



City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 4th Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Anthony Cotten
Complainant,

v.

Lito's Empanadas
Respondent.

Case No.: 13-P-81

Date of Ruling: October 8, 2015

Date Mailed: November 5, 2015

TO:

Anthony Cotten
6517 S. Bell
Chicago, IL 60636

Carlos Escalante
1437 W. Taylor Street
Chicago, IL 60607

FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on October 8, 2014, the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.

Pursuant to Commission Regulations 100(15) and 250.150, a party may obtain review of this order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

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FINAL RULING ON LIABILITY AND RELIEF

I. INTRODUCTION

On December 2, 2013, Complainant Anthony Cotten, who uses a wheelchair due to paraplegia, filed a Complaint alleging that Respondent Lito's Empanadas (a restaurant) discriminated against him based on his disability. In particular, Complainant alleges that he was unable to enter Respondent's restaurant because there were two to three steps leading up to the front door of the premises. Complainant further alleges that his friend, who went inside Respondent to inquire about accessibility, was told by one of Respondent's employees that they did not have a ramp or accessible entrance. Complainant claims that he was denied full access to a public accommodation on account of his disability in violation of the Chicago Human Rights Ordinance, Chapter 2-160 of the Chicago Municipal Code.

On January 13, 2014, Respondent filed a Response to the Complaint and Position Statement. On January 23, 2014, Complainant filed a Reply to the Response. On May 30, 2014, the Commission made a finding that there was substantial evidence of the violation of the Chicago Human Rights Ordinance (CHRO) as alleged by Complainant.

The Commission held an administrative hearing on May 22, 2015. Neither party was represented by counsel. Complainant and Carlos Escalante, who identified himself as Respondent's owner, were the only two witnesses who testified. Complainant did not offer any exhibits in support of his claim and Respondent offered just one exhibit (namely, a Department of Business Affairs and Consumer Protection Cancellation Form dated June 3, 2014, regarding Respondent) in support of its defense. Both parties consented to the Commission's consideration of the Complaint, the Response to the Complaint, and the Reply to the Response during its deliberations on this case.

On August 12, 2015, the hearing officer issued his Recommended Ruling on Liability and Relief. No objections were filed.

II. FINDINGS OF FACT

1. Complainant Anthony Cotten is a T-12 paraplegic who uses a power wheelchair for mobility and he cannot traverse stairs. Complaint, ¶1; Transcript ("Tr."), at 2-3.¹

2. Respondent was a restaurant located at 1437 West Taylor Street in Chicago that was open for business to the general public on the date of the incident that caused Complainant to file this case. Response to the Complaint. Respondent has two steps that precede its entrance and it had a menu posted at the front door. Response to the Complaint, at 2, 3.

3. During the building permit process before the restaurant opened, Respondent's owner, Carlos Escalante, asked the City of Chicago if he needed to install a ramp for the restaurant and he was told that he could not do so because the building was over one hundred years old and a ramp would impermissibly encroach on the public way. Tr., at 5-6; Response to the Complaint, at 3. The interior of the restaurant was fully accessible to individuals with disabilities. Tr., at 7.

4. Respondent's employees have helped individuals in wheelchairs enter the restaurant by lifting them over the two entry stairs. Tr., at 5, 6-7. Respondent also displayed a menu at its front door and Respondent trained its employees to assist anyone who has difficulty entering the restaurant by providing service at the door and curbside service. Response to the Complaint, at 3. However, Respondent did not have any way of notifying individuals with disabilities about the availability of these service options at the time the events in question occurred in November 2013. Tr., at 7.²

5. On November 25, 2013, Complainant and a friend stopped by Respondent to have a bite to eat. Tr., at 2. Complainant noticed that there were two to three steps leading up to the entrance of the restaurant and he did not see any accessible way for him to enter the premises. Tr., at 2-3.

