers the purpose of the Act and shall cure the unlawful discrimination alleged and proven by the Complainant.

Therefore, the ALJ's recommendations to mandate sensitivity training, suspend existing public contracts, and to impose a three-year ban on future public contracts shall not be adopted by the Commission.

C. Emotional Distress Award

If recovery of pecuniary losses will not compensate a complainant for all actual damages, an award which is adequate to make up for the emotional distress caused by the respondent's discriminatory conduct is in order. *See* Smith and Cook County Sheriff's Office, Cook County Department of Correction, IHRC, ALS No.: 1077, October 31, 1985. In order to establish an award for emotional distress damages, two elements of proof are need: 1) proof of actual harm or injury; and 2) proof that the unlawful conduct caused the harm or injury. *See* Schuler and Sears Logistics Services, Inc., IHRC ALS No.: 05-0315, September 21, 1996. The act of violating the Complainant's

civil rights, by itself, is insufficient to support an award for emotional distress. Garrity and Lockett, IHRC, ALS No. 6389, May 3, 1996.

The probative factors in determining the amount of an emotional distress award in a totality of the circumstances analysis are the nature of the violation that caused the injury, its effects, the injury itself, and the duration of the suffering experienced by the complainant. *See* ISS International v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E. 2d 592 (1st Dist. 1995). Although helpful, but not required, documented medical evidence or expert testimony is considered in awarding damages. Brown and American Highway Technology, IHRC, ALS No.: 10805, January 2, 2003.

Further, "[c]oncerning damages for emotional distress, the Commission has established two important guidelines. First, the conduct of the Respondent must be continuous and outrageous....Second, damages cannot be based on mere speculation...." Benjamin Clark and Phoenix Police Department, IHRC, ALS No.: 9865, 1998 WL 603545, July 24, 1998. *(Internal citations omitted)*. An award for emotional/mental distress "must be kept within reasonable parameters." Village of Bellwood Board of Fire and Police Commissioners v. Illinois Human Rights Commission and Craig Kincaid, 184 Ill.App.3d 339, 355, 541 N.E.2d 1248 (1st Dist. 1989).

In a prior Commission case where a complainant alleged gender-identity discrimination in employment, she requested, and the Commission ordered, an emotional distress award in the amount of $ 50,000.00. *See* Venessa Fitzsimmons and Universal Taxi Dispatch, IHRC, ALS No.: 09-0661, September 12, 2011. Fitzsimmons worked as a taxi driver. She sued her former employer for employment discrimination based on sexual orientation, related to gender identity. Liability was determined on default. Thereafter a hearing on damages was held.

At the damages hearing, Fitzsimmons testified that during the course of her employment with the Respondent, which spanned from May 2004 until February 29, 2009, she had been subjected by the Respondent's owner and operator to verbal attacks and vile taunts that were intentionally made to injure, embarrass, humiliate her, and that went to the very nature of her identity. During the course of Fitzsimmons' employment, the Respondent's owner called her a "freak of nature," a "queer," and an "abomination."

In support of her request for emotional distress damages, Fitzsimmons offered no medical evidence. However, she testified that the use of the same or similar derogatory terms from May 2004 to Complainant's separation on February 29, 2009, caused her to lose "self-esteem," consider "suicide," "lose sleep," increase "fears," and "feel bad," experience heightened "depression" and "bi-polar" condition, until the "middle of 2009." At that point, she "started to see a therapist and started taking the right kind of medications." The Commission found that under all the circumstances presented by the record, an award of $ 50,000.00 for emotional distress was fair and reasonable.

In light of the Commission's prior precedent and the standards set forth for determining a fair and reasonable emotional distress damages award amount, the Commission believes that there needs to be at minimum a further articulation by the ALJ of the factual basis for his recommendation of a $ 220,000.00 award for emotional distress in the instant case.

To be clear, the Commission is not rejecting the ALJ's recommendation that the Complainant is entitled to some award for emotional distress. Rather, for the reasons stated herein, the

Commission is not prepared at this time to adopt the ALJ's recommendation as to the amount of the emotional distress award to which the Complainant is entitled.

Therefore, the matter will be remanded back to the ALJ for further findings and articulation of the evidentiary basis for the emotional distress damages award amount to which the Complainant is entitled.

WHEREFORE, IT IS HEREBY ORDERED:

1. The Recommended Order and Decision is **ADOPTED, IN PART, AND NOT ADOPTED, IN PART,** as herein specified.

2. This matter shall be remanded to the Administrative Law Section solely for the purpose of further findings and recommendations on the issue of the appropriate amount of the emotional distress damages award, as herein instructed.

