The attached Decision and Order discusses the following issues:

Age Discrimination in Public Accommodations

Retaliation for Opposing Unlawful Public Accommodations Practices

Liability of the Agent of a Disclosed Principal

Compensatory Damages

10/1/08

Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 06 PAG 158
06 PRT 159

In the matter of

Brian E. Alber, Jr.
Robynne Alber
Complainants

v. DECISION AND ORDER

POP, LLC and Daniel Puerini
Respondents

INTRODUCTION

On January 3, 2006, Brian E. Alber, Jr. filed a charge against POP, LLC and Daniel Puerini (hereafter referred to as the respondents) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge alleged that the respondents discriminated against him because of his age in violation of the Rhode Island Hotels and Public Places Act, Title 11, Chapter 24 of the General Laws of Rhode Island (hereafter the HPPA). The charge was investigated. On March 30, 2006, Preliminary Investigating Commissioner John B. Susa assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents violated the HPPA with respect to the allegations in the charge. On October 13, 2006, a complaint and notice of hearing issued. The complaint alleged that the respondents had denied Mr. Alber access to a public accommodation because of his age in violation of the HPPA.

On January 3, 2006, Robynne Alber filed a charge against the respondents with the Commission. The charge alleged that the respondents retaliated against her because she opposed an unlawful public accommodations practice in violation of the HPPA. The charge was investigated. On March 30, 2006, Preliminary Investigating Commissioner John B. Susa assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents violated the HPPA with respect to the allegations in the charge. On October 13, 2006, a complaint and notice of hearing issued. The complaint alleged that the respondents had retaliated against Mrs. Alber because she opposed an unlawful public accommodations practice.

Brian E. Alber, Jr. and Robynne Alber will be referred to as the complainants.

Hearings were held on both complaints on July 13, 2007 and August 9, 2007 before Commissioner Alberto Aponte Cardona.[1] All parties were in attendance at the hearing and represented by counsel. On October 24, 2007, the complainants filed the Complainants' Post Hearing Memorandum. On July 29, 2008, the respondents filed the Memorandum of Respondents. On August 8, 2008, the complainants filed the Complainants' Reply Memorandum.

JURISDICTION

The respondent POP, LLC is a Limited Liability Company which, during the time in question, operated a restaurant in Rhode Island where food and spirituous liquors were sold. The restaurant was a public accommodation as defined in R.I.G.L. Section 11-23-3 and therefore POP, LLC is subject to the jurisdiction of the Commission under the HPPA. Daniel Puerini, at the time in question, was a member of POP, LLC and the manager of a public accommodation, and therefore he is subject to the jurisdiction of the Commission under the HPPA.

FINDINGS OF FACT

1. POP, LLC is a Limited Liability Company. POP, LLC offers restaurant and hospitality services. At the time of the events in question, it owned and operated a restaurant, "POP", located at 162 Broadway in Newport, Rhode Island. (The restaurant will be hereafter referred to as POP.) POP served food and alcoholic beverages. The cover of the menu of POP contained the phrase: "kitchen and cocktails".

2. Daniel Puerini was a member of POP, LLC. He testified that he was "the owner of POP". Trans. Vol. 2, p. 33. He managed POP at the time of the events in question.

3. POP was a public accommodation at the time of the events in question.

4. POP opened in August, 2002. Since its opening, the front door contained the notation: "21+". Since its opening, the policy of the respondents was that only individuals who were twenty-one years of age or older were allowed into POP as customers.

5. The date of birth of Brian Alber, Jr. is February 8, 1986.

[1] The transcript of the hearing of July 13, 2007 will be referred to as Vol. 1 and the transcript of the hearing of August 9, 2007 will be referred to as Vol. 2.

6. On a Sunday afternoon on April 24, 2005, Robynne Alber and two friends went to POP. Mrs. Alber had frequented the restaurant on other occasions. Mrs. Alber and her friends ordered a bottle of wine and appetizers. Within a short period of time, Mrs. Alber's husband, Brian Alber, and her son, Brian Alber, Jr., joined Mrs. Alber at POP. Brian Alber, Jr. was then nineteen (19) years old. He looked at the menu and was considering buying a hamburger. He did not plan to order an alcoholic beverage.