6. Complainant asked his friend to go inside to see if they had an accessible entrance for him to use or if they had a portable ramp that they could bring out for him to use to enter the premises. Tr., at 3. After five to ten minutes, Complainant's friend returned and told him that one of Respondent's female employees stated that Respondent did not have an accessible entrance or a portable ramp that Complainant could use to come inside. Tr., at 3.³

7. Complainant's friend asked Complainant whether Complainant wanted him to go back inside to order some food to go. Tr., at 3. Complainant declined his friend's offer because he wanted to go inside to buy something and he told his friend that they would just go to another place. Tr., at 3. Complainant thereafter left Respondent's premises and never

¹ Complainant offered extremely brief and vague testimony regarding his disability and its impact on his mobility. See Tr., at 2-3. Nonetheless, the Commission takes judicial notice of its prior findings regarding the nature of Complainant's disability and his inability to traverse stairs. See *Cotten v. Addiction Sports Bar & Lounge (Formisano, Inc.)*, CCHR No. 08-P-68, at 4 (Nov. 4, 2009) (taking judicial notice of the Commission's past findings regarding the nature and impact of Mr. Cotten's disability).

² At some point after November 2013, Respondent placed a sign at its door that describes its ability to provide curbside service for anyone in need. Response to the Complaint, at 3.

³ The Commission credits Complainant's testimony on this point despite the fact that it is based on hearsay because Respondent voiced no objection to the testimony and -- more importantly -- because Respondent does not dispute that it lacked a wheelchair accessible entrance or ramp that a wheelchair user could make use of. See Tr., at 5-6; Response to the Complaint, at 2-3.

returned. Tr., at 3. Complainant himself did not speak with any of Respondent's employees nor did he have any interaction with them. Tr., at 3; Response to the Complaint, at 3.

8. Complainant decided on the spot that he would file a complaint with the Commission and Complainant completed and signed his Complaint the next day (November 26, 2013). Tr., at 3; Complaint.

9. On December 2, 2013, Complainant filed his Complaint with the Commission. Complaint. Complainant seeks an award of injunctive relief to force Respondent to become wheelchair accessible and \$800 in damages. Tr., at 3-4.

10. On June 3, 2014, Lito's Empanadas II, LLC filed a Cancellation Form with the City of Chicago's Department of Business Affairs and Consumer Protection to cancel its business license. Respondent's Ex. 1. Lito's Empanadas II, LLC indicated on the Cancellation Form that its business address is Respondent's location (1437 W. Taylor Street, First Floor, Chicago, IL 60607) and the reason given for the cancellation of its business license is that it went "out of business" as of the "end date" of April 30, 2014. *Id.* The Cancellation Form was signed under penalty of perjury by Carlos Escalante, Respondent's owner. *Id.*

11. In his testimony, Escalante confirmed that Respondent went out of business in April 2014 and that Respondent does not exist anymore. Tr., at 6, 10-11.

12. Lito's Empanadas II, LLC went into "voluntary dissolution" status on May 29, 2015, according to the LLC File Detail Report found on the Illinois Secretary of State's online database.⁴

IV. CONCLUSIONS OF LAW AND ANALYSIS

1. The CHRO, at §2-160-170, provides in pertinent part:

No person that owns, leases, rents, operates, manages or in any manner controls a public accommodation shall withhold, deny, curtail, limit or discriminate concerning the full use of such public accommodation by any individual because of the individual's ...disability....

See also Regulation 520.100.

2. Subpart 500 of the Commission's Regulations clarifies the obligations of persons who control a public accommodation. In particular, Regulation 520.110 defines the "full use" requirement as follows:

'Full use' of a public accommodation means that all parts of the premises open for public use shall be available to persons who are members of a Protected Class...at all times and under the same conditions as the premises are available to other person

⁴ At its discretion, the Commission accesses the Secretary of State's online database to verify the status of LLCs and corporations. *See, e.g., Cotten v. Fat Sam's Fresh Meat & Produce*, CCHR No. 08-P-76, at 2 (July 20, 2010); *Raffety v. Great Expectations*, CCHR No. 04-P-35, at 4 n.3 (May 7, 2008).