3. This Order is not yet final and appealable.

STATE OF ILLINOIS)
) **Entered this 28th day of July 2017.**
HUMAN RIGHTS COMMISSION)

Commissioner Diane M. Viverito

Commissioner Michael Bigger

Commissioner Amy Kurson

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MEGGAN SOMMERVILLE,	)	
	)	
Complainant,	)	**Charge Nos.: 2011CN2993**
	)	**2011CP2994**
	)	**EEOC No.: N/A**
	)	**ALS No.: 13-0060C**
HOBBY LOBBY STORES,	)	
	)	**Judge William J. Borah**
Respondent.	)	

SUPPLEMENTAL RECOMMENDED ORDER AND DECISION

On July 28, 2017, a three-member panel of the Illinois Human Rights Commission issued a Remand Order to be addressed by Administrative Law Judge William J. Borah.

The Illinois Department of Human Rights (Department) is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

The Issue

The July 28, 2017, Remand Order adopted the May 15, 2015, Recommended Liability Determination (RLD) that concluded Respondent violated the Illinois Human Rights Act (Act). It also adopted the February 2, 2016, Recommended Order and Decision (ROD) that articulated Complainant's damages and attorneys' fees. However, the Commission panel added a request for supplemental facts to support the amount recommended for Complainant's emotional distress damages.

In pertinent part, the Commission agreed that Complainant was entitled to an award for emotional distress, but it was not prepared to accept the recommended amount of $220,000.00, without more factual evidence. As a result, the Commission remanded the matter to me for

"further findings and articulation of the evidentiary basis for the emotional distress damages award amount to which the Complainant is entitled."

FINDINGS OF FACT

This Supplemental Recommended Order and Decision (SROD) incorporates the Findings of Fact from the RLD and ROD, which the Remand Order did not disturb. The following Findings of Facts are from the record and relate to the recommended award to Complainant for her emotional distress damages.

1. In July 1998, Respondent hired Complainant as an employee. In 2000, Complainant was transferred to Respondent's East Aurora store.

2. Complainant was on Respondent's premises both as an employee and as a customer.

3. Respondent's restrooms are designated by gender.

4. Complainant is a transsexual who presents and identifies as female.

5. At the public hearing, Complainant testified that she did not feel "safe" talking to her family about her "life time knowledge" of her sexual identity, as a female. Complainant's immediate family included her parents, her wife of twenty years, and her two children, a daughter and a son. It was even more difficult for Complainant to publicly reveal her sexual identity to her conventional corporate employer, with all its supervisors, staff, and co-employees.

6. In 2009, when Complainant finally disclosed her sexual identity to Respondent, Complainant had been an employee for 11 years. By that time, Complainant had medical treatment from health care providers which resulted in female secondary sex characteristics, including breasts and absence of facial hair.

7. In February 2010, Complainant was permitted by Respondent to use her female name and appear at work in feminine dress and make-up. Respondent also changed Complainant's personnel records and benefits information to identify her as female.

8. After Complainant heard her female name paged over the store's intercom, she stated, "It was probably one of the best days of my [Complainant's] life."

9. On or around July 9, 2010, Edward Slavin, supervisor, asked Complainant whether it was her intention to use the women restroom, "once I [Complainant] transitioned." Complainant acknowledged that intention and explained the importance of it, "I would be a female, so that would be the logical restroom to use upon presenting as female."

10. On July 13, 2010, Slavin told Complainant that she would not be permitted to use the women's restroom and not to discuss the topic with any other employee. After Respondent's decision to ban access to her, Complainant described her mental state, "I was angry. I was shocked. I was extremely emotional, frustrated. My mind was pretty much spinning, just a whole host of emotions about it, and not having a reason why, just kind of aggravated the whole situation."

11. Complainant asked Slavin and Annalee Miller, Respondent's Human Resource representative, for the basis of their decision. Responding, Miller and Slavin demanded Complainant's "legal basis" for mandating access.

12. Relying on Respondent's precondition to produce her "legal basis," Complainant had her name legally changed to Meggan Renee Sommerville; obtained a new Illinois driver's license identifying her as female; attained a new social security card with her female name; and forwarded a copy of the Illinois Human Rights Act and related statutes from other states. She also submitted a letter from Howard Brown Health Center that verified Complainant as a female transgender, described her transitional process, and advocated Complainant's use of the women's restroom.