7. The bartender on duty at POP at the time, Diego Pichardo, went over to the table and asked Brian Alber, Jr. to leave. Mrs. Alber asked why he had to leave. Mr. Pichardo answered because he was under twenty-one.

8. Mr. Pichardo indicated that POP's liquor license would not allow them to have people under twenty-one years old on the premises. Mrs. Alber asked to see the license. She then called the Newport Police Department and spoke with Lieutenant Russell Patrick Hayes. Mrs. Alber had worked in the records office at the Newport Police Department and at the Newport Clerk's Office. She had worked with licenses and knew that the Police Department had duplicate licenses. She asked Lieutenant Hayes to look up the license for POP. It was a Retailer's Beverage License–Class B-Victualer and it did not contain restrictions on the age of patrons. Lieutenant Hayes told Mrs. Alber that there were no restrictions or limitations listed on the license.

9. While Mrs. Alber was speaking with the Newport Police Department, Brian Alber, Jr. left POP. He was "a little aggravated. [He] was confused and kind of embarrassed". Trans. Vol. 1, p. 31.

10. While Mrs. Alber was talking with the Police Department, Mr. Pichardo called Daniel Puerini who told him that Brian Alber, Jr. could not stay on the premises. When Mrs. Alber was done with her conversation with Lieutenant Hayes, she spoke with Mr. Puerini on the telephone. The conversation started with both parties speaking in civil tones. Mr. Puerini said that his liquor license did not allow anyone under twenty-one on the premises. Mrs. Alber said that she knew that was not true and the police had just confirmed that his license did not provide that. Mr. Puerini said that it was his policy that no one under twenty-one was allowed on the premises. He and Mrs. Alber then discussed the legality and merits of the policy. As the conversation went on, Mrs. Alber's tone became louder and louder. Eventually, Mrs. Alber indicated that she would look into it further on the next day and the conversation ended. She sat back down at the table.

11. Mr. Pichardo was unsure what Mr. Puerini wanted to do at that point and called him back. After discussion, Mr. Puerini told Mr. Pichardo that he should ask the party to leave because of Mrs. Alber's loudness. Mr. Pichardo went to the table and asked the entire party to leave. Mrs. Alber called Lieutenant Hayes at the

Newport Police Department and told him that they had been asked to leave and he told her they probably should leave. Mrs. Alber and her party then left.

12. Mr. Puerini testified that from the first date POP was open his policy was, and continued to be, that he would not allow anyone under twenty-one years old on the premises as a customer. (Trans. Vol. 2, pp. 43, 56, 57, 62, 63, 87.)

13. Mr. Puerini testified that "it became apparent that she [Mrs. Alber] was making people uncomfortable. And that ... she was being loud and making people uncomfortable, and I then asked him [Mr. Pichardo] to ask them all to leave". Trans. Vol. 2, p. 64. He further testified, in response to a question about Mrs. Alber being asked to leave, that: "It wasn't her objections to my policy. It was her loudness and belligerence and her making Diego [Pichardo] and everybody else uncomfortable." Trans. Vol. 2, p. 85. When asked if she was making people uncomfortable because she was challenging his policy, he replied: "Because she was yelling. Who wants to be in a restaurant with somebody yelling?" Trans. Vol. 2, p. 85.

CONCLUSIONS OF LAW

The respondents discriminated against Brian Alber, Jr. because of his age with respect to the services and facilities of a public accommodation. The respondents discriminated against Brian Alber, Jr. by posting a written or painted communication, notices and advertisements to the effect that the facilities and accommodations of POP would be denied to people because of their age.

Mrs. Alber failed to prove by a preponderance of the evidence that the respondents retaliated against her because she opposed an unlawful public accommodations practice, as alleged in the complaint.