3. The CHRO and corresponding Commission regulations balance the requirement of providing full use of a public accommodation to people with disabilities with the practicalities of making that possible. Specifically, Regulation 520.105 provides:

No person who owns, leases, rents, operates, manages or in any manner controls a public accommodation shall fail to fully accommodate a person with a disability unless such person can prove that the facilities or services cannot be made fully accessible without undue hardship. In such a case, the owner, lessor, renter, operator, manager or other person in control must reasonably accommodate persons with disabilities unless such a person in control can prove that he or she cannot reasonably accommodate the person with a disability without undue hardship.

4. As the Commission has repeatedly held, an individual may be deprived of the full use of a public accommodation where he or she cannot readily enter the front entrance in a wheelchair because of the existence of a barrier. *See, e.g., Cotten v. Arnold's Restaurant*, CCHR No. 08-P-24, at 2 (Aug. 18, 2010); *Cotten v. La Luce Restaurant, Inc.*, CCHR No. 08-P-34, at 2 (Apr. 21, 2010) (citing numerous cases).

5. The Commission has further held that respondent public accommodations do not provide disabled complainants with the “full use” of its premises “[w]hen [c]omplainant’s access was dependent on others.” *Mahmoud v. Chipotle Mexican Grill Service Co., LLC (d/b/a Chipotle Mexican Grill)*, CCHR No. 12-P-25, at 7 (June 18, 2014). Consistent with this, “[t]he Commission interprets the CHRO as not allowing the carrying or lifting of a wheelchair user as either a full or reasonable accommodation.” *Cotten v. La Luce Restaurant, Inc., supra*, at 7.

6. To prove a *prima facie* case of disability discrimination with respect to a public accommodation, Complainant must show that: (a) he is a person with a “disability” within the meaning of the CHRO; (b) he is a qualified individual in that he satisfied all non-discriminatory standards for service; and (c) he did not have full use of the facility as customers without disabilities did. *See Cotten v. Addiction Sports Bar & Lounge, supra*, at 3 (citing cases); *Cotten v. Taylor Street Food and Liquor*, CCHR No. 07-P-12, at 3 (Aug. 2, 2008) (same).

7. Although a complainant “does not have a claim for disability discrimination regarding access to a public accommodation merely because [he or she] uses a wheelchair and observes that a facility is not wheelchair accessible,” *Cotten v. CCI Industries, Inc.*, CCHR No. 07-P-109, at 7 (Dec. 16, 2009), “[q]ualification to use a restaurant is minimal and requires generally the desire to utilize and pay for the services offered to the public for a fee.” *Mahmoud v. Chipotle Mexican Grill, supra*, at 7; *Cotten v. La Luce Restaurant, Inc., supra*, at 4-5.

8. Once a complainant establishes a *prima facie* case, the respondent must prove by a preponderance of the evidence that providing full use of its public accommodation would cause an undue hardship. *Mahmoud v. Chipotle Mexican Grill, supra*, at 7.

9. Respondents can prove “undue hardship” only through the presentation of “‘objective evidence’ of the financial costs, administrative changes, or other projected costs or changes which would result from accommodating the needs of persons with disabilities.” *Cotton v. Eat-A-Pita*, CCHR No. 07-P-108, at 4 (June 4, 2009). “Factors to be considered in determining whether an accommodation would impose an undue hardship include, but are not limited to: (a) the nature and costs of the accommodation; (b) the overall financial resources of the public accommodation, including resources of any parent organization; (c) the effect on expenses and

resources, or the impact otherwise of such accommodation on the operations of the public accommodation; and (d) the type of operation or operations of the public accommodation.” *Id.*

10. Even if a respondent makes an initial showing that an undue hardship exists, the respondent must also establish that (a) it reasonably accommodated the complainant; or (b) it could not reasonably accommodate the complainant without undue hardship. *Id.*

11. Complainant has established a *prima facie* case of disability discrimination. In particular, Complainant is a person with a disability within the meaning of §2-160-020(c) of the CHRO in that he is a paraplegic who uses a wheelchair for mobility. Moreover, Complainant established that he was a qualified individual through his unchallenged testimony that he sought to get a bite to eat at Respondent restaurant. Furthermore, at the time of the incident that prompted Complainant to file his complaint (November 25, 2013), Respondent Lito's Empanadas was a public accommodation within the meaning of §2-160-020(j) of the CHRO and Regulation 510.110(d).

