EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Anthony Briggs
4101 Portland Pkwy
Madison WI 53714

Complainant

vs.

Popeyes Chicken & Biscuits Restaurant
3737 Milwaukee St
Madison WI 53714

Respondent

RECOMMENDED FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER ON DAMAGES

CASE NO. 20083073

This complaint came on for a hearing on the issue of damages before Commission Hearing Examiner, Clifford E. Blackwell, III, on March 11, 2009, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainants appeared in person and by their attorneys, Lawton & Cates, SC by Heather Curnutt. The Respondent did not appear by either a corporate representative or by counsel.

Based upon the record of these proceedings, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order on the issue of damages:

RECOMMENDED FINDINGS OF FACT

1. The complaints in these matters were filed with City of Madison Department of Civil Rights, Equal Opportunities Division on April 21, 2008. The complaints allege that the Complainants, Anthony, Miranda and Avari Briggs, were denied equal services or benefits of a public place of accommodation or amusement because of their race (African American) and color (black) on June 26, 2007.

2. The Respondent is Mackesey Enterprises, d.b.a. Popeye's Chicken, with a location at 3737 Milwaukee Street, Madison, Wisconsin. The principal place of business of the Respondent is located at 1849 Wright Street, Madison, Wisconsin.

3. Subsequent to an investigation of the allegations of the complaints, Initial Determinations were issued on September 8, 2008. The Initial Determinations concluded that there was probable cause to believe that the Respondent had discriminated against the Complainants in provision of a public place of accommodation or amusement because of their race and/or color. Efforts at conciliation were unsuccessful and the complaints were transferred to the Hearing Examiner for a hearing on the merits of the complaints.

4. On October 27, 2008, the Hearing Examiner conducted a pre-hearing conference in these matters. The Complainants appeared by their counsel. The Respondent appeared by its owner/agent, Patrick Mackesey. During the pre-hearing conference, the Hearing Examiner informed the Respondent that the Ordinance, the Rules of the Commission and the Notice of Hearing that would be issued subsequent to the pre-hearing conference all required the Respondent to file a written answer to the Notice of Hearing within 10 days of its receipt. The Respondent was given the opportunity to ask any questions that he might have about the Commission's process or procedures. The Respondent did not ask any questions. The complaints were consolidated for hearing with the consent of both parties.

5. On October 29, 2008, the Hearing Examiner issued a Notice of Hearing which was received by the Respondent on October 31, 2008.

6. The Respondent did not file an answer of any type in these matters.

7. On December 3, 2008, the Complainants filed a motion for default judgment for the Respondent's failure to answer the Notice of Hearing. This motion was renewed on January 6, 2009. On January 6, 2009, the Hearing Examiner issued an Order to Show Cause requiring the Respondent to explain his failure to file an answer. The Respondent received the Order to Show Cause on January 16, 2009.

8. The Respondent did not file any statement or document in response to the Order to Show Cause.

9. On February 20, 2009, the Hearing Examiner issued a default judgment on the issue of liability against the Respondent in these matters for his failure to file an answer to the Notice of Hearing. The Hearing Examiner ordered the parties to appear at 9:00 a.m. on February 24, 2009 to schedule further proceedings with respect to the issue of damages. The Complainants appeared by their counsel, but the Respondent did not appear.

10. On February 27, 2009, the Hearing Examiner issued a scheduling order setting the time and date for a hearing on the issue of damages for 9:00 a.m. on March 11, 2009. The Respondent received the Scheduling Order on March 2, 2009.

11. On March 11, 2009, the Complainants appeared in person and by their attorney. The Respondent did not appear, but it sent two employees to observe the proceedings. The observers did not enter an appearance and took no part in the proceedings.

12. The complaints in this matter result from a denial of service on June 26, 2007. The Complainants were told that they needed to get their orders processed through the drive-up window because the counter was closed. The Complainants observed white customers, who entered the restaurant after them, being served at the counter.

13. When the Complainants confronted employees and managers about their treatment, they were not provided with service. In fact, they received indications that such treatment had occurred in the past.

14. Miranda Briggs was extremely upset when she came to understand that she had experienced discrimination. This upset and distress is renewed on an almost daily basis as she travels past the restaurant frequently. The restaurant is located a few blocks from

the Complainant's home. The restaurant was often the place for the Complainants' dinner because of the favorable prices and the quality of the food. The Complainants would often socialize with family and friends at the restaurant.

15. Though other friends and family of the Complainants frequent the restaurant, the Complainants no longer feel comfortable as patrons of the restaurant. The Complainants have not explained to their family or friends their inability to come to the restaurant due to a mistaken understanding of an agreement that was not made effective.

16. Anthony Briggs has experienced similar distress and upset to that of his wife, Miranda. For both of them, the distress continues to this day. Neither Miranda nor Anthony is comfortable going out to eat for fear that they will experience the same discrimination that they experienced at the Respondent's restaurant. They also have come to mistrust white friends and co-workers because of their treatment at the Respondent's restaurant.