DISCUSSION

I. MR. ALBER PROVED THAT THE RESPONDENTS DISCRIMINATED AGAINST HIM IN VIOLATION OF THE HPPA

A. THE EVIDENCE ESTABLISHED DISCRIMINATION

The HPPA provides in relevant part that:

> No person, being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation, resort, or

> amusement shall directly or indirectly refuse, withhold from, or deny to any person on account of ... age, ... any of the accommodations, advantages, facilities, or privileges of that public place. No person shall directly or indirectly publish, circulate, issue, display, post, or mail any written, printed or painted communication, notice, or advertisement, to the effect that any of the accommodations, advantages, facilities, and privileges of any public accommodation place shall be refused, withheld from, or denied to any person on account of ... age or that the patronage or custom at that place of any person belonging to or purporting to be of any particular ... age, ... is unwelcome, objectionable, or not acceptable, desired, or solicited. The production of any written, printed, or painted communication, notice, or advertisement, purporting to relate to any public place and to be made by any person being its owner, lessee, proprietor, superintendent, or manager, shall be presumptive evidence in any action that its production was authorized by that person.

R.I.G.L. Section 11-24-2.

Age is defined in R.I.G.L. Section 11-24-3.2 as follows: "For the purposes of this chapter, 'age' is construed as anyone over the age of eighteen (18)".

The evidence is undisputed that the respondents denied the services of POP to Brian Alber, Jr. because he was not yet twenty-one years of age. Mr. Alber was covered by the protections of the HPPA because he was over the age of eighteen (18). When evidence of discriminatory exclusion from a public accommodation is uncontested, a finding of discrimination is justified. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S. Ct. 964, 19 L.Ed.2d 1263 (1968) (finding of discrimination in public accommodations upheld and remedies provided; plaintiffs proved, based on undisputed evidence, that they were denied access to public accommodations because of their race); Evans v. Seaman, 452 F.2d 749 (5th Cir. 1972) (evidence that black patrons were denied admission and the rink owner's testimony that he had never admitted blacks and that it was his policy to exclude blacks, was sufficient evidence to find discrimination in a place of public accommodation). The respondents denied Mr. Alber the accommodations and services of its facility to Mr. Alber because he was not yet twenty-one years old, in violation of the HPPA.

The Commission also notes that the respondents had a painted sign on the front door that read: "21+" and that such a sign is prohibited under the HPPA as a notice that the accommodations of POP will be withheld from people on account of age.

B. THE RESPONDENTS HAVE NOT DEMONSTRATED THAT THE PROVISIONS OF THE HPPA CONFLICT WITH OTHER LAWS

The respondents argue that the Commission should use various legal doctrines of interpretation to hold that the respondents' policy should trump the HPPA. However, the respondents have not demonstrated that the respondents' policy is required by any Rhode Island statute or case law. There are statutes that prohibit licensees from selling, delivering, furnishing or serving alcoholic beverages to individuals under twenty-one years old (hereafter "underage individuals"). *See* R.I.G.L. Sections 3-8-1, 3-8-4 and 3-8-5. There are statutes that make a licensee liable for the damages caused by an underage individual's consumption of alcohol if the licensee negligently or recklessly serves alcoholic beverages to an underage individual. *See* R.I.G.L. Sections 3-14-6 and 3-14-7. There is a statute that prohibits underage individuals from entering a licensee: "for the purpose of purchasing or having served or delivered to him or her alcoholic beverages...". R.I.G.L. Section 3-8-6(a)(1). However, the respondents have not cited, and the Commission does not know of, any statute or case that prohibits a person between eighteen and twenty-one years old from entering a licensee for a lawful purpose, such as ordering food. Given that the respondents have not cited any statute or legal precedent that conflicts with the HPPA in the circumstances in this case, the Commission need not utilize the doctrines cited by the respondents, which come into play when there is a conflict. "If the language of the statute is clear and unambiguous, we must interpret it literally, giving the words of the statute their plain and ordinary meanings. [Citations omitted.]" Stebbins v. Wells, 818 A.2d 711, 715 (R.I. 2003).