13. After submitting the documents that made up Complainant's "legal basis," she contacted Miller five or six times over a several month period, without a response, other than a statement that the managers were considering the issue.

Because of the delay, in September 2010, Complainant handed Miller a letter "outlining my [her] frustrations... [with] my transition at work."

In pertinent part, Complainant wrote:

1) Restroom usage - "...I am not asking for preferential treatment, I am seeking equal rights as any other female in the employment of Hobby Lobby, which includes, but not limited to, the use of the women's restroom. If I were to come to be fully recognized as Meggan at work, by associates and customers, and still be required to use the men's restroom, I would be embarrassed and humiliated. This would never be asked of any other female associate. At this time, I have to be covert any time I use the men's restroom, due to the fact that many customers have assumed I was female and even though not going overboard on my appearance, the treatment I am currently under has modified my appearance to be more feminine. Finally on this subject, what difference does it make if I am pre-operative or post-operative? The restroom stalls are a private place where no one is going to see anything of a personal private nature.

2) Notification of associates - Since it has been decided that I cannot post a letter to my fellow associates about the changes in my life, how then am I supposed to notify them. Discussing this information in an open meeting of all associates can be extremely uncomfortable for everyone.

14. As a result of Respondent's ban, Complainant "ended up having to structure my [Complainant's] life around how often I [she] would be able to use the restroom."

Restroom Usage: Until 2012, Complainant was able "to hold it" until the scheduled lunch break, which was between 1:00 and 1:30 p.m. Once diagnosed with hyperthyroidism and fibromyalgia in 2012, her restroom usage increased three to four times per shift. Complainant had to monitor and "severely limited my [her] fluid intake prior to going to work" and "[A]void eating breakfast," even when her wife and children were present at the morning meal.

Strategizing: Complainant's biological necessities required her to thoughtfully strategize each time she needed to use the delegated men's restroom, unlike the other employees. Complainant had to become "covert as possible, not wanting any customers or associates to see me using the men's restroom. I would peek in there, just open the door slightly and see if there was anybody in the stall or standing up. If there was, I would leave and wait until it was empty. I would go in, use the stall and come out as quickly as possible." "If I heard anybody there, I would wait in the stall until I felt like they were gone."

If someone entered the restroom while Complainant was there, she would stay in the stall, "hoping and praying they didn't need to use the stall as well." (By the use of the singular of the word "stall," it is inferred there was only one stall in the men's restroom.)

Complainant describes her distress once in the men's room, "I was embarrassed, humiliated, to be a woman in the men's restroom. I felt for my safety." "The violence against the transgender community is very well documented. I was very, very familiar with it. The reactions of people [associates and customers] could be unpredictable, and I was afraid at times of what somebody might do to me when I was in there."

"Every time that I have to use---forced to use the men's restroom, I feel I have to deny who I am."

The Use of a Women's Restroom at Another Location: During lunch break, Complainant testified that she would "punch out, and go across the parking lot, about 100 yards, to Culver's fast food restaurant to use its [Women's] restroom, a walk of ten minutes." The walk occurred during "pretty foul weather outside" or pleasant days. Respondent was aware Complainant was using another store's restroom.

15. Disciplined for Using the Women's Restroom: On four or five occasions, Complainant testified that she was "unable to wait any longer and felt I [Complainant] had no option but to use the women's restroom [on Respondent's premises]," and she did. On February 23, 2011, Complainant was disciplined for entering the women's restroom.

The February 23, 2011, disciplinary action was a blunt reaffirmation of Respondent's ban and its willingness to jeopardize Complainant's career to enforce it. In fact, Woolridge ordered that if any employee should spot Complainant enter the women's restroom, they should report it.

Complainant testified, "I was emotionally devastated, felt like some ways they were recognizing me as female, but yet they were segregating me. I felt as though there were the guys, the gals, and then me. Sorry. ("Sorry," Complainant said after showing an outward sign of emotion on the stand. Complainant then composed herself and continued her testimony.) It

was, like, having something ripped out of me. It affected me almost all the time. Any time I had to be at work, I felt humiliated."

16. Slavin wrote his synopses of the February 23, 2011, disciplinary meeting, including his account of Complainant's outward signs of distress:

> "On 02-23-11 Adam Woolridge [District Manager], Meggan Scmmerville and I had a conversation about Meggan using the women's restroom. Meggan stated that she did not understand why the company wasn't changing its stand on the issue. She said that she was getting the run around from Annalee at corporate. Meggan was written up for going into the women's restroom. Meggan feels that we are being unfair with her." (Signed) Edward Slavin.