12. Respondent does not dispute that its premises are inaccessible to Complainant and other individuals with disabilities who make use of wheelchairs for mobility. However, Respondent offers three arguments to avoid liability. First, Respondent, which presented no “objective evidence” to show that it would suffer an undue hardship to provide full use of its premises to individuals with disabilities, nonetheless asserts that it is entitled to rely on the “undue hardship” defense. Specifically, Respondent asserts that it asked the City of Chicago during the building permit process prior to its opening whether it needed to install a wheelchair accessible ramp for the restaurant. Tr., at 5- 6; Response to the Complaint, at 3. According to Respondent, the City told Respondent that it could not install a ramp because the building was over one hundred years old and because a ramp would impermissibly encroach on the public way. *Id.* These reasons are insufficient to establish the undue hardship defense. Although the age and configuration of the building may be relevant to an undue hardship defense, *Cotten v. Arnold's Restaurant, supra*, at 8, the fact that the City of Chicago certified Respondent's compliance with the Chicago Building Code or that Respondent passed inspections by the City's Department of Building does not in itself provide a defense to liability disability discrimination under the CHRO. *Cotten v. Addiction Sports Bar & Lounge, supra*, at 5. Respondent had a legal duty to comply with all of the City's Ordinances. *Id.*; *Cotton v. Arnold's Restaurant, supra*, at 9. The fact that Respondent complied with the City's Building Code does not constitute a certification that Respondent has complied with the CHRO. *Id.*

13. Second, Respondent asserts that it provided reasonable accommodations to its customers with mobility impairments by physically assisting wheelchair users by lifting them over the two entry stairs, training its employees to assist anyone who has difficulty entering the restaurant by providing service at the door and curbside service, and by posting a menu at the door of its premises. Tr., at 5; Response to the Complaint, at 3. Although some of these actions (such as curbside service) could potentially be acceptable as part of a plan to provide individuals with disabilities with a reasonable accommodation, none of these actions are sufficient to prevent liability unless and until Respondent has proven an undue hardship. *See, e.g., Cotten v. Eat-A-Pita, supra*, at 6. As stated above, Respondent has failed to offer sufficient evidence to meet its burden of proving an undue hardship.

14. Finally, Respondent asserts that Complainant's case against it should be dismissed because Respondent went “out of business” in April 2014 and no longer exists. Tr., at 10-11. This argument has merit. Regulation 210.195 provides that the Commission can dismiss a case against a respondent if it determines, after reasonable inquiry, that no action can be taken against

respondent if, for example, “a business respondent is out of business without a known successor.” See, e.g., *Cotten v. Fat Sam's Meat & Produce*, *supra*, at 2-3 (dismissing case against respondent where there was insufficient information regarding the location and/or continued existence of respondent to allow the case to proceed); compare *Raffety v. Great Expectations*, *supra*, at 4 & n. 3 (denying motion to dismiss where the evidence showed that respondent had only closed its Chicago office but was not out of business with no known successor and the LLC that was doing business as respondent was still in “good standing” per the Illinois Secretary of State). Respondent has provided testimony and documentary evidence to show that it went “out of business” in April 2014. *Supra*, at findings of fact ##10-11. Moreover, the LLC that was doing business as Respondent (namely, Lito’s Empanadas II, LLC) went into “voluntary dissolution” status on May 29, 2015, and Respondent has no known successor. *Supra*, at finding of fact #12. For these reasons, there is no mechanism for taking action against Respondent or awarding the relief that Complainant seeks because Respondent no longer exists.⁵ Accordingly, pursuant to Regulation 210.195, dismissal of the Complaint is appropriate.

V. CONCLUSION

Accordingly, the Commission finds in favor of Respondent Lito’s Empanadas and against Complainant Anthony Cotten on Complainant’s disability discrimination claim. Accordingly, this Complaint is DISMISSED.

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Mona Noriega, Chair and Commissioner

Entered: October 8, 2015

⁵ The Commission notes that Complainant did not add Respondent's owner Carlos Escalante as a respondent in this lawsuit and there is therefore no legal basis for awarding relief against him.