The respondents' concerns about preventing underage drinking are creditable. The respondents' concerns about their liability for underage drinking are understandable.[2] However, the respondents' concerns do not outweigh the statutory protections provided by the HPPA. An economic argument was specifically disavowed in the U.S. Supreme Court decision which upheld the federal public accommodations law, Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 85 S. Ct. 348 (1964):

> It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others * * * has never been a barrier' to such legislation. [Citation omitted.]

Id., 379 U.S. at 260, 85 S. Ct. at 359

[2] The Commission notes however, that the respondents' interpretation of Cesaroni v. O'Dowd, 94 R.I. 66, 177 A.2d 777 (1962) is not justified. The case, which upholds a ten day suspension of a liquor license, does not discuss a strict liability standard and does not provide that a licensee's best efforts to prevent underage drinking are of no avail. The case simply upholds an administrative agency's factual finding that a minor was served alcohol on the premises, since there was evidence of that service in the record.

R.I.G.L. Section 11-24-2 provides that the respondents cannot deny entry to POP to individuals because of their age if they are over the age of eighteen. R.I.G.L. Section 11-24-5 provides that: "The provisions of §§ 11-24-1 – 11-24-6 shall be construed liberally for the accomplishment of their purposes, and any law inconsistent with their provisions shall not apply...." The Commission cannot refrain from enforcing the law because of the respondents' concerns.

C. THE RESPONDENTS HAVE NOT ESTABLISHED THE DEFENSE THAT MR. PUERINI IS NOT PERSONALLY LIABLE FOR VIOLATIONS OF THE HPPA

In their Answer, the respondents raise as an affirmative defense that "Respondent Puerini ... is not the corporate entity that owns and operates the establishment. As an agent of a disclosed principal he is not personally liable". Respondents' Reply to Complaint, p. 1. Other than raising it in their Answer, the respondents did not present arguments to prove this defense.

It is a common-law principle that "an agent acting on behalf of a disclosed principal is not personally liable to a third party for acts performed within the scope of his authority". Cardente v. Maggiacomo Insurance Agency, Inc., 108 R.I. 71, 73, 272 A.2d 155, 156 (1971) (when plaintiffs sued insurance agents who were agents for a national insurance company, claiming that the insurance agents breached their agreement to provide coverage, the insurance agents were not liable for their failure to properly amend the plaintiffs' insurance policy). However, this principle is not universally applied. An agent may be personally liable "for acts within the scope of a duty that is otherwise independent of the agency relationship. *Forte Brothers, Inc. v. National Amusements, Inc.*, 525 A.2d 1301, 1303 (R.I. 1987)". Kennett v. Marquis, 798 A.2d 416, 419 (R.I. 2002). In Forte Brothers, the Court found that a site engineer who was alleged to have performed negligently was not immune from suit by a construction company even though the engineer was employed by a disclosed principal. *See also* Stebbins v. Wells, *supra.* In Stebbins, the Court held that a purchaser could sue the seller's real estate agents. The agents had allegedly failed to disclose a severe erosion problem. The Court held that the Real Estate Sales Disclosure Act created a duty for agents to disclose certain conditions and that the failure to disclose could be the basis for negligence and negligent omission claims. Case law establishes that an agent for a disclosed principal can be held liable if he or she has a duty independent of the agency relationship.

In the instant case, Mr. Puerini had an independent duty to refrain from discrimination based on the HPPA. The HPPA clearly provides that:

> **No person**, being the owner, ..., proprietor, manager, ..., agent, or employee of any place of public accommodation, ... shall directly or indirectly refuse, withhold from, or deny to any person on account of ... age, ... any of the accommodations, advantages, facilities, or privileges of that public place.