Slavin testified that Complainant was "very upset" about the Respondent's decision and that "She broke down crying."

17. After the disciplinary action, Complainant testified she felt that any communication with her supervisors or human resources department "was falling on deaf ears." In fact, Complainant was told by Miller that any further communication would have to go through its legal counsel.

18. After having "time to compose myself [herself],"Complainant was also given an opportunity to write her summary of the February 23, 2011, disciplinary meeting, which included her expression of emotional distress:

> I am agreeing in only the acknowledgment that any repeat occurrence will result in further disciplinary action.
>
> In no way am I in agreement with the policy set forth by Hobby Lobby. The policy targets a single person or a select group of individuals. The policy shows a lack of understanding and/or a willingness to understand individuals like myself. The policy also shows a lack of respect. It is in direct opposition to my standing as a female as recognized by Hobby Lobby's own Human Resource Dept. Benefits Dept. and the words of this warning. Meggan R. Sommerville (Signed.)

19. Complainant told of reoccurring dreams of restrooms, being approached by men, and being physically assaulted and laughed at by them. These dreams are on a "random basis for the last five years."

20. Besides sleeplessness, Complainant expressed her grave fear of being confronted by men entering the men's restroom and being on constant guard. "I still have to deny my gender when I'm forced to use the men's restroom and that's denying who I am. There are times when that is extremely difficult to live with. It throws me back into those mind sets when I was growing up." "Every time I feel like I was forced to use the men's restroom, I have to wait to use the unisex restroom. It makes me feel less than human. The segregation affected my human dignity."

21. Complainant developed physical symptoms, including dehydration, due to lack of fluids, headaches, fatigue, muscle cramps, and gastric problems.

22 Complainant had "ongoing conversations with health professionals at Howard Brown Health Center." According to Complainant, "They're not just concerned about my physical well-being, but my mental health as well. They specialized in LGBT, health issues, and are very well versed in transitional-related issues, both health and mental."

23. In December 2013, Respondent built a unisex restroom. Answering the question on what Complainant felt when it was built, she said, "Segregated. The other associates have the ability to use that, or either of the other two restrooms. I'm relegated to either the unisex restroom or the men's restroom.

24. Roberta Sommerville, Complainant's mother, observed that Complainant was "upset" when discussing work. She testified that Complainant "felt it was unfair. She was being treated differently than she should be as a woman being transitioned." Complainant was observed as being "emotional." Melessa Riemer, Service Manager, observed her "upset" behavior. Slavin testified that Complainant was "emotional," and "very upset and broke down crying," both during his meeting announcing Respondent's decision forbidding her to enter the women's restroom and when she was disciplined.

25. Respondent changed its precondition from producing "legal basis" to anatomical surgery. In 2014, Respondent, yet again modified its precondition to Complainant changing her birth certificate, a known impossibility in the State of Illinois at the time.

CONCLUSIONS OF LAW

This SROD incorporates the conclusions of law from my RLD and ROD, which the Remand Order did not disturb.

DISCUSSION

The probative factors in determining the amount of an emotional distress award in a totality of the circumstances analysis are the *nature* of the violation that caused the injury, its *effects*, the *injury* itself, and the *duration* of the suffering experienced by the complainant. (Emphasis added.) ISS International v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E. 2d 592 (1st Dist. 1995); Gipson and H.P. Mechanical, Inc., and Steve Hathorne, IHRC, ALS No. 06-060C, August 3, 2007.

In Bellwood, *supra*, as here, no medical evidence was adduced during the public hearing. Although helpful, documented medical evidence or expert testimony is not required prior to awarding damages. Id; Brown and American Highway Technology, IHRC, ALS No. 10805, January 2, 2003. It is possible to suffer demonstrable emotional distress without seeking medical treatment. Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No. 03-0059, May 17, 2005.

Complainant credibly testified that the "nature and duration" of her mental distress began on July 9, 2010, and continued up though the public hearing.

During this entire period, Respondent was aware of Complainant's weakened emotional state. Her managers saw her oral and written requests, her protests, and her crying. They knew about her restroom maneuvers. Complainant's physical pain, humiliation, anguish, and worry were caused by, and then used by Respondent in its systematic ploy and managerial strategy against her.