17. Avari Briggs was 2 years old on June 26, 2007. He did not appreciably understand the incident. Avari Briggs does wish to return to the restaurant to eat chicken or to accompany family and friends. It is difficult for Miranda and Anthony Briggs to explain to Avari and their other children why they will not return to the Respondent's restaurant.

18. The Complainant's have incurred costs and fees in the pursuit of their claim in the amount of $30,635.33. This amount is comprised of $29,925.00 in attorney's fees and $710.33 in associated costs.

CONCLUSIONS OF LAW

1. As prevailing Complainants in a claim of discrimination, the Complainants are entitled to be made whole for the act of discrimination.

2. There are no economic damages stemming from the Respondent's act of discrimination.

3. The Complainants have experienced non-economic damages for their emotional distress, embarrassment and humiliation resulting from the Respondent's act of discrimination.

4. One reasonable measure of emotional distress damages is that amount placed upon that award by the individual experiencing the emotional distress. A party has a duty to mitigate even emotional distress damages.

5. A prevailing Complainant, in order to be made whole, is entitled to the costs and fees including a reasonable attorney's fee associated with the bringing of a complaint so long as those costs and fees are reasonably necessary and not duplicative.

ORDER

1. The Hearing Examiner's default judgment issued on February 20, 2009 is incorporated by reference as if fully set forth herein.

2. In order to make the Complainant, Miranda Briggs whole, the Respondent shall pay to her the sum of $10,000.00 for her emotional distress no later than 30 days from this order's becoming final.

3. In order to make the Complainant, Anthony Briggs whole, the Respondent shall pay to him the sum of $10,000.00 for his emotional distress no later than 30 days from this order's becoming final.

4. The Respondent shall pay to Complainant's counsel, no later than 30 days from this order's becoming final, her attorney's fee in the amount of $29,925.00 and her costs in the amount of $710.33.

MEMORANDUM DECISION

These complaints arise from an incident involving the parties on June 26, 2007. As noted in the default judgment on the issue of liability dated February 20, 2009, Miranda and Anthony Briggs along with their two year old son, Avari, went to the Respondent's restaurant at 3737 Milwaukee Street to purchase dinner. The Complainants up to that date had been frequent patrons of the restaurant because it was near their home and they appreciated the price and the quality of the food.

However, things changed on June 26, 2007. The Complainants, who are African Americans, attempted to order their dinners at the counter. They were told that the counter was closed, but that they could be served at the drive through. As they left the restaurant proper, they observed a white patron who had entered the restaurant after them being served at the counter.

Upset by what they had observed, they returned to speak with the manager. The manager would not discuss their complaints. Employees of the restaurant gave the Complainants the impression that this had happened on other occasions. They left the restaurant not to return.

The Respondent in this matter has at times taken part in the process and for much of it, has refused to participate. Such a lack of participation led to the entry of the default judgment of liability on February 20, 2007 and to the record that this decision is based upon. It is not clear what, if any, defense the Respondent might interpose to either the finding of liability or to the damages sought by the Complainants. The Respondent has been given notice and the opportunity to appear and respond, but has declined those opportunities.

The question before the Hearing Examiner is what order might make the Complainants whole again or otherwise redress the discrimination that they have experienced. Mad. Gen. Ord. 39.03(10)(c)2b. In a case of discrimination in the provision of a public place of accommodation or amusement there are likely few, if any, economic damages. In the present case, such economic damages might consist of higher food prices or greater expenses in the form of additional miles traveled or gas consumed to an equivalent restaurant. The parties did not make any showing as to these additional costs.

Despite the lack of economic damages in a claim of discrimination, one must consider the existence, even the likelihood of non-economic damages such as those for emotional distress, humiliation or embarrassment. The problem for the Hearing Examiner is attempting to calculate those damages. It is an almost impossible task to place oneself in the position of another who has experienced a specific act of discrimination.

In attempting to fashion an award of damages for emotional distress, humiliation and embarrassment, one should first look to the injured party's own evaluation of his or her loss. Cronk v. Reynolds Transfer & Storage, MEOC Case No. 20022063 (Ex. Dec. 8/29/06), Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Wis. Ct. App. 1985). The injured party is in the best position after all to know of the impact on him or her. If the record then offers support for such a personal evaluation, it is not unreasonable to issue an award. Cronk, *supra*. If on the other hand, the record does not support the request of the Complainant, the Hearing Examiner should not follow the Complainant's lead. Nichols v. Buck's Madison Square Garden Tavern, MEOC Case No. 20033011 (Ex. Dec. 10/14/03; Ex. Dec. 11/08/05; Comm. Dec. 05/22/06; *aff'd* Daily d/b/a Buck's Madison Square Garden Tavern v. EOC, City of Madison, 06CV1931 (Dane County Cir. Ct. 03/30/07)).

In the present matter, the Complainant's each seek an award of a minimum of $10,000.00 in compensatory damages for their emotional distress. They do not seek to establish a minimum figure for the emotional distress of Avari, who was 2 years old at the time of the incident giving rise to this complaint. Instead of setting an amount for the damages for Avari, Miranda and Anthony ask the Hearing Examiner to exercise his discretion to set such an award.