R.I.G.L. Section 11-24-2 [Emphasis added.] R.I.G.L. Section 11-24-4 clearly allows a charge to be filed against persons who have violated this provision. It states, in relevant part, that:

> .... whenever an aggrieved individual ... makes a charge to the commission that **any person**, agency, bureau, corporation, or association, subsequently referred to as the respondent, has violated or is violating any of the provisions of §§ 11-24-1 – 11-24-3 the commission may proceed in the same manner and with the same powers as provided in §§ 28-5-16 – 28-5-26 and the provisions of §§ 28-5-13 and 28-5-16 – 28-5-36 as to the powers, duties and rights of the commission, its members, hearing examiners, the complainant, respondent, interviewer [*sic*] and the court shall apply in any proceedings under this section.

Mr. Puerini had a duty under the HPPA to refrain from denying the services of POP to Brian Alber, Jr. because of Mr. Alber's age, and that individual duty prevents him from being able to claim that he is immune from liability as the agent of a disclosed principal.

D. RELIEF

The Commission orders the respondents to cease and desist from violating the HPPA. The respondents must remove any signs which indicate that entry will be denied to a person over eighteen (18) years old because of his/her age. The respondents must change their policy of refusing to provide food and non-alcoholic drinks to people between eighteen and twenty-one years old. Mr. Puerini and all staff of the respondents must be trained in the provisions of the HPPA. The Commission orders the respondents to publish a public notice in the *Providence Journal* and *Newport Daily News* that the Commission found that the respondents discriminated against Mr. Alber because of his age in violation of the Rhode Island Hotels and Public Place Act.

The Commission has determined that it will not award compensatory damages to Mr. Alber. The Commission has awarded compensatory damages for pain and suffering in previous cases. The Commission has indicated that it will be guided by federal cases interpreting federal civil rights laws and the state case law on damages for pain and suffering. R.I.G.L. Section 28-5-24(b) provides that:

> (b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages. As used in this section, the term "compensatory damages" does not include back pay or interest on back pay, and the term "intentional discrimination in violation

of this chapter" means any unlawful employment practice except one that is solely based on a demonstration of disparate impact.

The U.S. Equal Employment Opportunity Commission (EEOC) has issued Policy Guidance on "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", CCH Employment Practices Guide, Vol. 2, Para. 5360 (1992) (hereafter referred to as Policy Guidance). The Policy Guidance provides that it is EEOC's interpretation that compensatory damages are available for pecuniary and non-pecuniary losses caused by discriminatory acts. Non-pecuniary losses include damages for pain and suffering, inconvenience and loss of enjoyment in life. "Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." Policy Guidance, p. 6225. While "there are no definitive rules governing the amounts to be awarded," the severity of the harm and the time that the harm has been suffered are factors to be considered. Policy Guidance, pp. 6226, 6227.

In Rhode Island, the determination of the appropriate amount of compensatory damages should not be influenced by sympathy for the injured party nor should the damages be punitive. Soares v. Ann & Hope of R.I., Inc., 637 A.2d 339 (1994). The decision makers should determine the damages for pain and suffering by the exercise of judgment, the application of experience in the affairs of life and the knowledge of social and economic matters. Quince v. State, 94 R.I. 200, 179 A.2d 485 (1962). There is no particular formula to calculate damages for pain and suffering, although lawyers are free to argue that the damages should be calculated at a certain amount per day. Worsley v. Corcelli, 119 R.I. 260, 377 A.2d 215 (1977).

Damages for the pain and suffering which result from discrimination fall within a wide range. *See, e.g.*, Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006) (reinstating a jury award of $950,000 {reduced to the statutory cap of $300,000} when there was evidence that the plaintiff was subjected to such constant ridicule about his mental impairment that it required him to be hospitalized and eventually to leave the workforce); O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) (reinstating a jury award of $275,000 where the plaintiff had endured years of sexual harassment causing insomnia, severe weight gain, depression, panic attacks and likely permanent disability); Howard v. Burns Bros., 149 F.3d 835, 843 (8th Cir. 1998) (upheld the propriety of an award of $1,000 compensatory damages to a plaintiff who proved that a co-worker "brushed" her on several occasions and made sexual remarks; the plaintiff and her husband had testified as to her emotional distress); Azimi v. Jordan's Meats, Inc., 456 F.3d 228 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 1831 (2007) (jury that found that the plaintiff was subjected to a hostile work environment based on his ancestral origin, race and religion was authorized to evaluate the testimony on the plaintiff's emotional distress and determine that no compensatory damages should be awarded).