Complainant's distress was first caused by her constant need for defensive and scouting maneuvers prior to entering the mandated men's restroom and fear for her safety once inside. Complainant credibly testified that she suffered from the daily anxiety of just going to the restroom, a biological act normally performed by most men and women without much forethought. Each time, Complainant was "on guard," retreating from entering the men's restroom if a man went in, or once in, remaining in the stall until the male or males left the facility. "I was embarrassed, humiliated to be a woman in the men's restroom." Complainant also feared for her safety. She testified that "I was afraid at times of what somebody might do to me when I was in there...I feared everything from being laughed at to being physically assaulted." (The men's restroom is available to both to the customers and employees.) Thus, Complainant always faced the possibility that a male customer, unaware of Complainants' situation, would confront her in the men's restroom.

Besides defensive tactics, logistic preparation was also necessary. Complainant had to be cognizant of her fluid intake during the day. She had to be aware of the number of trips taken from the store to a female restroom located about 100 yards away in a fast food restaurant. Related to these trips, Complainant had to be attentive to the amount of time away from her employment duties. In other words, "I [Complainant] ended up having to structure my life around how often I would be able to use the restroom."

Years later, the "Unisex" bathroom Respondent constructed further acted to publicly segregate and isolate Complainant. Other employees or customers had the option of using the "unisex" restroom or the restroom of their sexual identification. Complainant was relegated to either the unisex or the men's restroom. As a result, Complainant testified that she was made to "feel less than human."

Respondent's access ban was enforced by discipline. On February 23, 2011, Complainant was formally disciplined for entering the women's restroom and warned not to do it again, with the implied threat of termination. Thus, Complainant was subjected to the

intimidation of employment discipline and the shame of being exclusively and publicly monitored by Respondent's staff and employees.

By its ban, Respondent undermined its own initial public acceptance of Complainant's transition by relegating Complainant to the store wide public humiliation of being merely a male employee who was permitted to wear a female costume to work and pretend to be female.

Other witnesses observed Complainant's demeanor and it was displayed on the stand during her testimony. Melessa Riemer, Service Manager, observed her "upset" behavior. Slavin testified that Complainant was "emotional," and "very upset and broke down crying," both during his meeting announcing Respondent's decision forbidding her to enter the women's restroom and when she was disciplined. Complainant's parents also described Complainant's distraught state.

Intensifying Complainant's anguish was her realization that Respondent's preconditions for access were disingenuous and a pretense to obstruct, delay, and frustrate. All conditions, the requests for legal basis, surgery, and change of birth certificate, were all strategic actions contrived to coerce Complainant into silent compliance, and nothing more.

In Beasley and Arby's Restaurant a/k/a Franchise Management Systems, IHRC, ALS No. S11685, March 28, 2003, a case based on disability discrimination, the Commission found that getting the "run-around," "stringing (complainant) along," and having her "jumping through hoops" at respondent's request, when it had no intention of making good on the employment promise was "*particularly egregious*," and evidence of embarrassment and humiliation sufficient to support an award of emotional distress. (Emphasis Added.)

Capsulizing the Findings of Fact, Complainant credibly explained, "Anytime I had to be at work, I felt humiliated." "The use of the men's restroom, denies who I am." Such feeling manifested itself in being "emotionally devastated." "I felt segregated. I felt as though there were the guys, the gals and then me. It was like having something ripped out of me. It affected me almost all the time."

Damages

It is difficult to quantify emotional distress damages. Emotional distress awards are not well suited to ready mathematic calculation. Ultimately, determining the amount of an award is an "act of judgment and discretion." Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No. 03-059, May 17, 2005.

Determining an appropriate award of monetary damages for emotional distress has proven to be difficult when one tries to base the figure solely upon other Commission cases. That is because it is difficult to measure with precision the monetary value of a particular individual's distress versus the distress felt by another individual. Kuhlman and The Korner House, IHRC, ALS No. 9696, November 24, 1997.

Although the Appellate court reminds the Commission to keep awards for emotional distress "within reasonable parameters," [1] it does not mean to keep those awards artificially and unjustifiably low. There are no statutory damage caps, nor did the term "reasonable" mean to compromise the compensational emotional suffering of a Complainant, or to undermine the legislative remedies available "to make the Complainant whole" for the harm caused by acts of discrimination/harassment/retaliation. To arbitrarily interpret "reasonable" as low, would also undercut the Commission as an enforcement tribunal and make discrimination cases merely a nuance to be resolved with low amounts of awards, a "cost of doing business," with little relationship to the actual suffering by the Complainant.