The record, which consists solely of the testimony of Miranda and Anthony Briggs, is compelling and adequately supports their request for $10,000.00 for each of them. They were credible as they spoke of their shock and dismay as they realized that they had experienced discrimination. Their recounting of the difficulty they had in explaining to their children why they did not feel they could return to the Respondent's restaurant was compelling. The description that both Miranda and Anthony provided about their loss of trust in other establishments and even their own friends and co-workers was delivered with a sincerity that the Hearing Examiner does not doubt.

The testimony of the Briggs' is similar to that provided by the Complainant in Leatherberry v. GTE Directory Sales Co., MEOC Case No. 21124 (Comm. Dec. 4/14/93, Ex. Dec. 1/5/93) and Laitinen-Schultz v. TLC Wisconsin Laser Center, MEOC Case No. 19982001 (Ex. Dec. 7/1/03). While the Briggs' circumstances lack the individualized attack involved in those cases, their testimony about the loss of trust, the continuing nature of the harm and the effect on their relationships are sufficient to overcome this difference. Unlike other cases where the Complainant's testimony was found to be insufficient to establish support for a large award such as in Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (2nd Ex. Dec. 6/3/01), the testimony here was detailed and contained a depth not found elsewhere.

While the Complainant's testimony is striking and one might be tempted to increase the award beyond that requested by the parties, there is an element of question or argument that prevents the Hearing Examiner from doing so. There is a continuing duty for a prevailing Complainant to mitigate his or her damages. The fact that the Complainants have been unwilling or unable to put this single act of discrimination behind them is somewhat troubling. The parties testified that their friends and families still patronize the Respondent's restaurant

and frequently ask the Complainants to join them. The fact that such friends and family, presumably some of them African American have not experienced the same treatment as the Complainants, could indicate that either there has been a change in policy or personnel that would allow the Complainants to once again join in the benefits of the Respondent's restaurant. Had the Respondent chosen to participate in these proceedings, perhaps this question could have been explored or determined with more definitively. That the Complainants hold to their emotions and do not demonstrate an openness to determine if others have experienced a change in attitude keeps the Hearing Examiner from increasing the award of emotional distress damages beyond that specifically requested by the parties.

The Hearing Examiner declines to set any award for the emotional distress of Avari Briggs. There was no testimony establishing that as a two year old, Avari had any understanding of the circumstances of June 26, 2007. Equally, Miranda's testimony was that Avari wished to return to the restaurant and Miranda had to explain why Avari's parents were unwilling to do so. Given these limitations in the record, the Hearing Examiner cannot find any support for an award to Avari Briggs.

The Complainants seek an award of punitive damages in this matter. The Hearing Examiner cannot find that the record supports such an award. The Hearing Examiner also doubts that the Commission has the authority to make such awards.

The Complainant's cite Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. on liability 10/14/93, on damages 12/9/93), in support for their request. The Hearing Examiner notes that as with the present matter, that case involved a defaulting Respondent and the issue of punitive damages was not thoroughly litigated. The Hearing Examiner does not find reliance on such authority to be well founded.

Finally, the Complainant's seek the costs and fees associated with bringing this complaint. The Commission has a long history of making such awards to prevailing Complainants in order to provide a make-whole remedy. If a prevailing Complainant were to be required to pay for his or her own costs and fees out of the proceeds of a complaint, there would be a chilling effect on the willingness of the public to bring especially modest claims under the ordinance or any other equal rights statute. The only question presented by this record is the size of the requested award of costs.

The Complainants seek an award of costs and fees including a reasonable attorney's fee in the total amount of $30,635.33. This is comprised of $29,925.00 in attorney's fees and $710.33 in costs. This amount is further broken down by the Complainants by the date of November 12, 2008. On the record, it is not entirely clear why this date is important, but the Hearing Examiner suspects that it is related to a potential agreement between the parties that was not brought to fruition. The Complainants attribute $21,531.49 in costs and fees to the period up to November 12, 2008 and $9,103.84 to the period since November 12, 2008 to the present.

The Complainant's counsel, by affidavit, avers that she has reviewed the contemporaneous billing records and has removed any item that was not reasonably necessary or might be duplicative. Despite this self-review, the Hearing Examiner finds the total request to be astonishing.

The present case was originally the subject of a potential settlement and was ultimately disposed of by default judgment and a hearing where the Respondent did not appear. Even in cases that were heavily litigated and appealed to the courts, fee petitions have rarely reached this level. Sprague v. Rowe & Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. on attorney's fees 2/9/98), Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. on Attorney's Fees 6/1/01).

Despite the Hearing Examiner's surprise, the records submitted by the Complainant appear in order. The Respondent did not appear nor has it objected at any stage of these proceedings. Given this state of the record, the Hearing Examiner will award the Complainants their requested costs and fees. That is not to say that the Hearing Examiner is convinced that such costs and fees are entirely justified given the outcome in this matter.

Signed and dated this 19th day of March, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Douglas J Phebus