In the circumstances of the instant case, the Commission does not award compensatory damages. The respondents' discriminatory act was to ask Mr. Alber to leave POP. The evidence was that there were very few people in POP at that time and that Mr. Pichardo

was not rude when he leaned over to Mr. Alber and asked him to leave. See Trans. Vol. 1, pp. 10, 13, 38, Trans. Vol. 2, p. 6. While Mr. Alber testified that at the time of the incident he had some embarrassment and aggravation (Trans. Vol. 1, pp. 31) and later felt bothered when other people brought up the incident (Trans. Vol. 1, pp. 31-32), the Commission finds that Mr. Alber's reactions did not rise to the level of compensable pain and suffering.

II. MRS. ALBER DID NOT PROVE THAT THE RESPONDENTS RETALIATED AGAINST HER IN VIOLATION OF THE HPPA

A. RETALIATION IS PROHIBITED UNDER THE HPPA

The HPPA does not explicitly prohibit retaliation. The Commission is charged with interpreting HPPA liberally. *See* R.I.G.L. Section 11-24-5 which provides in pertinent part that: "The provisions of §§ 11-24-1 – 11-24-6 shall be construed liberally for the accomplishment of their purposes...."

The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the state civil rights laws. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See Newport Shipyard, Inc.*, 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998).

The U.S. Supreme Court has held in a series of cases that retaliation for activity that opposes discrimination is discrimination. *See* Gomez-Perez v. Potter, ___ U.S. ___, 128 S. Ct. 1931 (2008) (the federal Age Discrimination in Employment Act (ADEA) prohibits age discrimination against federal employees, but does not explicitly prohibit retaliation; a federal worker is protected from retaliation because retaliation for engaging in protected conduct is age discrimination); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 125 S. Ct. 1497 (2005) (Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational programs by recipients of federal funds but does not explicitly prohibit retaliation, prohibits discrimination against a male coach who complained of unequal treatment of the girls' basketball team, "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX", 544 U.S. at 174, 125 S. Ct. at 1504); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L.Ed.2d 386 (1969) (the civil rights protections against race discrimination in 42 U.S.C. Section 1982 also prohibit retaliation for opposing race discrimination).

The Commission's duty to interpret the HPPA liberally, and a series of U.S. Supreme Court decisions holding that retaliation is a form of discrimination, support finding that retaliation is prohibited under the HPPA.

B. MRS. ALBER DID NOT PROVE THAT THE RESPONDENTS WERE MOTIVATED BY RETALIATION

As discussed above, federal cases are often used as guidelines in interpreting Rhode Island civil rights laws. Federal cases interpreting evidence in retaliation cases generally use the method of proof used to evaluate evidence of discrimination. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) (hereafter referred to as Quinn) and Gordon v. New York City Board of Education, 232 F.3d 111 (2nd Cir. 2000) (hereafter referred to as Gordon) set forth the standards used to evaluate evidence of retaliation. *Accord*; Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006). The prima facie case for proving unlawful retaliation can be made by demonstrating that:

1) Mrs. Alber engaged in protected activity (such as opposing an unlawful public accommodations practice) known to the respondents;
2) The respondents took adverse action against her;
3) There is a causal link between the protected activity and the adverse action.

The plaintiff's "prima facie burden [in a retaliation case] is not onerous." Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996).

The Commission finds that Mrs. Alber engaged in protected activity known to the respondents. In this case, the Commission has found that Mr. Alber was unlawfully denied the services of POP because of his age. Mrs. Alber disputed the respondents' treatment of Mr. Alber. She disputed the respondents' claim that POP's license limited admittance based on age, she called the Newport Police Department to obtain the exact language on the license, she stated that she believed that the respondents' practices were not lawful and she forcefully debated the policy with Mr. Puerini on the telephone.