In fact, in a 2015, Windsor Clothing Store, v. Illinois Human Rights Commission, et al., 2015 IL App (1st) 142999, 41 N.E.3d 983 (1st Dist.), the Appellate Court *rejected citing past cases of the Commission with lower damages to decide excessiveness of the current award.* (Emphasis Added.) "Although ...cites several Commission orders in which lesser amounts were awarded for emotional distress, 'courts in Illinois have traditionally declined to compare

[1] Village of Bellwood Board of Fire and Police Commissioners v. Illinois Human Rights Commission, 184 Ill. App.3d 339, 541 N.E.2d 1248 (1st Dist. 1989).

damages awarded in one case to damages awarded in other cases in determining whether a particular award is excessive'" Windsor, quoting Drakeford v. University of Chicago Hospitals, 2013 IL App (1st) 111366, 62, 994 N.E.2d 119.[2]

Even if past awards can be referenced, Windsor is a case where an employee followed the customer, who was African-American, from one end of the store to the other during the 30 minutes she was shopping. Once home, the customer cried, had difficulty sleeping, and headaches, but did not see a doctor. The ROD issued recommended an amount of $25,000, for this single limited 30 minute event when nothing was said or access denied. The amount was "compounded" because the store did not acknowledge any discrimination, as with Respondent within.

Even in Fitzsimmons and Universal Taxi Dispatch, IHRC, ALS No. 09-0661, September 12, 2011, Fitzsimmons, a taxi cab driver, had the sanctuary of her cab. While driving she was away from the sporadic name calling by the owner who was located at the shop. The restroom usage or access to the shop was not an issue.

In Kilpatrick and Lifetime Fitness, Inc., IHRC, ALS No. 05-011, April 27, 2005, the Commission awarded complainant $15,000.00 for a single public incident of race discrimination that had embarrassing repercussions. In Simpson and Dewey's Restaurant, et al, IHRC, ALS No. 1989, June 30, 1987, the Commission noted that an "outright denial of service is a clear-cut and ugly violation of the Act, particularly when [other] patrons continued to be served." Even refusing to serve a cup of soup caused actionable emotional distress in the amount of

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[2] "The amount of damages awarded to a prevailing claimant by the Commission will not be disturbed on review absent an abuse of discretion. (Cites omitted) Under this standard, the Commission's award will not be disturbed unless it is arbitrary or capricious, or unless no reasonable person would agree with the Commission's position. (Cited omitted) A decision is arbitrary and capricious if it contravenes legislative intent, fails to consider a critical aspect of the matter, or offers an explanation so implausible it cannot be considered an exercise of the agency's expertise. In determining whether there has been an abuse of discretion, this court may not substitute its judgement for that of the agency, or even determine whether the agency exercised its discretion wisely. (Cites Omitted)" Windsor Clothing Store, supra.

$5,000.00. See, Marcus Blakemore and Glen's Restaurant, IHRC, ALS No. 1743 (K), November 3, 1987. (The ages of the cases should be noted.)

Cumulatively, the conduct of Respondent was so malicious, continuous, and purposeful as to rise to the level beyond the bounds of tolerable behavior. It justifies a substantial award to compensate Complainant for her emotional damage. As discussed in the RLD, Respondent chose to resurrect the antiquated and long abandoned schemes of "separate, but equal" and outright segregation. It turned to intimidation, humiliation, and punishment to silence Complainant and to make her obey. No number of raises, promotions, or the use of the "unisex" restroom, can substitute for barring a female from a women's facility that is open to all women, but not to her. Discrimination is not less hurtful because it is based upon sexual identity, as opposed to any other protected class.

Respondent is liable for the distress, anguish, anxiety, humiliation, fear, and embarrassment Complainant suffered every day due to Respondent's intentional acts. As in Windsor, Respondent still has not acknowledged its discriminatory behavior, which "compounds" the damages.

RECOMMENDATION

Based on the additional articulated facts requested by the Remand Order and cited above, I remain convinced that the amount of emotional distress recommended in the ROD is appropriate, based on Complainant's long suffering and continuous emotional distress. This is particularly true when the harm was purposely caused, but not acknowledged by Respondent. Therefore, an award of $220,000.00 for emotional distress damages is fair and reasonable under all of the factual circumstances presented by this case, and $220,000.00 is recommended.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: October 4, 2017