The respondents took adverse actions against Mrs. Alber; they asked her and her party to leave POP. *See* Burlington Northern & Santa Fe Ry. Co v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006) (an action is adverse when a reasonable person would have found the respondent's conduct so adverse that it could well dissuade the person from making or supporting a charge of discrimination).

The time between the protected activity and the adverse action can establish a causal connection, particularly if the time period is short. *See* Quinn, *supra*. In this case, the time between Mrs. Alber's complaints and the respondents' asking her to leave the premises was very short. The timing of the adverse action supports a causal connection for purposes of the prima facie case of retaliation.

Once a complainant has made a prima facie case of retaliation, the respondents have the burden of presenting a legitimate, non-discriminatory reason for its actions. Gordon, *supra.*, Quinn, *supra*. In this case, Mr. Puerini testified that that "it became apparent that she [Mrs. Alber] was making people uncomfortable. And that ... she was being loud and making people uncomfortable". Trans. Vol. 2, p. 64. He further testified, in response to a question about Mrs. Alber being asked to leave, that: "It wasn't her objections to my

policy. It was her loudness and belligerence and her making Diego [Pichardo] and everybody else uncomfortable." Trans. Vol. 2, p. 85. When asked if she was making people uncomfortable because she was challenging his policy, he replied: "Because she was yelling. Who wants to be in a restaurant with somebody yelling?" Trans. Vol. 2, p. 85. (See Finding of Fact No. 12 above.)

Once a respondent has presented a legitimate, non-discriminatory reason for its actions, the Commission must determine whether the complainant proved that the reason given by the respondent was a pretext for retaliation or that retaliation was one of the motivating factors for the respondent's actions. In order to find a violation, the Commission must find that the respondent's actions were motivated by the unlawful basis.

In order to prove that the respondent was motivated by retaliation, a complainant may present direct evidence that the respondent was motivated by retaliation or indirect evidence that the respondent was motivated by retaliation (such as evidence that the reasons presented by the respondent are not credible). Under St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (hereafter referred to as Hicks), the finder of fact, in this case the Commission, must find that the respondent's actions were motivated by discrimination or retaliation. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519. [Emphasis in original.] The "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" but it does not compel such a finding. Hicks, 509 U.S. at 511. [Emphasis in original.] Retaliation may also be proven if a complainant proves that retaliation was one of the motivating factors, but not the sole motivating factor, for respondent's actions. Gordon at 117; R.I.G.L. Section 28-5-7.3.

Simply put, the Commission credited the testimony presented by the respondents on the issue of retaliation. (While the Commission also found Brian Alber, Jr. to be a credible witness, he left before Mrs. Alber had the conversation with Mr. Puerini so he could not testify about that conversation or its aftermath.) The findings of the Hearing Officer are critical as the Hearing Officer observes the demeanor of the witnesses as they testify. The Hearing Officer credited the testimony of Mr. Puerini and Mr. Pichardo. *See* Poisson v. Comtec Info. Sys., 713 A.2d 230, 235 (R.I. 1998) which stated, with respect to findings of fact in a Workers' Compensation case: "As the factfinder it was within the purview of the director to evaluate the evidence before him and to accept or reject the testimony of the witnesses in whole or in part". Mr. Puerini did not ask Mrs. Alber to leave when she started to dispute his policy, he heard her out. He did not ask her to leave at the end of their conversation. After the conversation, Mr. Pichardo called him to ask what to do. Mr. Puerini consulted with Mr. Pichardo, who was on the scene, before making the determination that Mrs. Alber should leave. Mr. Pichardo no longer works for Mr. Puerini so he had no incentive to color his testimony on that basis. Mrs. Alber, in the heat of the moment, may not have realized the volume and tone of her speech. Evaluating the evidence and taking into consideration the Hearing Officer's determinations on credibility, Mrs. Alber did not prove that the reason given by the respondents for their actions was a pretext for retaliation and did not prove that retaliation was a motivating factor for respondents' actions.

ORDER

I. Having reviewed the evidence presented on July 13, 2007 and August 9, 2007, the Commission, with the authority granted it under R.I.G.L. Section 11-24-4, finds that Mrs. Alber has failed to prove the allegations of her complaint of retaliation and hereby dismisses said complaint as to the respondents.

II. Having found a violation of R.I.G.L. Section 11-24-4 with respect to the complaint of Brian Alber, Jr., the Commission hereby orders the respondents:

A. To immediately cease and desist from unlawful practices under the HPAA;

B. To immediately remove from signs, posters, notices and/or advertisements any wording, numbering or symbols that would indicate or infer that people between the ages of eighteen and twenty-one years of age are not welcome to enter the premises for the purposes of eating and/or drinking non-alcoholic beverages;

C. To require that all staff of the respondents, including Mr. Puerini, receive training on the requirements of the HPPA and to provide to the Commission on or before ninety (90) days from the date of this Order a certification that the training was completed, the name and resume of the trainer, a list of the people trained and an outline of the training provided;

D. To, within forty-five days of the date of this Order, cause to be published a prominent display advertisement in the *Providence Journal* and *Newport Daily News* that states that:

THE RHODE ISLAND COMMISSION FOR HUMAN RIGHTS HAS FOUND THAT POP, LLC OF NEWPORT, RHODE ISLAND AND DANIEL PUERINI VIOLATED THE RHODE ISLAND HOTELS AND PUBLIC PLACES ACT BY DENYING ADMITTANCE TO POP RESTAURANT TO BRIAN ALBER, JR. BECAUSE OF HIS AGE.

III. The attorney for Mr. Alber may file a Motion and Memorandum for Award of Attorney's Fees no later than forty-five (45) days from the date of this Order. The respondents may file a Memorandum in Opposition no later than forty-five (45) days from receipt of the complainant's Motion and Memorandum. The parties' attention is directed to Morro v. Rhode Island Department of Corrections, Commission File No. 81 EAG 104-22/02 (Decision on Attorney's Fees 1982) for factors to be generally considered in an award of attorney's fees under the HPPA. Any party may elect a hearing on the issues involved in the determination of an appropriate award of attorney's fees by requesting it in the memorandum.

Entered this 1st day of October, 2008.

Alberto Aponte Cardona
Hearing Officer

I have read the record and concur in the judgment.

Nancy Kolman Ventrone
Commissioner

OPINION OF COMMISSIONER ROCHELLE LEE, JOINING IN PART AND DISSENTING IN PART

I join the Commission's opinion that finds that the respondents discriminated against Brian Alber, Jr. because of his age in violation of the HPPA.

I join the Commission's Order with respect to the relief awarded to Mr. Alber but I conclude that he should have also been awarded compensatory damages. He testified that he was shocked, aggravated, confused and embarrassed on the day in question and bothered by people who brought up the incident later on five or six occasions. (Trans. Vol. 1, pp. 29, 31-32.) He was asked to leave POP in front of his family, family friends and another couple whom he did not know. I see no reason why the respondents should escape compensating Mr. Alber for this embarrassment and humiliation.

I dissent from the Commission's findings with respect to Mrs. Alber. It is clear that she was engaged in protected activity, opposing the discrimination against Mr. Alber. She did not engage in unlawful activity. The evidence as to her allegedly loud tone of voice is vague and inconclusive. My interpretation of the evidence is that Mr. Puerini ordered that Mrs. Alber and her party leave because she continued to assert the rights of Mr. Alber, even after he told her that Mr. Alber had no rights.

I am concerned with the precedent that this case may set. A person who argues to stop discrimination should be afforded protection from retaliation even if she is not submissive and soft-spoken in her arguments. Therefore, I dissent from the Commission's Decision and Order with respect to Mrs. Alber's complaint of retaliation.

Rochelle B. Lee — 10-1-08

Rochelle B. Lee — Date